ADVISORY COMMITTEE
Probate Law Revision

Thirty-second Meeting
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Dates) and: Times) 1:30 p.m., Friday, January 20, 1967 and 9:00 a.m., Saturday, January 21, 1967
Place: Judge Dickson's Courtroom
744 Multnomah County Courthouse
Portland

Suggested Agenda

1. Approval of minutes of December meeting.

2. Reports on miscellaneous matters.

3. Accounting (This will be a continuation of the discussion of the draft prepared by Campbell Richardson, William Tassock and William Keller which was distributed prior to the November 1966 meeting).

4. Sale or other disposition of property (Continuation of the discussion and recommendations of Clifford Zollinger and Charles Lovett, sections 860.01 through 860.13 of the proposed Wisconsin Probate code).

5. Ancillary administration (Draft by Professor Mapp and William Riddlesbarger).

6. Escheat (Wallace Carson).

7. Estates of persons presumed dead (Stanton Allison).

8. Inheritance Tax (ORS Chapter 118, subcommittee members Wallace Carson, Patricia Braun and Patricia Lisbakken).

9. Next Meeting.

ADVISORY COMMITTEE
Probate Law Revision

Thirty-second Meeting, January 20 and 21, 1967
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The thirty-second meeting of the advisory committee (a joint meeting with the Committee on Probate Law and Procedure, Oregon State Bar) was convened at 1:30 p.m., Friday, January 20, 1967, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Lisbakken, Mapp and Riddlesbarger. Butler, Carson, Frohnmayer, Gooding, Husband and Jaureguy were absent.

The following members of the Bar committee were present: Braun, Gilley, Krause, Meyers, Kraemer, McKay, Piazza, Thalholfer, Thomas (arrived at 2:20 p.m.) and Richardson.

Also present: James Sorte from the staff of Legislative Counsel.

Minutes of December Meeting

There being no objection, the minutes of the last meeting (December 16 and 17, 1966) were approved as submitted.

Miscellaneous Matters

Gilley announced that four former members of the bar committee had been reappointed so there would be some continuity of the people who have been working on the probate revision. The members who have been reappointed are Judge John Warden, Campbell Richardson, Wade Bettis and John Copenhaver.

Sorte reported that although Sam Haley will be leaving the office of the Legislative Counsel to become Public Utility Commissioner, there should not be any changes that would jeopardize the probate revision project. He reported that he had discussed the matter with both Mr. Haley and Mr. Lundy, and although it was indicated that the changes will have some impact upon the services to the committees on probate, it was too early to predict in precise terms what the impact will be.

Sorte introduced Mrs. Vivian Leonard who will be assisting the committee as stenographer.

Riddlesbarger suggested that the members of the bar committee whose terms had expired should be thanked for their services. The committees agreed and Zollinger directed Sorte to furnish a list of the persons who had served on the committee but who were no longer current members.

Proposed Probate Code Relating To Accounting. (Continuation of the discussion November 18 and 19, 1966, and the Memorandum dated November 14, 1966 by Campbell Richardson, William Tassock and William Keller.)

Section 20. Richardson advised the committees that section 20 of the Memorandum was taken from section 193 of the Model Probate Code and was similar to ORS 117.710. He indicated that he preferred the Model Code. Zollinger and Riddlesbarger were in favor of retaining ORS 117.710 as it is.

Riddlesbarger moved that ORS 117.710 be retained. Motion carried.

Section 21. Richardson explained that section 21 was similar to ORS 117.660 but had been expanded to authorize the court to direct compensation for the services of an attorney if the attorney had been of assistance to the court in resolving disputes. Richardson explained that there might be situations where the attorney represented a person to resolve a problem in the estate but was not the prevailing party. If the court could approve the fees they would be a proper deduction for purposes of inheritance taxes.

Gilley and Zollinger were of the opinion that the wording should be that the court could "authorize or direct" payment. There followed a discussion of the use of the language "... for any party whose rights had to be resolved in order to properly administer the estate."

Richardson pointed out that in certain instances it might be proper to pay the attorney fees of both the prevailing and the losing party. Richardson suggested that the heading of the section should be "Expenses" and not "Expenses and Compensation." Richardson moved adoption of the section as amended. Motion carried.

Section 22. Compensation of Representative. Richardson pointed out that section 22 is the same as ORS 117.680. Richardson indicated that the subcommittee had no recommendations with reference to the fees of the personal representative. The discussion that followed indicated that there is considerable variance among the states on the rate of compensation. Richardson

indicated that he was of the opinion that ORS 117.680 was adequate in its present form.

Allison expressed the opinion that the arrangement of the section should be revised. There followed a discussion of whether the compensation of the personal representative should be based on the property as listed in the inventory or the inventory and the property listed for inheritance tax purposes.

Zollinger expressed the view that the personal representative should not be allowed to be appointed as provided in a will that fixed his compensation and later reject the compensation provided in the will and be compensated at the statutory rate. He said that he would prefer to have the personal representative either accept the compensation of the will or reject it prior to and not after his appointment.

Dickson pointed out that if the will provided the compensation the personal representative could accept it without any statute covering that situation. He also pointed out that the personal representative is working for the court and the court always has the right to fix the compensation.

Mapp read the Model Code provision and the comment that followed the section. The theory apparently is that unless you give the personal representative the right to reject the amount of compensation provided by the will you might lose a competent person to one who would not be competent.

Piazza said that he did not like the provision that the "personal representative shall be compensated at ...". He indicated that there are occasions when the personal representative does not want a fee. He would favor a provision "the personal representative may upon application receive...".

Dickson said he would favor a provision that would provide the compensation was "X" dollars for an estate under $10,000, and then three percent for the estate value over $10,000 to $50,000 and two percent on the estate value over $50,000.

Zollinger favored having an absolute minimum fee of $250 and expressed the view that $250 probably would not be adequate compensation for a $10,000 estate.

Dickson pointed out that Wisconsin section 857.05 provided a formula similar to the one he was suggesting to the committees.

Allison favored compensation at the rate of three percent on the first $50,000 and two percent on the amount over $50,000.

Gilley pointed out that a lot of the work done by the attorney was consumed dealing with property that was not considered

part of the estate for the purpose of establishing the compensation.

Riddlesbarger favored the Iowa approach which allowed the court to fix the compensation.

Dickson disagreed and pointed out that the variance among the courts would further complicate the problem.

Thalhofer suggested that the compensation of the personal representative should be based on the amount of work that was done and not the value of the estate.

There followed a discussion of what the "gross estate" or "estate" consisted of and upon which the compensation would be based.

Riddlesbarger favored the value listed in the inventory. He suggested the matter of compensation be referred to a committee that would report back at the next meeting.

Zollinger directed that the matter be postponed until a later date.

Section 23. Account of deceased or incompetent personal representative. The committees discussed the allocation of the compensation when a personal representative is replaced. Dickson advised the committees that it had been his experience that the attorneys agreed on the allocation of the compensation in such a situation. After further discussion a motion was made to delte section 23. Motion carried.

Dickson directed that the matters that were not completed be placed on the Friday afternoon session in February.

Section 24. When property is discharged from administration; distribution of surplus. The committees reviewed the theory adopted that the property vests upon death in the persons entitled to it.

Richardson pointed out the difficulty of reconciling that theory with some of the terminology used. If title vests upon death what are you distributing? Richardson suggested "In its decree of final settlement."

Zollinger moved that section 24 be approved with the understanding that the Legislative Counsel would make any necessary changes in the wording. Motion carried.

Richardson pointed out that the subcommittee had not covered removal of the personal representative. He indicated that it was the view of the members that there should be a general statute covering all of the penalties for breach of duty by the personal representative. He pointed out that section 65 of the Iowa Code has such a provision. No action was taken.

Sale or Other Disposition of Property. (Continuation of the discussion at the December 16 and 17, 1966 meeting. See Appendix A to these minutes.)

Zollinger advised the committees that the Legislative Counsel had drafted subsections (5), (6) and (7) to be added to the provisions of section 860.11 of the Wisconsin code as follows:

"REPORT
January 10, 1967

"TO: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure
"FROM: Legislative Counsel

"At the December 1966 meeting of the committees the substance of section 860.11 of the proposed Wisconsin probate code was approved and the following subsections were appended and asked to be reproduced and distributed to committee members prior to the January 1967 meeting:

"Wisconsin proposed probate code section 860.11

"(5) A personal representative may be enjoined from making a threatened sale, mortgage or lease in breach of duty.
"(6) If the personal representative sells, mortgages or leases property in breach of duty he is:
"(a) In contempt of court and may be punished as for other contempts.
"(b) Subject to removal as personal representative.
"(c) Liable to the persons affected by the sale for their actual damages because of the sale, mortgage or lease, and punitive damages not to exceed twice the value of the property. Punitive damages may be awarded irrespective of whether or not there are actual damages.
"(d) Precluded from receiving any fee for acting in the capacity of personal representative.
"(7) A sale, mortgage or lease is not made in breach of duty if written consent thereto is given by the persons affected by it."

He reiterated his opposition to allowing punitive damages in instances where there were no actual damages. He pointed out

that this is contrary to existing law and a radical change of the law. He proposed that the personal representative should only be liable in punitive damages when a sale, mortgage or lease is made in breach of duty and the personal representative has acted wilfully and with bad motive.

Riddlesbarger questioned the meaning of "in breach of duty."

Piazza asked whether there was any necessity to set forth the penalties in this section. He indicated he believed that the general section dealing with penalties for violation of duty by the personal representative was enough. He indicated that he favored punitive damages without actual damages because of a possible sale of a family heirloom and actual damages would be difficult to prove. If the penalty provisions are to be located in the chapter on selling property the section should read "These penalties are in addition to ORS_____."

Gilley was of the opinion that punitive damages should be a matter of discretion of the court. Krause agreed with the position of Gilley. Gilley proposed that subsection (6) include subparagraphs (a), (b) and (d). He favored making subparagraph (c) subsection (7).

Mapp compared the Wisconsin section, as amended by the committees, with the draft of Richardson dealing with violation of duty by the personal representative. He favored a provision that would allow interested parties to enjoin the personal representative from any breach of duty. He also favored a provision that the personal representative would be in contempt for violation of any duty, and not just for breach of duty with regard to a sale, mortgage or lease of property.

Zollinger and Gilley favored placing the sections dealing with breach of duty in the section on the powers of the personal representative to sell, mortgage or lease property. The majority of the committees disagreed.

The committees agreed that the sections under consideration should be cross referenced to general powers and duties of the personal representative.

Piazza suggested a provision that where there is a breach of duty there could be nominal damages and punitive damages. This would avoid the criticism of punitive damages irrespective of actual damages.

Zollinger agreed with Piazza.

Allison was of the opinion that the sections as presently drafted, with the amendments of the committees as a result of the December 1967 meeting, subjected the personal representative

to very severe consequences. He favored a provision that punitive damages could only be awarded based on actual damages and only for a wilful or malicious act.

Foreign Personal Representative; Ancillary Administration. (A draft of this subject was distributed by Mr. Riddlesbarger and Mr. Mapp at the October 1966 meeting.)

Mapp explained that the draft prepared by Riddlesbarger and himself, included provisions of both the Uniform Ancillary Administration of Estates Act and the Uniform Powers of Foreign Rempresentatives Act. Mapp distributed a Report dated November 16, 1966, prepared by Mapp and Riddlesbarger. (This report is appendix A to these minutes.) Mapp proceeded to discuss the report. He explained that ancillary administration is necessary in a situation where a person domiciled in Washington dies leaving real property in Oregon. The reason, he explained, is that unless there is an ancillary administration there is a cloud on the title to the property in Oregon. The property is also subject to claims and to sale for payment of estate debts. If the Washington decedent died intestate the ancillary administration at least provides a public record of heirs.

ORS 116.186 authorizes a foreign personal representative to collect personal property in Oregon, but the real difficulty arises in the event there is real property. Mapp then reviewed the committees' previous action in refusing to adopt the Uniform Foreign Wills Act. Under the Act once a will is admitted in the domiciliary state, it is also admitted in any other state without proof of due execution. The state, other than the domiciliary state, does not require proof other than that the will has been admitted in the domiciliary state. The Uniform Act also provides that if there is a will contest in the domiciliary state, the state other than the domiciliary will accept the decree of the domiciliary state. These provisions eliminate the necessity of proof of execution and contests concerning the admission of the will or testamentary capacity.

Mapp explained that under the provisions of the draft on wills adopted by the committees virtually all wills will be admitted in Oregon. (See page 1 of Appendix A to these minutes.) However, because of the previous action by the committees, the will must be proved in Oregon even though it has been admitted in Washington. The Uniform Act would eliminate the requirement of proof in a foreign state once the will is admitted in the domiciliary state.

The meeting adjourned at 5:00 p.m.

The meeting was reconvened at 9:00 a.m., Saturday, January 21, 1967, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Zollinger, Allison, Butler, Carson, Husband, Lisbakken, Mapp and Riddlesbarger. The following members of the Bar committee were present: Braun, Gilley, Krause, Meyers, Kraemer, McKay (left at 10:30 a.m.), Piazza, Thalholfer and Thomas. Also present was Sorte from Legislative Counsel Committee.

Foreign Personal Representative; Ancillary Administration. (cont'd)

Riddlesbarger explained to the committees that they must have some understanding of the Uniform Foreign Wills Act when discussing the matter of ancillary administration.

Mapp was of the opinion that once a will is admitted to a court of any state it should be admitted in Oregon when proof establishes the will was admitted in the domiciliary state. He was of the opinion that once a court in any state litigates the admission of a will Oregon should bow to that state's decision admitting the will. Mapp explained that under the present law the will could be offered in Oregon but it would require evidence of due execution etc.

Piazza was of the opinion that once a will is admitted to probate it should be admitted in Oregon without the necessity of proof of attestation and testimentary capacity. He would also abolish the distinction between real and personal property.

Mapp then explained that under the Uniform Act if a will was admitted to probate in Washington and then admitted in Oregon the same person would be the personal representative. The advantage in appointing the same personal representative for all of decedent's estate, wherever it is, is that the estate would be administered by someone familiar with all of the property and claims.

Husband asked if the proposed act would give a preference to Oregon creditors and Mapp said under the proposed act Oregon creditors would not be given a preference.

Allison advised the committees that under the uniform act all of the money would go into a single fund and all creditors, Washington and Oregon, would share in that fund for payment of claims.

The committees then discussed previous action taken by the committees, and at the April 15, 16, 1966 meeting it had been agreed there should be a provision to allow a nonresident executor to act in Oregon provided he be bonded and appoint a process agent in Oregon.

Riddlesbarger advised the committees that the draft overlapped ORS 116.186.

Mapp pointed out that the three main objectives of adopting the act would be: (1) To have the same person act in the capacity of personal representative in both states; (2) To establish and maintain privity in the two administrations; and (3) Pro-rate the assets of all of the estate to creditors in both states. This will allow the personal representative to bind the estate for acts in either state.

Zollinger expressed the view that when administration is in more than one state the creditor might be paid twice on his claim. It would also give the creditor a chance to select the place to file or litigate a claim.

Kraemer indicated he was opposed to allowing a creditor a choice of forum in which to file and litigate a claim.

Mapp then reviewed the provisions of the New York Code providing for ancilliary administration.

The meeting recessed at 12:30 p.m.

The meeting was reconvened at 2:00 p.m. The following members of the advisory committee were present: Zollinger, Allison, Butler, Carson, Husband, Lisbakken, Mapp and Riddlesbarger. The following members of the Bar committee were present: Braun, Gilley, Krause, Meyers, Kraemer, Piazza, Thomas (left at 2:15). Also present was Sorte.

Krause asked about the payment of Federal tax. The committees agreed there should be some provision for coordinating the actions of the personal representatives in different states.

Mapp indicated that if the uniform act is adopted he would favor making it applicable only if the other jurisdiction had a similar statute.

Husband expressed the opinion that unless there is some method to coordinate the administration in two jurisdictions there could be payment of claims in one state and denial of claims in Oregon. He was of the opinion that all of the creditors should

share in the assets of the estate without regard to their residence. He indicated he would favor having one of the two states having the final say in estate matters.

Allison was of the opinion that to adopt the uniform act would make the code, as presented to the legislature, more controversial and more difficult to pass. He indicated that in the matter of ancillary administration there had not been much difficulty operating under the existing law.

Riddlesbarger made a motion that the committees approve the Uniform Ancillary Administration of Estates Act without change.

Butler expressed approval of the general idea of the uniform act, but said he would make several changes.

Those voting for the motion were Husband, Riddlesbarger, Lisbakken, Mapp, Carson, Allison, Butler, Zollinger, Thomas, Piazza, Thalhofer and Gilley. Those opposed were Braun, Meyers, Krause and Kraemer.

Riddlesbarger then asked the committees to indicate whether or not they wanted the subcommittee of Mapp and Riddlesbarger to pursue the matter further.

Those favoring further consideration of the matter of ancillary administration were: Husband, Riddlesbarger, Mapp, Lisbakken, Carson, Allison, Zollinger, Butler, Thomas, Thalhofer, Piazza and Gilley. Those opposed were: Meyers, Braun, Krause and Kraemer.

The committee then considered section 504 of the Iowa probate code. Gilley said that he would oppose a provision such as Iowa has which favored Iowa residents and creditors. He said he believed that attitude was parochial and provincial.

Riddlesbarger moved that all of the provisions of the uniform act be approved with an amendment to provide a preference for local creditors similar to section 504 of the Iowa code. The motion lost.

Carson made a motion that the committees approve the Iowa approach to ancillary administration. Those favoring the motion were Carson, Allison, Thomas, Krause, Karemer, Riddlesbarger and Zollinger. Those opposed were Husband, Lisbakken, Thalhofer, Piazza, Gilley, Butler and Kraemer.

A motion was made that would give preference to a foreign representative if probate in Oregon was necessary. Motion carried.

A motion was made to establish privity between foreign and local personal representative. Motion carried.

A motion was made to give preference to Oregon Creditors. Motion failed.

The matter of ancillary administration was placed on the agenda for the February 1967 meeting.

Carson then discussed the matter of escheat. He advised the committees that he had received a letter from Mr. Mallicoat, clerk of the State Land Board. One of the suggestions made by Mallicoat was that in certain instances there be a presumptive escheat.

Allison said that the entire area of escheat has always bothered him because of provisions regarding determination of heirship. He said there are other specific sections dealing with the entire subject of heirship determination and he saw no need for sections in the escheat chapter.

Piazza suggested that the present law gives more rights to the state, where there is an escheat, than are given to heirs of an estate. He did not see any reason to give preferential treatment to the state.

Allison made a motion to require notice to the State Land Board where it appeared that the property would escheat. Motion carried.

A motion was made that the State Land Board be given all other notice that is required to be given to an heir. Motion carried.

Gilley favored the wording of the statute be that whenever it appeared from the record of the probate proceedings that the property would escheat notice be given to the State Land Board.

Carson moved that the language be worded so that the statute apply to an invalid or partially invalid will. Motion carried.

Carson advised the committees another recommendation of Mr. Mallicoat was that the State of Oregon be given the right to decide whether there would be a private or public sale.

Zollinger favored handling escheat estates in the same manner as other estates. The procedure is to wind the estate up and distribute it to those entitled to it. Zollinger was opposed to giving the state any more rights than other heirs, and said if the personal representative was acting contrary to the best interests of the estate, the State Land Board could object to the final account.

Carson advised the committees that the state would prefer having property delivered to them to sell. In many instances there are articles that have value as antiques that a casual observer would sell for less because he was not aware of the value.

Piazza indicated he would favor giving notice to the state with a statement of the administration.

Zollinger made a motion that the sections dealing with escheat be in a manner to give the state the same rights as other heirs. Motion carried.

Allison indicated that he thought there should be some determination by the court that there was an escheat.

The committees apparently favored allowing an heir to petition the State Land Board for a conveyance of property or payment of money if the property had escheated. If the Land Board denied the petition the heir could procede under the Administration Procedure Act.

February Meeting of Committees

The agenda for the February 1967 meeting was tentively scheduled to include the following matters:

1. Allocation of income.
2. Accounting.
3. Creditors rights and insolvent estates.
4. Estates of persons presumed dead.
5. Inheritance tax.
6. Effect of a provision in a will "to pay my just debts."
7. Drafts of:

    a. Intestate succession.
    b. Wills.
    c. Avancements
    d. Adoption.
    e. Illigitimacy.
    f. Family Rights.

The meeting was adjourned at 4:30 p.m.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, January 20, 21, 1967)

REPORT

November 16, 1966

To: Members of the Advisory Committee on Probate Law Revision and Bar Committee on Probate Law and Procedure

From: Mr. Mapp and Mr. Riddlesbarger

Subject: Problems related to ancillary administration of Estates.

Facts: Deceased died domiciled in Washington, leaving real and personal property in Oregon. A domiciliary personal representative has been appointed in Washington.

1. Necessity for ancillary administration.

a. Real property is subject to debts of decedent, and for a period of 6 years from the time of death creditors may seek administration in order to subject the real property to sale for the payment of debts.
J. & L. 3539.
ORS 12.190 (establishes 6 year limitation).
Thus for 6 years there is a cloud on the title to the real property.

b. If Decedent died intestate, the Oregon administration at least provides a public record including sworn testimony as to the identity of the heirs of the real property.
J. & L. 3539.

c. If Decedent died testate, how can the will be established as proof of the devisees? Under ORS 115.160, if a will is made pursuant to ORS 114.060 and probated in another jurisdiction, "copies of such will and of the probate thereof... shall be recorded in the same manner as wills executed and proved in this state, and shall be admitted in evidence in the same manner and with like effect."

This committee has voted (p. 13 of March Minutes) to replace ORS 114.060 with a section reading as follows:

Sec. 4. Validity of Will. A will is legally executed if it is written, signed by the testator, and is otherwise executed in accordance with the law in force of

(1) this state at the time of execution or at the time of the testator's death, or

(2) the domicile of the testator at the time of execution or at the time of his death, or

(3) the place of execution at the time of execution.

Thus ORS 115.160 would establish a means for the proof of devisees in Oregon under virtually any will probated in another jurisdiction. However, ORS 115.160 does not result in ancillary probate of the Decedent's will in Oregon, and its use does not remove the cloud on the title to real property which exists because such property remains subject to sale for the payment of debts for 6 years after the decedent's death.

d. The domiciliary (Washington) personal representative may collect debts owed to the Decedent by Oregon residents, and may collect personal property of the Decedent in Oregon, without ancillary administration in Oregon, by complying with the provisions of ORS 116.186.

2. Procedure for Ancillary Administration.
"The Oregon Code makes no reference, by name, to ancillary administration or to ancillary executors or administrators. And there is very little law in this state on the subject."
J. & L. 3595.

a. Probate of Will in Oregon.

Assuming Decedent died testate, and that ancillary administration in Oregon is deemed necessary to perfect the devisees' title to real property, the first question concerns probate of the will in Oregon.

Under existing Oregon law, the will would simply be offered for original probate in Oregon. Due to the broad provisions concerning validity incorporated in section 4 quoted above, most wills would be "legally executed" in terms of the technical formalities. However, the fact that the will had already been probated in Washington would not be relevant. Due execution would have to be established in Oregon. Consequently, a will probated at the domicile in Washington might be contested in Oregon, and refused probate.

The basic purpose of the Uniform Probate of Foreign Wills Act is to defer to the fact of domiciliary probate, and admit such a will for ancillary probate upon proof of the domiciliary

probate. The proposed Wisconsin Code contains the Uniform Probate of Foreign Wills act in sections 868.01. The new Iowa Code achieves the same basic objective in § 496, but does not cover certain other technical problems treated in the Uniform Act. The new New York Code appears to be substantially patterned after the Uniform Act, and accepts the basic philosophy that a Decedent's estate should be treated as a unit insofar as possible. See sections 1601-1604.

b. Eligibility and powers of foreign domiciliary representative.

Under existing Oregon law, no special procedures exist governing ancillary administration. The purpose of the Uniform Ancillary Administration of Estates Act is to establish procedures leading to the treatment of an entire estate as a unit insofar as possible. It is contained in the proposed Wisconsin Act in section 868.03. Sections 1607-10 and 1612-13 of the new New York Code appear to be substantially patterned after the Uniform Act.

The committee recommends that the Uniform Act be adopted in Oregon, with such technical changes as may be required to meet specific drafting problems when the entire revised Oregon Code is prepared.

ADVISORY COMMITTEE
Probate Law Revision

Thirty-third Meeting
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Dates) and: Times) 1:30 p.m., Friday, February 17, 1967 and 9:00 a.m., Saturday, February 18, 1967
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland

Suggested Agenda

1. Approval of minutes of the January meeting.
2. Reports on miscellaneous matters.
3. Allocation of income (Mr. McMurchie).
4. Accounting (continuation of the discussion at the January meeting by Mr. Richardson).
5. Ancillary Administration (Mr. Mapp and Mr. Riddlesbarger).
6. Creditors rights and insolvent estates (Mr. Gooding).
7. Estates of persons presumed dead (Mr. Allison).
8. The effect of a provision in a will "to pay all my just debts" (Mr. Riddlesbarger).
9. Inheritance tax (Mr. Carson, Mrs. Braun and Miss Lisbakken).
10. Drafts of the following subjects:
    (a) Wills
    (b) Family rights
    (c) Advancements
    (d) Effect of adoption
    (e) Effect of illegitimacy
11. Next meeting.

ADVISORY COMMITTEE
Probate Law Revision

Thirty-third Meeting, February 17 and 18, 1967
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The thirty-third meeting of the advisory committee (a joint meeting with the Committee on Probate Law and Procedure, Oregon State Bar) was convened at 1:45 p.m., Friday, February 17, 1967, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison (arrived at 3:45 p.m.), Butler, Gooding, Mapp and Riddlesbarger. Carson, Frohnmayer, Husband, Jaureguy and Lisbakken were absent.

The following members of the Bar Committee were present: Biggs, Braun, Krause, Lovett, Meyers, Kraemer, McKenna (arrived at 3 p.m. and left at 4:45 p.m.), Richardson and Bettis. Gilley, Mosser, Silven, Piazza, Thalholfer, Pendergrass, Thomas, Copenhaver and Warden were absent.

Also present were Mr. Jack McMurchie who presented a draft relating to allocation income earned during administration of a decedent's estate, and James Sorte from the staff of Legislative Counsel.

Minutes of January meeting

There being no objections, the minutes of the last meeting (January 20 and 21, 1967) were approved as submitted.

Miscellaneous Matters

There were no reports of miscellaneous matters.

Allocation of Income

Mr. Jack McMurchie distributed to all members of the committees a proposed draft for the allocation of income of an estate. [Note: This draft is Appendix A of these minutes.] McMurchie explained, for the benefit of new members, that he had previously appeared before the committees at the time the committees discussed Accounting (See minutes 10/14, 15/66 p. 6). Following the October meeting, McMurchie had prepared a draft that was considered at the November meeting (See minutes 11/18,19/66 pp. 9 to 12). At the November meeting, the committees had suggested certain changes in the draft so that it would be applicable to testate and intestate situations. The committees had also favored a proposal that would not require periodic adjustments during administration where the

amount of the estate was small. It was felt that small estates would not justify all of the time and work involved. McMurchie advised committees that he felt the present draft (Appendix A) would provide the suggested changes recommended by the committees.

McMurchie advised the committees that prior to preparing the draft he discussed the matter with several bank and trust officers, and they in turn discussed the matter with other people who deal with problems of allocation of income in an estate.

McMurchie said that all of the people he had talked to favored changing the Uniform Principal and Income Act rather than drafting new sections to be placed in the chapters on estates. He said one of the reasons for this is that there might be some confusion over whether a trustee is to follow the estate law.

Dickson said that he felt some cross reference should be placed in the Uniform Principal and Income Act, but that he believed there should be sections in the probate chapters dealing with this problem. The committees seemed to agree.

McMurchie said that the committees had wanted the draft to be applicable to both testate and intestate situations. He said that after considering this he had decided that there is no particular problem in intestate situations. In those cases, the residue is divided and the income allocated in the same manner of division. He suggested there is some problem where the widow elects to take against the will, but it would not justify adding to the statute proposed.

He indicated that he had changed the draft so that there should not be a problem of periodic adjustments in small estates, and this, too, was as requested by the committees.

One change in the first draft is the way the paragraph begins, and the present draft (Appendix A) begins "Unless the decedent's will otherwise provides,".

Another change that was made was in the place of "liability", as used in the Uniform Principal and Income Act, he used "liabilities, claims, debts, expenses of administration and inheritance and estate taxes."

Subsection (1)

McMurchie said that there were no changes made in subsection (1) of the first draft.

Subsection (2)

McMurchie advised the committees that subsection (2) was amended so that an outright pecuniary bequest that qualified for a marital deduction under the federal laws would share in income.

McMurchie told the committees that he had changed the first draft so that there do not have to be periodic adjustments as claims are paid except in the situation where the claims are large and it is necessary to make an equitable apportionment.

McMurchie said that the present plan is to use inventory values and not calculate increases in the estate.

Butler moved the adoption of the draft, Zollinger seconded the motion and the motion carried.

Compensation of Personal Representative (Continuation of the discussion by Campbell Richardson on Accounting. See minutes 11/18, 19/66 and 1/20, 21/67).

Richardson explained that the only matter in the draft remaining to be discussed was compensation of the personal representative. (See Memorandum dated November 14, 1966, prepared by Campbell Richardson, William Tassock and William Keller relating to Accounting). He explained that he had made a comparison of the various states, and there is a wide variance in not only the approach, but also the amount of the compensation of a personal representative.

Richardson distributed a draft of a section proposed to be adopted and incorporated into the proposed probate code. [Note: This draft is Appendix B to these minutes.]

Butler commented that he had discussed the amount of the compensation of the personal representative with a number of bank and trust officers. They had concluded that most of the work involved in an estate is in those estates with a value of less than $50,000, and that the proposed draft would further reduce the fee in those estates. He said that the people he talked to felt it would be realistic to adopt a fee schedule that would allow the personal representative four percent of the first $50,000, three percent of all over $50,000 up to $100,000 and two percent on all property of a value exceeding $100,000. He said he would also favor compensation, on property listed for tax purposes, at the rate of one percent. McKay agreed that what Butler proposed would be a reasonable rate of compensation.

Richardson pointed out that he felt the draft represented what he believed the committees had indicated they wanted from previous discussion. He said that the draft in no way reflected his own views, and he had merely tried to draft the provision to reflect the wishes of the committees.

Braun asked whether the proposed schedule would be a fixed schedule without regard to whether the estate was difficult to administer.

Dickson said that the present compensation was not out of line, and neither would the compensation outlined in the draft be out of line. He said that often when a personal representative earns his compensation from administering a relatively easy estate it makes up for the time that he works very hard in administering an estate that is difficult.

McKay was of the opinion that the percentage should be higher on the first $1,000.

Bettis said that if there is a provision in the code that eliminates the need to probate small estates, this would justify a higher rate of compensation.

Zollinger asked for an indication of the feelings of the members with reference to small estates.

Butler said that the absolute minimum fee, on any estate, should not be less than $250.

Zollinger said that the minimum fee could always be changed by agreement of the parties.

There followed a discussion of the difference between the compensation of the personal representative and attorney.

Dickson indicated he would favor a proposal that allowed the compensation at the rate of four percent of the first $60,000 and two percent of the overplus. He said that the court could always authorize an extraordinary fee. He also favored compensation of one percent of the value of property listed for tax purposes but not part of the probate estate.

Bettis said that he would favor compensation at the rate of one percent of property not part of the probate estate but part of the estate for tax purposes if the compensation was for the attorney. He said that type of property does add work for the attorney, but not the personal representative.

Riddlesbarger said he would not favor the one percent applying to the proceeds of insurance.

Mapp said he did not think any state in the union allowed compensation to be based on property that was not part of the estate the personal representative was charged with the responsibility to administer.

Butler noted that Oregon and the federal government require insurance to be reported.

Zollinger said he would be inclined to favor a proposal that the court could allow a reasonable fee for the work required for property not a part of the probate estate. He said that there would be such a variance in the amount of work required for this kind of property that a fixed percentage would be unrealistic.

Kraemer and Richardson were of the opinion that insurance proceeds should not be considered in fixing the amount of compensation.

After further discussion, Butler moved adoption of the proposal. Kraemer seconded the motion. Motion carried.

Ancillary Administration (Continuation of the discussion at the February 1967 meeting by Riddlesbarger and Mapp. A draft of the proposal is Appendix C to these minutes).

Riddlesbarger said that section 9 of the draft presupposes administration of an estate at the domicile of the decedent. Where there is no administration at the domicile, administration in Oregon would not be considered ancillary.

There followed a general discussion of whether or not a will admitted in the domiciliary state would have to be proven in ancillary administration. Riddlesbarger and Mapp said they did not see any need for going through the proof a second time once it was admitted in the domiciliary state. In reply to a question, they both favored reliance on the domiciliary court's decision, not only on the admission of the will, but also an order of the domiciliary court refusing admission of the will to probate.

Dickson asked whether or not it would be feasible to simply provide that Oregon will follow the decree of distribution of the domiciliary state.

Allison asked the reason for giving preference to the domiciliary state. He posed a problem where there was property in the domiciliary state, but the bulk of the property was in another state. The question raised was whether previous action by the non-domiciliary state would be nullified by subsequent action by the domiciliary. Mapp answered that this was the intent of the proposal. One of the reasons is to discourage someone from shopping for a forum in which to probate an estate.

McKay questioned whether there was any need to change the law. Under Oregon law, as to property in Oregon, you simply probate it as any other estate.

Riddlesbarger suggested that the domicile of the testator was the proper forum. The testator chose to live in the domicile, probably executed his will there and the domiciliary state would be the proper state to administer the estate if the intention of the testator was to be followed.

Zollinger said that he opposed following the acts of the domicile state. He indicated the basis for his objection is that this deals with the question of the sovereignty of the State of Oregon.

Allison said that he could visualize a problem with following the ruling of the forum of the domicile of the decedent. In a situation where a man lived all of his life in Oregon, had most of his property here, executed his will here, moved to New Mexico and died, the facts of undue influence, if any, would more easily be proved in Oregon. However, under the proposal, Oregon courts would be bound by a determination of the New Mexico courts.

The meeting was adjourned at 5:05 p.m.

The meeting was reconvened at 9:00 a.m., Saturday, February 18, 1967, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Carson, Gooding, Jaureguy, Lisbakken, Mapp and Riddlesbarger. The following members of the Bar committee were present: Biggs, Braun, Krause, Lovett, Meyers, McKay, Silven and Bettis. Also present was Sorte.

Ancillary Administration (continued)

Mapp read the sections of the proposal and explained the sources the draftsmen had used in preparing the proposal.

Allison raised the question of what instruments are filed when you commence ancillary administration. He indicated the proposal did not spell out whether you file the will, the will and a record of testimony, or whether there was a requirement that there be a petition.

Riddlesbarger said that just what is filed might vary considerably and it would probably be better to leave this part somewhat vague.

Allison was of the opinion that Oregon should not defer to the domiciliary state in all instances. He indicated that Oregon should have the right to decide how much evidence it takes to establish a will.

Riddlesbarger called attention to the fact that Oregon presently allows most of the things the proposal has with reference to personal property and that he did not see any objection to making the same laws applicable to real property.

Riddlesbarger summarized the alternatives to the ancillary administration proposal as follows: (1) Foreign powers act; (2) Require original probate but with less proof required; or (3) A combination of ancillary and original probate.

Zollinger said that whatever the committees adopted should be consistent with the guardianship law.

Allison favored filing the will so it would be known if there were restrictions on the sale of real property.

Dickson called attention to the fact that the court could order recording the will in the absence of statute.

McKay indicated that the timing of the recording was important as a sale could be made prior to compliance with recording the will.

The committees then raised the question of whether the committees favored a proposal that a domiciliary administrator can act in Oregon in that capacity, without any other circumstances, and in testate and intestate situations. The committees voted yes.

Zollinger noted the problem that might arise by allowing a corporate-foreign personal representative to act without complying with general Oregon corporation law.

The committees voted in favor of allowing a foreign corporation to serve as personal representative in Oregon.

The committees favored requiring a foreign corporation to qualify to do business in Oregon prior to serving as personal representative.

The committees voted against a proposal that would bind Oregon to any acts taken by the personal representative in the domiciliary state.

The committees favored a proposal that would allow a will contest in Oregon even though the will had been admitted in the domiciliary.

The committees recessed at 12:15 p.m.

The meeting was reconvened at 1:30 p.m., Saturday, February 18, 1967, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison (left at 3:45 p.m.), Gooding (left at 3:30 p.m.), Butler, Carson, Jaureguy, Lisbakken and Mapp. The following members of the Bar committee were present: Biggs, Braun, Lovett, Meyers, McKay, Silven and Bettis (left at 3:30 p.m.). Also present was Sorte.

Provision in will "to pay my just debts."

Riddlesbarger distributed a report dated February 17, 1967. [Note: This report is Appendix C to these minutes.]

Riddlesbarger pointed out to the committees that a provision in a will "to pay my just debts" is a common expression in a will, but it is not clear whether this should be interpreted as an expression of intent on the part of the testator. Riddlesbarger said that although he did not feel the committees should concern themselves with this problem at this time, he called it to their attention so this could be looked at when the committees considered drafts of the proposed probate code.

Jaureguy asked whether or not such an expression in a will authorized payment of debts for which there had been no claim filed.

Zollinger expressed the opinion that this should all be considered at the time the drafts are considered. Zollinger moved that there be a group of sections in the proposed code dealing with interpretation of wills, and that there be a definition of the meaning of "to pay all my just debts." Motion carried.

Creditors Rights and Insolvent Estates

Gooding distributed to the members of the committees a memorandum he had prepared. [Note: This is Appendix D to these minutes.]

Gooding advised the committees that he had been working with Judge Dickson and Judge Snedecor in the area of creditor's rights and insolvent estates. He said that a question arose as to whether or not all insolvent estates should be handled through the bankruptcy courts or the probate courts. Another question arose as to preferences, and again whether the bankruptcy courts are a better place to deal with these problems.

Zollinger asked whether the assets of a trust, that was created for the benefit of the trustor and others, are available to the personal representative.

Gooding indicated that these assets would be available if the trust were revocable by the trustor, or if there were other incidents of ownership.

After discussion of the policy considerations of the proposal, Biggs moved that the committees do not adopt the proposal. Motion carried.

Estates of Persons Presumed Dead

Allison distributed a draft he had prepared. [Note: This draft is Appendix E to these minutes.]

Allison explained that since the adoption of the present Oregon code in this area there has been very little litigation. He indicated that before drafting the proposal he had studied the Iowa and Washington codes. Allison indicated that he believes the present Oregon law on this subject is too cumbersome. It was pointed out that some of the problems when persons are missing are the management of property, needs of the family of the missing person, protection of buyers of property and protection of the rights of the missing person. Allison explained the changes he had made and compared the proposal with the Iowa and Washington code.

Butler questioned whether there could be a guardian ad litem appointed for a deceased person.

Lovett asked whether the present law uses the date of disappearance or the date of the court order as the date of death. Zollinger said that the present law is somewhat obscure on this point.

Allison explained that one of the things he intended was to shorten the time within which a missing person could come back and demand his property. In the proposal, the requirement is that the missing person be protected for one year after the probate.

The committees then discussed the provision for bonds by the distributees of the missing person. After further discussion, the committees decided to postpone consideration of the matter until the March meeting. Chairman Dickson appointed Allison and Braun to review the matter prior to the March 1967 meeting and to lead the discussion at that time.

Inheritance Tax

Carson reviewed previous action by the committees, and said that the committees had taken action in addition to the recommendations of the subcommittee of himself, Braun and Lisbakken. He said that the primary objective is to allow the determination and payment of the inheritance tax outside of the probate proceeding. The present plan is that the determination of inheritance tax will be extra-judicial, except in cases where there is a dispute, and in the latter case there will be a judicial determination. Carson said that the objective of the subcommittee at this time is to prepare a draft, and in doing so, the subcommittee will keep in touch with the inheritance and gift tax people of the state. He said that this was true because presumably the inheritance and gift tax people would have the same objectives as the probate committees.

Dickson asked the subcommittees to contact Senator Husband and Mr. Ferder prior to the next meeting, and he would place inheritance tax on the agenda for the March 1967 meeting of the committees.

Next Meeting

The following matters were tentatively scheduled for discussion at the March 1967 meeting of the committees:

1. Minutes of the February meeting.
2. Ancillary Administration.
3. Persons presumed dead.
4. Inheritance Tax.
5. Drafts of the following:

    a. Intestate succession.
    b. Wills.
    c. Advancements.
    d. Illegitimacy.
    e. Adoption.

The meeting was adjourned at 4:30 p.m.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, February 17,18, 1967)

129.XXX. Income earned during administration of a decedent's estate.

Unless the decedent's will otherwise provides, income from the assets of a decedent's estate received after the death of the decedent and before final distribution, including income from property used to discharge liabilities, claims, debts, expenses of administration and inheritance and estate taxes, shall be determined in accordance with the rules applicable to a trustee under this Act and distributed as follows:

(1) To specific legatees and devisees the income received from the property bequeathed or devised to them respectively, less taxes, ordinary repairs and other expenses incurred in the management and operation of the property, any interest paid during the period of administration on account of such property, and an appropriate portion of taxes imposed on income (excluding taxes on capital gains) which are paid during the period of administration.

(2) To all other legatees and devisees, except legatees of pecuniary bequests not in trust which do not qualify for the marital deduction provided for in Section 2056 of the federal Internal Revenue Code, as of January 1, the remaining income, in proportion to the respective interests of such legatees and devisees in the assets of the estate which have not been distributed to them or expended for the payment of inheritance or estate taxes, charged against their particular share of the estate, computed at the time of each such distribution or payment, on the basis of inventory values. As used in this subparagraph, remaining income means the total income from all property which is not specifically bequeathed or devised less the taxes, ordinary repairs, and other expenses incurred in the management and operation of all such property from which the estate is entitled to income, any interest paid during the period of administration on account of such property and the taxes imposed on income (excluding taxes on capital gains) which are paid during the period of administration, and which are not charged against the property specifically bequeathed or devised.

(3) Income received by a trustee under this section shall be treated as income of the trust.

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, February 17,18, 1967)

MEMORANDUM
February 9, 1967

TO: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

FROM: Campbell Richardson

At the January meeting I was asked to redraft the section relating to compensation of representatives which appears at the bottom of page 9 of the November 14, 1966 memorandum re accounting.

The American College of Probate Counsel has published a study, revised as of July 1, 1966, of fees of executors, administrators and testamentary trustees. The study sets out the fees in effect in each of the various states. It notes that in most of the states fees of executors and administrators are specified by statute and that in the remaining states, the statutes merely provide for reasonable compensation or contain no provision at all. Even where statutory rates are prescribed, such rates may either by the terms of the statute or in the application thereof be considered as maximum rates. A majority of the statutes provide that additional compensation may be allowed for unusual or extraordinary services. The study also notes that the property upon which the fee rates are based varies considerably from state to state.

Present Oregon law provides as compensation a commission "upon the whole estate accounted for by him," and such further compensation as is just and reasonable for any extraordinary or unusual services not ordinarily required of an executor or administrator in the discharge of his trust.

The following Section 22 is proposed for further discussion:

Section 22. COMPENSATION OF REPRESENTATIVE. (1)Upon application to the court the personal representative shall be entitled to receive compensation for his services as hereinafter provided. If there shall be more than one personal representative, the compensation shall not be increased, but may be divided among them as they shall determine or as the

court may order. The compensation shall be a commission upon the whole estate accounted for, which shall include property inventoried and subject to the court's jurisdiction, additions thereto such as income and realized gains, and property not included in the appraised value of the estate but reportable for Oregon inheritance or federal tax purposes. Commissions shall be as follows:

(a) 4% of the first $60,000, but not less than $250

(b) 2% of all above $60,000

(c) 1% of property exclusive of proceeds of life insurance not included in the appraised value of the estate but reportable for Oregon inheritance or federal estate tax purposes, whichever is greater.

(2) The court may also allow just and reasonable compensation for any unusual services not ordinarily required of personal representatives in such estates.

(3) When a decedent by his will has made special provision for the compensation of his personal representative, such personal representative is not entitled to any other compensation for his services, unless prior to his appointment he subscribes and files with the clerk a written declaration renouncing the compensation provided by the will.

APPENDIX C

(Minutes, Probate Advisory Committee Meeting, February 17,18, 1967)

REPORT
February 17, 1967

To: Members of Advisory Committee on Probate Law Revision and Bar Committee on Probate Law and Procedure

From: W. P. Riddlesbarger

Subject: Effect of direction in a will for payment of "my just debts."

A direction in a will to pay "all my just debts" directs the payment of expenses of administration and all state and federal estate and inheritance taxes. Thompson v. Thompson, 230 SW2d 376; In re Keller's Estate, 286 P2d 889; In re Clarkson's Estate, 12 N.Y.S.2d 304. Contra: In re Doerfler's Estate, 109 N.E.2d 230; Furley v. Hazelwood, 174 So. 616; In re Owens Estate, 145 P2d 376. These cases hold that the word "debts" does not include obligations arising after the death of the testator.

In the Nawrocki case, 200 Or 660 the court said that in determining whether the devise of mortgaged property was entitled to exoneration, the provision of the will directing that all just debts be paid from the first money available from the estate would be given weight, but was not conclusive. The court decided the case by applying the common law rule of exoneration out of any residuum not specifically devised. No other Oregon case has been found interpreting such a direction in a will.

It is recommended that the foregoing information be kept in mind as re-examination of revisions of the statutes takes place.

APPENDIX D

(Minutes, Probate Advisory Committee Meeting, February 17,18, 1967)

If the amount realized from the assets reported in the Inventory and Appraisement are not sufficient to pay the costs and expenses of administration of and the claims against the estate, and if the decedent was, at the time of his death, the owner with right of survivorship of personal or real property (excepting property for which there is an exception from execution on judgment) with one or more others, then the surviving owner or owners shall be deemed to hold the interest in the property attributable to the decedent in resulting trust for the benefit of the personal representative of the decedent to the extent necessary to pay any unpaid claims or costs or expenses of administration. The interest attributable to the decedent is defined as the ownership interest expressed in the document establishing the ownership, or if no ownership interest is there expressed, shall be in equal proportion with the other owner or owners.

APPENDIX E

(Minutes, Probate Advisory Committee Meeting, February 17,18, 1967)

ESTATES OF ABSENTEES

I was directed to submit suggestions for ORS 120.310 to 120.400 inclusive entitled "Estates of Persons Presumed to be Dead."

Before discussing the attached tentative redraft of the above sections, it seems obvious that any section including these provisions should also incorporate ORS 127.010 to 127.350 inclusive which cover trustees to administer property of missing persons and persons missing during war. I have not made an analysis of these sections but my present recommendation is that these sections be incorporated verbatim in the proposed code.

The sections on estates of persons presumed to be dead are discussed in Section 862 of Jaureguy and Love who recite the general rule expressed, among other authorities, in Cunnius v. Reading School District, 198 U.S. 458, 25 S.Ct. 721, 49 L. Ed. 1125, that two criteria are necessary for assurance of due process:

(1) Adequate notice to the absentee of the pending proceeding;

(2) Adequate protection to the absentee in the event he is found alive within a reasonable time provided by the statute.

I have examined the applicable sections in the Iowa 1963 Probate Code, Sections 510 to 517, and the Washington 1965 Code, Sections 11.80.010 to 11.80.100 inclusive.

It seemed advisable, since apparently this is a seldom-used proceeding which has not been amended since it was enacted in 1917, to reduce somewhat the amount of time required. The present Oregon statute would require twenty weeks before probate proceedings would be commenced, plus a minimum of six months for the probate proceeding, plus an additional five years for the rights to be asserted against distributees.

My suggested draft incorporates the first six sections of the Iowa Code with some additional time provided, and the balance is a minor redrafting of the present Oregon sections, since the Iowa Code does not provide for an assertion of rights if the absentee turns up alive.

STANTON W. ALLISON

ESTATES OF ABSENTEES

Incorporate ORS 127.010 to 127.350 inclusive.

I.

Administration may be had upon the estate of an absentee. A petition therefor must be filed in the office of the clerk and must allege:

1. Whether the absentee was a resident or a nonresident of this state, and his address at his last known domicile; that he has, without known cause, absented himself from his usual place of residence, and concealed his whereabouts from his family, for a period of seven years; that for such period his whereabouts have been and still are unknown. (A1 added)

2. That the said absentee has property in this state (describing it with reasonable certainty), all or part of which is situated in the county in which the petition is filed.

3. The names of the persons, so far as known to the petitioner, who would be entitled to share in the estate of the absentee if he were dead.

4. In the case of a nonresident, whether administration upon the estate has been granted in the state of last known domicile.

5. Facts showing that the petitioner is a party who would be entitled to administer the estate of the said absentee in case the absentee were known to be dead. (A1-ORS in too lengthy section concerning resident and nonresident absentee.)

II.

Upon filing of such petition, the court shall, by a proper order, prescribe the notice and the return day therein, which shall be addressed to and served upon such absentee and the alleged distributees of his estate.

III.

Said notice shall in all cases be served:

1. By publication in the county in which the petition is filed, once each week for four consecutive weeks, in a newspaper designated by the court; and

2. Upon all the alleged distributees of the estate of said absentee by ordinary mail addressed to them at their last known address.

IV.

Proof of the publication and service of such notice shall be filed with the clerk aforesaid on or before the day set for hearing.

V.

If, on the day set for hearing, the absentee fails to appear, the court shall appoint some disinterested person as guardian ad litem to appear for the absentee and all distributees not appearing, and said cause shall thereupon stand continued for thirty days. The court shall have authority to make further continuance upon proper showing. The guardian ad litem shall investigate the matter and things alleged in the petition. Upon the further hearing, the court shall hear the proofs, and, if satisfied of the truth of the allegations of the petition, shall enter an order establishing the death of the absentee as a matter of law.

VI.

Upon the entry of order establishing the death of the absentee, administration of the estate of such absentee, whether testate or intestate, shall proceed as provided for the estates of other decedents, except as provided in this chapter.

VII.

Before distribution of the estate of an absentee, the persons entitled to receive the same shall furnish bonds, with securities approved by the court, in twice the amount of the personal property distributed, and in ten times the amount of estimated annual rents, issues, and profits of any real property so distributed, conditioned that if the absentee is in fact alive and shall within one year after the date of the order of distribution make demand therefor, refund will be made of the property distributed with interest on the amounts received.

VIII.

Any court having probate jurisdiction shall revoke letters of administration at any time upon due and satisfactory

proof that the absentee is in fact alive, after which revocation all the powers of the administrator shall cease, but all receipts or disbursements of assets and other acts by him before revocation shall remain as valid as though such letters had not been revoked. The administrator shall settle an account of his administration down to the time of such revocation, and shall transfer all assets remaining in his hands to the person as the administrator of whose estate he had acted, or to his attorney or other duly authorized agent. In the event a sale of real or personal property has been conducted and closed by the administrator the absentee has no right, title or interest in or to such real or personal property but only to the proceeds realized therefrom or so much thereof, if any, as remains in the hands of the administrator upon the closing of the estate of the absentee, and such absentee shall have the right of recovery of all such funds in all cases in which such recovery could have been had in the absence of ORS_____ to_____.

IX.

(1) After revocation of letters of administration, the person erroneously presumed to be dead may, on application filed of record, and in conformance with the statutory provisions, be substituted as plaintiff in all actions and suits brought by such administrator, whether prosecuted to judgment or otherwise. He may, in all actions or suits previously brought against such administrator, be substituted as defendant, on proper application filed by him or by the plaintiff therein, but shall not be compelled to go to trial within less than three months from the time of such application.

(2) Judgments or decrees recovered against such administrator before revocation of letters may be opened upon application by the absentee, made within three months after such revocation, and supported by affidavit, specifically denying, on the knowledge of the affiant, the cause of action or specifically alleging the existence of facts which would constitute a valid defense; but if within the three months such application is not made, or, being made, the facts shown are adjudged an insufficient defense, the judgment or decree shall be conclusive as to all intents, saving the defendant's right of appeal, as in other cases.

(3) After the substitution of the absentee as defendant in any judgment or decree, it becomes a lien upon his real estate in the county, and so continues as other judgments unless or until it is set aside by the lower court or reversed by the Supreme Court.

X.

The costs attending the issuance of such letters of administration or their revocation shall be paid out of the estate of the absentee, and costs arising upon an application for letters which are not granted, shall be paid by the applicant.

MEMORANDUM
February 9, 1967

TO: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

FROM: Campbell Richardson

At the January meeting I was asked to redraft the section relating to compensation of representatives which appears at the bottom of page 9 of the November 14, 1966 memorandum re accounting.

The American College of Probate Counsel has published a study, revised as of July 1, 1966, of fees of executors, administrators and testamentary trustees. The study sets out the fees in effect in each of the various states. It notes that in most of the states fees of executors and administrators are specified by statute and that in the remaining states, the statutes merely provide for reasonable compensation or contain no provision at all. Even where statutory rates are prescribed, such rates may either by the terms of the statute or in the application thereof be considered as maximum rates. A majority of the statutes provide that additional compensation may be allowed for unusual or extraordinary services. The study also notes that the property upon which the fee rates are based varies considerably from state to state.

Present Oregon law provides as compensation a commission "upon the whole estate accounted for by him," and such further compensation as is just and reasonable for any extraordinary or unusual services not ordinarily required of an executor or administrator in the discharge of his trust.

The following Section 22 is proposed for further discussion:

Section 22. COMPENSATION OF REPRESENTATIVE. (1) Upon application to the court the personal representative shall be entitled to receive compensation for his services as hereinafter provided. If there shall be more than one personal representative, the compensation shall not be increased, but may be divided among them as they shall determine or as the court may order. The compensation shall be a commission upon the whole estate accounted for, which shall include property inventoried and subject to the court's jurisdiction (less mortgages and liens thereon?), additions thereto such as income and realized gains, and property not included in the appraised value of the estate but subject to Oregon inheritance tax. Commissions shall be as follows:

(a) 3% of the first $100,000, but not less than $250

(b) 2% of all above $100,000

(c) 1% of property not included in the appraised value of the estate but subject to Oregon inheritance tax (exclusive of homestead?).

(2) The court may also allow such further compensation as is just and reasonable (for any extraordinary and unusual services not ordinarily required of a personal representative?).

(3) When a decedent by his will has made special provision for the compensation of his personal representative, such personal representative is not entitled to any other compensation for his services, unless prior to his appointment he subscribes

and files with the clerk a written declaration renouncing the compensation provided by the will.

REPORT
February 7, 1967

TO: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

FROM: William P. Riddlesbarger
Thomas W. Mapp

ANCILLARY ADMINISTRATION

Section 1. Ancillary probate based upon domiciliary probate.

(1) A written will which upon probate may operate upon any property in this state shall be admitted to probate upon proof that it has been admitted to probate at the testator's domicile or has been established in accordance with the law of such jurisdiction, and if its probate or establishment remains subject to contest under the law of his domicile, upon proof that it is not being contested there. A will so admitted to probate under this section is sufficient to operate on any property within the terms of the will, subject to any limitations upon its operation imposed by the law of the testator's domicile. Rights to take against the will are not affected by this section.

(2) A will offered for probate under this section may be contested only upon the ground that the conditions prescribed herein have not been satisfied or that the will has been denied probate in this state.

Comment: Based upon § 1602 New York Probate Code.

Section 2. Effect of right to contest or of revocation.

(1) If under the law of the testator's domicile the probate or establishment of his will therein is subject to contest within a time specified after probate or establishment, no property shall be transmitted to the domicile or distributed to beneficiaries

under the will during such period of time except upon order of the court and upon proof that a contest of the will is not pending at the testator's domicile.

(2) Payment, transmission or distribution of assets by an ancillary personal representative in good faith and pursuant to an order under subdivision (1) of this section operates as a complete discharge to the ancillary personal representative even if the probate or establishment of the will at the domicile is thereafter set aside or revoked for any cause whatever.

Comment: Adapted from § 1603 New York Probate Code.

Section 3. Original probate.

(1) A will of a non-domiciliary which upon probate may operate upon any property in this state and is lawfully executed for probate in this state, may be admitted to probate in the same manner as any other will may be admitted to probate under this act, except as herein otherwise prescribed.

(2) A will which has been admitted to probate or established at the testator's domicile shall not thereafter be admitted to original probate in this state except in a case where the court is satisfied that ancillary probate would be unduly expensive, inconvenient or impossible under the circumstances.

(3) A will which by judgment or decree of a competent court at the testator's domicile has been denied probate or establishment shall not be admitted to probate of this state except where the denial of probate or establishment is solely

for a cause which is not ground for rejection of a will of a domiciliary testator.

Comment: Based upon § 1605 New York Probate Code.

Section 4. Proof of will by probate in non-domiciliary jurisdiction.

In the case of original probate of the will of a non-domiciliary testator an authenticated copy of the will and of its probate or establishment in a jurisdiction other than the one in which he died domiciled shall be sufficient proof of its contents and lawful execution, if no objection is made thereto. If objection to the probate of such a will is filed this section shall not relieve proponent from offering competent proof of the contents and legal sufficiency of the will except that the original will need not be produced unless directed by a court.

Comment: Adapted from § 1606 New York Probate Code.

Section 5. Granting of ancillary letters.

(1) Any domiciliary personal representative, including a nonresident of this state or a foreign corporation, upon the filing of an authenticated copy of the domiciliary letters with the probate court, may be granted ancillary letters in this state.

(2) If the domiciliary personal representative is a foreign corporation, it need not qualify under any law of this state except those provisions of this act generally applicable to the qualification of personal representatives to authorize

it to act as ancillary personal representative in the particular estate.

(3) If application is made for the issuance of ancillary letters, any interested person may intervene and petition for the appointment of any person who is eligible under this act or the law of this state. The court may give preference in appointment to the domiciliary personal representative if it finds such preference to be in the best interests of the estate.

Comment: Adapted from § 2 Uniform Ancillary Administration of Estates Act.

Section 6. General powers and duties of ancillary personal representative.

(1) The court may direct the ancillary personal representative to pay from the assets received by him in this state the debts of the decedent due to creditors on claims allowed in this state, and to distribute the remaining assets after the payment of creditors and expenses to those entitled thereto or to otherwise dispose of the assets as justice requires.

(2) The court shall direct the ancillary personal representative to distribute the assets remaining after any distributions directed under the preceding subdivision of this section to the domiciliary representative.

Comment: Adapted from § 1610 New York Probate Code.

Section 7. Effect of adjudication for or against representatives.

A prior adjudication rendered by a court of competent

jurisdiction for or against any representative of the estate shall be conclusive against the ancillary personal representative in this state as if he were a party to the adjudication unless it resulted from fraud or collusion of the representative to the prejudice of the estate. This section shall not apply to an adjudication in another jurisdiction admitting or refusing to admit a will to probate.

Comment: Based on § 1612 New York Probate Code.

Section 8. Authentication and translation.

(1) Proof required by this act of letters, or of a will and the records of judicial proceedings with reference to the probate or establishment thereof, may be made by copies authenticated by the attestation of the clerk of the court, or other official having custody of the documents, (and by the seal of office of the clerk or other official if there is a seal, together with a certificate of a judge of the court that the attestation is in due form and by the proper officer.)

Comment: Adapted from ORS 115.160, 28 USC 1739, and § 7 Uniform Probate of Foreign Wills Act.

(2) If the respective documents or any part thereof are not in the English language, verified translations may be attached thereto and shall be regarded as sufficient proof of the contents of the documents unless objection is made thereto. If any person in good faith relies upon probate under this act he shall not thereafter be prejudiced because of inaccuracy of such translations, or because of proceedings to set aside or modify the probate on that ground.

Comment: Based on § 7 Uniform Probate of Foreign Wills Act.

Section 9. Application of general law.

Except where special provision is made otherwise, the law of this state relating to wills and to the probate, contest and effect thereof shall apply in the case of a non-domiciliary testator and the law and procedure of this state relating generally to administration and to representatives shall apply to ancillary administration and representatives.

Comment: Based on § 1613 New York Probate Code.

REPORT
January 27, 1967

TO: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

FROM: Legislative Counsel

In accordance with the request of the committees we are submitting copies of selected sections of the New York Probate Code dealing with ancillary administration.

§1604. Ancillary letters on foreign will

1. Upon admission of a will to probate under 1602 of this act the court shall issue ancillary letters to the following persons in the following order:

(a) The person expressly appointed in the will as executor with respect to property located within this state.

(b) The person to whom domiciliary letters are not issued, the person appointed in the will to administer all property wherever located.

(c) The person acting in the domiciliary jurisdiction to administer and distribute the testator's estate.

(d) A person entitled under this act to letters of administrator c.t.a.

2. If no person named in any subparagraph of subdivision 1 is willing to qualify or to designate a person eligible to receive ancillary letters they shall issue to a person in the succeeding subparagraph of such subdivision who will qualify or will designate a person eligible to receive letters.

§ 1607. Ancillary letters of administration

1. Upon petition as provided in 1609 of this act and upon proof that letters of administration of the estate of a decedent have been issued by a competent court in the decedent's domicile or upon proof that under the law of that jurisdiction letters of administration are not granted but that a person is acting in that jurisdiction to administer the decedent's estate in accordance with the law thereof, the court may issue

ancillary letters of administration. In a case where the court has theretofore issued original or ancillary letters or there is pending before the court an application therefor, the court shall take such proceedings as justice requires.

2. The court shall issue ancillary letters of administration to the following persons in the following order:

(a) The person appointed administrator in the domiciliary jurisdiction or the person acting in that jurisdiction to administer the decedent's estate in accordance with the law thereof.

(b) A person entitled to original letters of administration under this act.

3. If no person named in any subparagraph of subdivision 2 is willing to qualify or to designate a person eligible to receive ancillary letters they shall issue to a person in the succeeding subparagraph of such subdivision who will qualify or will designate a person eligible to receive letters.

§1608. Ancillary letters generally

1. A person acting in the decedent's domicile as executor or administrator or to administer the decedent's estate in accordance with the law thereof may by an acknowledged instrument designate and authorize the appointment of a person eligible to receive letters to act as ancillary administrator or ancillary administrator c.t.a. If conflicting designations or joint plural designations are made or if two or more persons are entitled jointly to letters under this article the court may appoint one or more of the persons so designated or one or more of the persons so entitled.

2. A person to whom ancillary letters are issued must qualify in the same manner as prescribed in this act for the qualification of a fiduciary except that the penalty of the bond may be in such sum, not exceeding twice the amount which appears to be due from the decedent to domiciliaries of this state, as to the court seems just.

3. In any case where the court is satisfied that there is no creditor of the decedent who is a domiciliary of this state and that no estate tax is assessable in this state, ancillary letters may issue without bond.

Before issuing such letters without bond, however, the court may require that supplemental process issue, directed generally to all creditors or persons claiming to be creditors who are domiciled in this state and that it be served by publication unless such process had theretofor been served in the proceeding.

4. All of the provisions of this act relating to eligibility to receive letters shall be applicable to appointments made under this article.

5. Any corporate banking institution of any state of the United States, the Commonwealth of Puerto Rico, territory or possession of the United States not entitled of right under the banking law to receive such letters may nevertheless be authorized by the court to receive such letters upon filing such bond as the court may require.

§1609. Petition; process

1. A petition for ancillary probate or for ancillary letters of any kind may be made by any creditor, public administrator, county treasurer or person interested. The petition shall show a statement of all of the decedent's property in this state and the value thereof, the amount of the security given on the original appointment, the name and post-office address of each domiciliary creditor or person claiming to be a creditor and the amount of each claim so far as it is ascertainable.

2. Process shall issue to the state tax commission, to all domiciliary creditors or persons claiming to be creditors and to such other persons entitled to letters or to designate an appointee as the court by order directs. The court may issue process generally to all creditors or persons claiming to be creditors who reside within the state, who shall be served in such manner as directed by the court.

§1610. General powers and duties of ancillary fiduciary

1. The provisions of law governing the rights, powers, duties and liabilities of a fiduciary apply to a person to whom ancillary letters are granted under this article except where a special provision is otherwise made or where a contrary intent is expressed in or plainly to be inferred from the context.

2. The court or any court of this state having jurisdiction may direct a person to whom ancillary letters have been issued to pay from the assets received by him in this state the debts of the decedent due to creditors who reside in this state. If the amount of all the decedent's debts here and elsewhere exceeds the amount of all the decedent's property applicable thereto the court may direct the ancillary fiduciary to pay such sum to each resident, creditor as equals that creditor's share of all distributable assets.

3. The court or any court of the state having jurisdiction may direct the ancillary fiduciary to distribute the remaining assets after the payment of creditors and expenses to those entitled thereto or or to otherwise dispose of the assets as justice requires.

4. Unless a court shall direct the ancillary fiduciary to distribute the assets as provided in the preceding subdivisions of this section he is required to transmit the remaining assets to the state or country where domiciliary letters were granted to be disposed of pursuant to the law thereof.

§1612. Effect of adjudication for or against fiduciary

A prior adjudication rendered by a court of competent jurisdiction for or against an estate fiduciary shall be conslusive against the ancillary fiduciary in this state as if he were a party to the adjudication unless it resulted from fraud or collusion of the fiduciary to the prejudice of the estate. This section shall not apply to an adjudication in another jurisdiction admitting or refusing to admit a will to probate.

§1613. Application of general law

Except where special provision is made otherwise, the law of this state relating to wills and to the probate, contest and effect thereof shall apply in the case of a non-domiciliary testator and the law and procedure of this state relating generally to administration and to fiduciaries shall apply to ancillary administration and ancillary fiduciaries.

SUPPLEMENTAL REPORT to our report dated
January 27, 1967

TO: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

FROM: Legislative Counsel

Because the Report dated February 27, 1967, which is a draft on Ancillary Administration by Professor Mapp and Mr. Riddlesberger, relies upon sections of the New York Probate Code in addition to those in our Report dated January 27, 1967, we enclose a copy of the following sections of the New York Code.

§ 1602. Ancillary probate based upon domiciliary probate

1. A written will which upon probate may operate upon any property in this state shall be admitted to probate by the surrogate's court having jurisdiction over property upon proof that it has been admitted to probate at the testator's domicile or has been established in accordance with the law of such jurisdiction, and if its probate or establishment remains subject to contest under the law of his domicile, upon proof that it is not being contested thereat. A will so admitted to probate under this section is sufficient to operate on any property within the terms of the will, subject to any limitations upon its operation imposed by the law of the testator's domicile. Rights to take against the will are not affected by this section.

2. A will offered for probate under this section may be contested only upon the ground that the conditions prescribed herein have not been satisfied or that the will has been denied probate in this state.

§ 1603. Effect of right to contest or of revocation

1. If under the law of the testator's domicile the probate or establishment of his will therein is subject to contest within a time specified after probate or establishment, no property shall be transmitted to the domicile or distributed to beneficiaries under the will during such period of time except upon order of the court.

2. If under the law of the testator's domicile the probate or establishment of his will is subject to contest for a period subsequent to the date of probate or establishment the court may authorize the ancillary fiduciary to transmit assets to the domicile or to make distribution to beneficiaries upon proof that:

(a) Seven months have elapsed since the issuance of ancillary letters in this state

(b) A contest of the will is not pending in the testator's domicile and

(c) The time provided in the domicile for the institution of a contest has expired.

3. Payment, transmission or distribution of assets by an ancillary fiduciary in good faith and pursuant to an order or decree under subdivision 2 of this section operates as a complete discharge to the ancillary fiduciary even if the probate or establishment of the will at the domicile is thereafter set aside or revoked for any cause whatever.

§ 1605. Original probate

1. A will of a non-domiciliary which upon probate may operate upon any property in this state and is deemed validly executed for probate in this state, may be admitted to probate in the same manner as any other will may be admitted to probate under this act, except as herein otherwise prescribed.

2. A will which has been admitted to probate or established in the testator's domicile shall not thereafter be admitted to original probate in this state except in a case where the court is satisfied that ancillary probate would be unduly expensive, inconvenient or impossible under the circumstances.

3. A will which by judgment or decree of a competent court in the testator's domicile has been denied probate or establishment shall not be admitted to probate in this state except where the denial of probate or establishment is solely for a cause which is not ground for rejection of a will of a domiciliary testator.

§ 1606. Proof of will by probate in non-domiciliary jurisdiction

In the case of original probate of the will of a non-domiciliary testator an authenticated copy of the will and of its probate or establishment in the jurisdiction in which the will was executed shall be sufficient proof of its contents and of compliance with the law of the place of execution, if no objection is made thereto. If objection to the probate of such a will is filed this section shall not relieve proponent from offering competent proof of the contents and legal sufficiency of the will except that the original will need not be produced unless directed by a court.

ADVISORY COMMITTEE

Probate Law Revision
fourth
Thirty-~~xxxxx~~ Meeting
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Dates) 1:30 p.m., Friday, March 17, 1967
and : and
Times) 9:00 a.m., Saturday, March 18, 1967
Place : Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland, Oregon

Suggested Agenda

1. Approval of minutes of February meeting.

2. Miscellaneous matters.

3. Ancillary Administration (Mr. Mapp and Mr. Riddlesbarger).

4. Persons Presumed Dead (Mr. Allison and Mrs. Braun).

5. Inheritance Tax (Report by Mr. Carson, Mrs. Braun and Miss Lisbakken).

6. Drafts of the following:

   (a) Intestate Succession.

   (b) Wills.

   (c) Advancements.

   (d) Effect of Illegitimacy.

   (e) Effect of Adoption.

   (f) Family Rights.

7. Next meeting.

ADVISORY COMMITTEE
Probate Law Revision

Thirty-fourth Meeting, March 17 and 18, 1967
(Joint Meeting with Bar Committee on Probate Law and Procedure

Minutes

The Thirty-fourth meeting of the advisory committee (a joint meeting with the Committee on Probate Law and Procedure, Oregon State Bar) was convened at 1:30 p.m., Friday, March 17, 1967, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Frohnmayer, Jaureguy, Lisbakken, Mapp and Riddlesbarger. Butler, Carson, Gooding and Husband were absent.

The following members of the Bar committee were present: Braun, Gilley, Krause, McKay, McKenna (left at 4:30 p.m.), Piazza, Thomas (arrived at 2:10 p.m.), Richardson and Bettis. Biggs, Lovett, Meyers, Kraemer, Mosser, Silven, Thalholfer, Pendergrass, Copenhaver and Warden were absent.

Also present: James Sorte from the staff of Legislative Counsel.

Minutes of February Meeting

There being no objection, the minutes of the last meeting (February 17, 18, 1967) were approved as submitted.

Miscellaneous Matters

Judge Dickson advised the committees that Butler and Judge Thalhofer had called and indicated that they would not be able to attend the meeting. Sorte reported that Carson had called him and indicated that he would not be able to attend the March meeting.

Dickson advised the committees that he had been in contact with Senator Husband, and that Husband indicated the date for hearings on bills in the Senate dealing with estate and tax matters would be held on March 21, 1967, at 3 p.m. Dickson asked for an expression of opinion of the members of the committees as to whether or not the committees should attempt to influence any pending legislation. Zollinger indicated that he would prefer to inform Husband that the committees were aware of

the pending legislation, but that the committees would not sponsor or oppose any of the pending bills. Dickson advised the committees that he would write to Senator Husband and advise him that the committees were aware of the pending legislation, but that the committees felt that they should not take any action at the present time.

Ancillary Administration

Professor Mapp explained to the committees that he had redrafted his draft of ancillary administration so that it would reflect the action of the committees at the February meeting. He further advised the committees that he had traveled to Portland early Friday to confer with Zollinger concerning some of the wording of the drafts. [Note: The draft is Appendix A to these minutes].

Section 1

Mapp explained that Section 1 of his draft would authorize an Oregon court to admit a will to probate with no further proof than that the will was admitted to probate in the domiciliary state.

Section 2

Mapp explained that the provisions of section 2 provide that if the domicillary state refused to admit a will this would be binding on the Oregon courts unless the domiciliary refused to admit the will on grounds that would not be grounds for refusal in Oregon.

Zollinger suggested that the following be added as the end of section 2: "This rule shall apply in the absence of collusion or fraud in the rejection of the will in the state of domicile."

There followed a discussion of the extent to which the judgments and decrees of a sister state should be followed. The committees finally agreed that full faith and credit did not require that the Oregon courts defer to judgments and decrees of other states when the judgments and decrees affected land with a situs in Oregon.

Allison asked whether or not the committees had previously voted on the question of what evidence would be required for the admission of a will to probate in an Oregon court. Mapp explained that it was his understanding that the committees had favored admission of a will of a nondomicillary decedent upon proof that the will had been admitted at the domicillary court.

Section 3

Mapp read section 3.

Section 4

Mapp read section 4. Dickson asked whether the draft was meant to authorize ancillary administration in both testate and intestate situations and Mapp replied in the affirmative.

Riddlesbarger questioned the title of section 1, and the committees agreed that the title should be "Granting of letters".

Dickson suggested that the draft contain a provision that the proof to a court in Oregon include evidence that the administration in the domiciliary jurisdiction was not closed.

Zollinger indicated that he would also require that the personal representative appoint an attorney for the service of process while the administration was open in Oregon. Zollinger also favored requiring the personal representative to furnish proof of payment of taxes prior to discharge as personal representative.

Mapp read the following revision subsection (1) of section 4: "Any domicilliary personal representative, including a nonresident of this state or a foreign corporation, upon the filing of an authenticated copy of the domiciliary letters with the probate court, may be granted letters in this state."

There followed a discussion of the action taken by the committees at the February meeting with relation to the question of whether or not the committees had decided to allow a foreign corporation to act as personal representative.

Zollinger said that he would have the draft provide that a foreign personal representative be required to appoint an irrevocable power of attorney prior to letters being granted to him. Richardson questioned a requirement that the appointment of a power of attorney be irrevocable. Gilley cited examples of situations where it would be necessary to revoke a power of attorney, as for example if the personal representative became incompetent.

Frohnmayer pointed out to the committees that the present Oregon law provides that a foreign corporation is required to list a registered office and registered agent. He indicated that he would also require that the foreign corporation file their post office address.

Bettis called attention to prior minutes of the committees where the minutes reflected that the committees had previously agreed that any person whom the court finds qualified could serve in the capacity of personal representative. Gilley expressed approval of the previous action and indicated that he felt that the language previously adopted was broad enough to cover the appointment of a personal representative from a sister state.

Section 5

Mapp read section 5. Mapp moved that there be deleted from the draft subsection (2) of section 5. Motion carried.

There followed a discussion of whether or not the term "ancillary personal representative" is appropriate in view of the general tenor of what the committees had approved. Dickson appointed a committee consisting of Zollinger, Carson and Sorte to draft a proposed definition of the term "ancillary personal representative."

Section 6

The committees next considered the type of authentication of documents that should be required for the proof of the admission of a will in the domiciliary state. Zollinger suggested that ORS 115.160 and 28 USC 1739 both required a three-way authentication and that those two sections required more than the section of the draft. Mapp was of the opinion that the usual requirements for authentication require more than is necessary. He pointed out that if the clerk that prepares the certificate is dishonest he could forge all of the authentication anyway.

Frohnmayer asked that the committees take up consideration of what documents would be required to prove a will being probated in a domiciliary jurisdiction. Richardson expressed the view that the committees would have to have certain minimum documents to satisfy the title companies. Allison suggested that the petition should contain the names of the heirs and devisees, and that the proof required should be at least the petition for letters and the order admitting the will to probate in the domiciliary jurisdiction. He indicated that without the names of the heirs and devisees one would not know if there was a praetermitted heir.

Riddlesbarger read the Iowa code section concerning proof of the admission of a will in a foreign state and suggested adoption of the substance of that section.

Frohnmayer pointed out that making copies and transcripts can be an expensive undertaking. He cited as an example taking the will of a citizen of the United States and having it translated into Spanish for probate in a court in Mexico.

Mapp suggested that subsection (1) of section 6 be reworded to read: "Proof required by this act shall be copies of the letters of administration, or of a will and the order admitting it to probate and establishment may be made by copies certified by the attestation of the clerk of the court or other official having custody of the documents."

Zollinger suggested that he would favor requiring that there also be a declaration that there was no contest pending in the domiciliary jurisdiction. He indicated that he did not favor an Oregon court being bound by a determination admitting a will to probate in a sister state.

Allison suggested that in subsection (1) of section 1 following "may be admitted to probate" there should be added "upon petition therefore and upon proof that it stands probated."

Frohnmayer suggested that the committees change section 6 and use the word "certified" in the place of "attested."

Time Schedule for the Proposed Code

There followed a discussion of how the committees should proceed to draft the proposed code. Sorte explained to the committees that he had discussed the matter with Lundy, and it was Lundy's belief that at some point the committees should stop meeting for a period of two or three months to allow a draftsman to put the entire code together. Many of the members of the committees disagreed. It was decided that at the April meetings of the committees all of the areas not previously covered should be covered. Judge Dickson said that by the May meeting he would like a draft of all of the areas covered and at that point the committees could begin the second look at the entire draft of the probate code.

Frohnmayer told that committee that the Uniform Commissioners were planning a six weeks meeting during the summer of 1967 in Colorado Springs, Colorado, and they hoped, after the session in Colorado, that they will have a final uniform draft of a probate code.

Zollinger suggested that if there is a uniform draft by summer perhaps the committees would consider the uniform draft and the draft of the committees, and adopt as much of the language of the uniform drafts as possible.

Dickson indicated that his plan is to have all of the drafts by the May meeting and the same people that drafted a given area could again be assigned to redraft that area. He suggested that without a complete draft it was difficult to remember the exact action the committees had taken.

Ancillary Administration

The committees next discussed whether or not the determination of a sister state that a will be admitted to probate should be binding on an Oregon court.

Piazza favored having the Oregon courts bound by a determination of a sister state admitting a will to probate. McKay was opposed to the Oregon court being bound by an order of a sister state.

Zollinger also moved that the matter of ancillary administration not be contained in a particular chapter of the code, but rather the various provision be placed in whatever chapter to which they related. The motion was seconded and carried.

Riddlesbarger moved that consideration of the matter of ancilliary administration be tabled. Braun seconded the motion and the motion carried.

The meeting recessed at 5:40 p.m.

The meeting was reconvened at 9:00 a.m., Saturday, March 18, 1967, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Frohnmayer, Husband, Jaureguy, Lisbakken, Mapp and Riddlesbarger. Absent were: Butler, Carson, Gooding.

The following members of the Bar committee were present: Braun, Gilley, Krause, Meyers, McKay, McKenna (arrived 11:45 a.m.), Piazza, Thomas (arrived 11:00 a.m.), Richardson and Bettis. Absent were Biggs, Lovett, Kraemer, Mosser, Silven, Thalholfer, Pendergrass, Copenhaver and Warden. Also present was Sorte from Legislative Counsel Committee.

Persons Presumed Dead

Allison explained to the committees that at the February meeting he was asked to prepare a new draft on persons presumed dead incorporating into the draft the language of the Uniform

Act. [Note: A copy of this draft, as it was before action by the committees at the March 1967 meeting, is Appendix B to these minutes]. Allison also explained that subsection (2) of the draft was prepared by Pat Braun. He indicated that the time lapse between a person becoming missing and the initiation of a probate is five years in Iowa and Washington.

There followed a discussion concerning the nature of the search that would be required prior to administration of the estate of a missing person. Husband favored the same search as that required prior to publication of summons. Mapp favored a provision that would allow the type of the inquiry to be left up to the descretion of the court. Zollinger favored diligent inquiry. Dickson advised the committees that he had experienced a good deal of success in locating missing persons by sending a letter to the Social Security Administration, containing a stamped, addressed envelope using the name of the missing person as the addressee.

Allison read the proposed draft. Allison explained that the person petitioning for administration is somewhat of a adversary of the missing person. He indicated that the Iowa code provides for the appointment of a third person to represent the missing person.

Dickson suggested that there be added to the first section a requirement that notice be sent as he described earlier and that this notice be sent to the Social Security Administration.

Zollinger suggested that there should be, in the new code, a provision for the appointment of a receiver when there were no facts upon which to base a presumption of death.

The committees then discussed the period of time that should lapse prior to any action by relatives of the missing person. Frohnmayer was of the opinion that the time lapse should be flexible. Allison favored an absolute minimum period of 30 days.

Riddlesbarger asked whether it was the purpose of the committees to have the draft of Allison replace the chapter on persons presumed dead and the chapter on missing persons and Dickson said that was the purpose.

Braun asked whether the date of death is the date of the petition or the date the person became noticed to be missing. Zollinger advised her that the date of death should be the date of the petition. Mapp suggested adding a section setting forth that the court shall hear and determine the date and time of death.

Zollinger moved that the time lapse before the presumption would become operable be shortened from five to three years. Frohnmayer seconded the motion and the motion carried.

A question arose as to whether changing the time lapse prior to operation of the presumption would necessitate amending the statutes on evidence. Dickson appointed Richardson and Mapp to look into the question and report back at the next meeting.

Piazza asked who would pay the costs if a missing person returned. Gilley favored the person petitioning for letters paying the costs if the missing person returned. Riddlesbarger favored charging the estate with the costs. Frohnmayer indicated that the court should determine who would pay costs if the missing person returned. The committees adopted the suggestion of Frohnmayer.

Section VII

The members added to section VII the following: "If the estate has been distributed the absentee may recover the estate or its proceeds from the distributees if either be in their hands."

Piazza, Thomas and McKay indicated that they would not give the absentee any right to recover the estate or its proceeds from the distributees.

Zollinger moved the adoption of the following language to be added to section VII: "If the estate has been distributed, the absentee may recover, upon demand, within five years of distribution, from the distributees, the estate or its proceeds." Motion carried.

The meeting recessed at 12:05 p.m.

The meeting was reconvened at 1:30 p.m. The following members of the advisory committee were present: Dickson, Zollinger, Allison, Frohnmayer, Husband, Jaureguy, Lisbakken (arrived at 3 p.m.), Mapp and Riddlesbarger. The following members of the Bar committee were present: Braun, Gilley, Krause, Meyers, McKenna, Piazza, Thomas, Richardson and Bettis. Also present was Sorte.

The members of the committees continued their discussion of Allison's draft. Zollinger referred the members to section 516 of the Iowa code and suggested that the committees adopt that section. No formal action was taken.

Zollinger suggested that there be a special provision for the contingency of a sale of property jointly owned by the absentee and another. He indicated that in that event the purchaser should acquire good title and the absentee should have a right against the surviving joint tenant, for a period of five years, to recover the proceeds to the extent of the absentee's prior interest. Piazza asked whether the period of time would run from the time of ajudication of death or distribution, and Zollinger indicated that he would favor the time running from adjudication of death.

There followed a discussion concerning which section of the draft should contain the provision suggested by Zollinger and the committee favored section VII.

There followed a discussion of previous action with reference to section VII and Dickson advised the committee that by previous action the following language was added to section VII: "Upon the hearing the court shall determine the fact and date of death and whether the decedent died testate or intestate. The court may grant letters of administration or deny the relief prayed for in the petition."

Allison expressed concern about whether or not there was sufficient provision for the rights of the absentee if he returned.

Frohnmayer suggested that when the chapter on estate of absentees is drafted it reflect the committee's decision to incorporate into the draft section 517 of the Iowa code. Allison was of the opinion that ORS chapter 127 contains the same provisions as 517 of the Iowa code.

Section VII (3)

The committees considered the problem of a lien the absentee would have on his property if he returned. Zollinger moved that subsection (3) of section VIII be deleted. Motion carried.

Frohnmayer moved that there be deleted from subsection (1) of Section VIII the following: "... whether prosecuted to judgment or otherwise." Motion carried.

Zollinger proposed the following language for subsection (2) of Section VIII: "All judgments or decrees against the personal representative shall constitute a judgment or decree against the absentee if he be alive, but such judgment or decree

may be vacated upon application by the absentee made within three months after he shall have knowledge of its entry, supported by affidavit denying material facts upon which the right of suit or action was based or alleging facts which would constitute a defense. The action or suit shall thereupon be tried upon the issues so made." Motion carried.

Thomas and Mapp were of the opinion that there should be some finality to the judgment or decree and would favor deleting any right in the absentee to vacate the judgment or decree.

Oregon Legislature

Lisbakken reported on legislation pending at the current Legislative Session. One of the bills in committee would require that estate taxes presently payable by the beneficiary would be paid from the residue of the estate unless the will provided to the contrary. A vote of the committees indicated that the members preferred that these taxes be paid by the beneficiaries rather than from the residue of the estate.

Lisbakken called attention to another bill that if passed would remove the requirement of notice to the State Treasurer.

A third bill would provide that the state could deny a deduction of executors and attorney fees from the gross estate if they were found to be unreasonable by the state. The members of the committees expressed the view that they were opposed to such a measure because the court approved executors and attorneys fees.

Another bill provides for the payment of a $2 fee for copies of tax clearances.

Sorte called attention to the fact that there has been a change made in the Uniform Simultaneous Death Act since the adoption of that Act by Oregon. Dickson appointed a subcommittee of Frohnmayer and Riddlesbarger to study the matter and report to the committees at the April meeting.

Next Meeting

Chairman Dickson directed that the proposed agenda for the April 21, 22, 1967 meeting be as follows:

1. Partial Distribution
2. Inheritance Tax
3. Uniform Simultaneous Death Act
4. Inheritance by Aliens

Adjournment

The meeting was adjourned at 4:20 p. m.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, March 17, 18, 1967)
Note: This is the draft without the changes made at the meeting.

REPORT: March 16, 1967

To: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: Thomas W. Mapp

ANCILLARY ADMINISTRATION

Section 1. Ancillary probate based upon domiciliary probate.

(1) The written will of a testator who died domiciled outside this state, which upon probate may operate upon any property in this state, may be admitted to probate upon proof that it stands probated or established in the jurisdiction where the testator died domiciled and is not being contested there. Rights to take against the will are not affected by this section.

Comment: Adapted from §1, Uniform Probate of Foreign Wills Act.

(2) A will offered for probate under this section may, however, be contested for a cause which would be grounds for rejection of a testator who died domiciled in this state.

Section 2. Original probate.

Original probate of the will of a testator who died domiciled outside this state, which upon probate may operate upon any property in this state, may be granted unless the will stands rejected from probate or establishment in the jurisdiction where the testator died domiciled for a cause which would be grounds for rejection of a will of a testator who died domiciled in this state.

Comment: Adapted from §5, Uniform Probate of Foreign Wills Act.

Section 3. Effect of rejection of will at domicile after local probate.

If, after a will has been admitted to probate in this state under section 1 or section 2, the will has been rejected or set

aside in the jurisdiction where the testator died domiciled, for a cause which would be grounds for rejecting or setting aside a will of a testator who died domiciled in this state, probate shall be set aside in this state upon application therefor within the time for contest of wills under the law of the jurisdiction where the testator died domiciled.

Section 4. Granting of ancillary letters.

(1) Any non-corporate domiciliary personal representative, including a nonresident of this state, upon the filing of an authenticated copy of the domiciliary letters with the probate court, may be granted letters in this state.

(2) If application is made for the issuance of letters, any interested person may intervene and petition for the appointment of any person who is eligible under this act or the law of this state. The court may give preference in appointment to the domiciliary personal representative if it finds such preference to be in the best interests of the estate.

(3) No nonresident of this state shall be granted letters until he files with the probate court an irrevocable power of attorney appointing an agent, approved by the court, to accept and be subject to service of process or of notice in any action or proceeding relating to the administration of the estate.

Section 5. Distribution of estate by ancillary personal representative.

(1) If under the law of the jurisdiction where the testator died domiciled the probate or establishment of his will is subject to contest within a period specified after probate or establishment, no property shall be distributed to beneficiaries under the will during such period except upon order of the court. Distribution made by an ancillary personal representative in good faith and pursuant to an order under this subsection operates as a complete discharge to the ancillary personal representative even if the probate or establishment of the will at the domicile is thereafter rejected or set aside for any cause whatever.

(2) No nonresident personal representative may distribute property to beneficiaries of the estate, or be authorized to deliver property to the domiciliary personal representative, until such nonresident personal representative has filed proof with the probate court that any income tax lawfully imposed upon him based upon fees allowed him in this state has been secured or paid.

(3) When administration in this state has been completed and the estate is in a condition to be closed, the court may,

upon application by the ancillary personal representative, authorize the delivery of such property to the domiciliary personal representative as the court finds necessary for the payment of debts, taxes, legacies or other charges upon the estate of the decedent.

Section 6. Authentication and translation.

(1) Proof required by this act of letters, or of a will and the records of judicial proceedings with reference to the probate or establishment thereof, may be made by copies authenticated by the attestation of the clerk of the court, or other official having custody of the documents.

Comment: Adapted from §7 Uniform Probate of Foreign Wills Act.

(2) If the respective documents or any part thereof are not in the English language, verified translations may be attached thereto and shall be regarded as sufficient proof of the contents of the documents unless objection is made thereto. If any person in good faith relies upon probate under this act he shall not thereafter be prejudiced because of inaccuracy of such translations, or because of proceedings to set aside or modify the probate on that ground.

Comment: Based on §7 Uniform Probate of Foreign Wills Act.

Section 7. Application of general law.

Except where special provision is made otherwise, the law of this state relating to wills and to the probate, contest and effect thereof shall apply in the case of a non-domiciliary testator and the law and procedure of this state relating generally to administration and to representatives shall apply to ancillary administration and representatives.

Comment: Based on §1613 New York Probate Code.

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, March 17, 18, 1967)
Note: This is the draft without the changes made at the meeting.

ESTATES OF ABSENTEES

I

Administration may be had upon the estate of an absentee. A petition therefor must allege, in addition to applicable facts required by ORS _____, whether the absentee when last heard from was a resident or nonresident of this state, and his address at his last known domicile; that he has been absent from his last known place of residence for more than five years, and that during all such period he has not been heard from and his whereabouts has been unknown.

II

Administration also may be had upon the estate of an absentee when the petition therefor alleges, in addition to applicable facts required by ORS _____, that his accidental death at a stated time, location, and circumstance is probable but the fact of the death may be in doubt solely by reason of failure to find or identify the remains of the missing person.

III

Upon filing such petition the court shall set a day for hearing not less than thirty days from such order. A copy of the notice of the hearing on said petition shall be sent by registered mail to the last known residence address of the alleged decedent, and to the alleged distributees of his estate.

IV

The court shall appoint some disinterested person as guardian ad litem to appear at such hearing for the absentee. The court may direct the guardian ad litem to make search for the alleged decedent in any manner which the court may deem advisable, including any or all of the following methods:

(a) By inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the alleged decedent;

(b) By notifying officers of justice and public welfare agencies in appropriate locations of the disappearance of the alleged decedent;

(c) By engaging the services of an investigation agency.

V

Upon the hearing the court shall determine whether the deceased died testate or intestate and shall grant letters accordingly, or on proper grounds may deny the petition. Such order shall, if uncontested or unappealed from, be final, subject to the following exceptions:

(a) The finding of the fact of death shall be conclusive as to the alleged decedent only if (1) the notice of the hearing on the petition for probate or for the appointment of a personal representative is sent by registered mail addressed to the alleged decedent at his last known residence address and (2), the court finds that the search was made as ordered by the court. If such notice is sent and search made, and the alleged decedent is not dead, he may nevertheless at any time recover the estate from the personal representative if it be in his hands, or he may recover the estate or its proceeds from the distributees, if either be in their hands.

VI

Upon the entry of order establishing the death of the absentee, administration of the estate of such absentee, whether testate or intestate, shall proceed as provided for the estates of other decedents, except as provided in this chapter.

VII

The court shall revoke letters of administration at any time upon due and satisfactory proof that the absentee is in fact alive, after which revocation all the powers of the personal representative shall cease, but all receipts or disbursements of assets and other acts by him before revocation shall remain as valid as though such letters had not been revoked. The personal representative shall settle an account of his administration down to the time of such revocation, and shall transfer all assets remaining in his hands to the person for whose estate he had acted, or to his duly authorized agent. In the event a sale of property has been conducted by the personal representative the absentee has no right, title or interest in or to the property sold but only to the proceeds realized therefrom or so much thereof, if any, as remains in the hands of the personal representative upon the closing of the estate of the absentee.

VIII

(1) After revocation of letters of administration, the

absentee may be substituted as plaintiff in actions and suits brought by the personal representative, whether prosecuted to judgment or otherwise. He may, in actions or suits previously brought against such personal representative, be substituted as defendant, on application filed by him or by the plaintiff therein, but shall not be compelled to go to trial within less than three months from the time of such application.

(2) Judgments or decrees recovered against the personal representative before revocation of letters may be opened upon application by the absentee, made within three months after such revocation, and supported by affidavit, specifically denying, on the knowledge of the affiant, the cause of action or specifically alleging the existence of facts which would constitute a valid defense; but if within the three months such application is not made, or, being made, the facts shown are adjudged an insufficient defense, the judgment or decree shall be conclusive, saving the defendant's right of appeal, as in other cases.

(3) After the substitution of the absentee as defendant in any judgment or decree, it becomes a lien upon his real estate in the county, and so continues as other judgments unless or until it is set aside by the lower court or reversed by the Supreme Court.

IX

The costs attending the issuance of such letters of administration or their revocation shall be paid out of the estate of the absentee, and costs arising upon an application for letters which are not granted, shall be paid by the applicant.

ADVISORY COMMITTEE

Probate Law Revision

Thirty-fifth Meeting
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Dates) and : Times) 1:30 p.m., Friday, April 21, 1967
and
9:00 a.m., Saturday, April 22, 1967

Place: Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland, Oregon

Suggested Agenda

1. Approval of minutes of March meeting.

2. Miscellaneous matters.

3. Definition of Ancillary Administration (Mr. Carson and Mr. Zollinger).

4. Partial Distributions (Report by Mr. Richardson, Mr. Tassock and Mr. Keller).

5. Inheritance by Aliens.

6. Conserving Property of Missing Persons, Chapter 127 (Draft reflecting committee action at the March meeting).

7. Presumption of Death (Report by Professor Mapp and Mr. Richardson on whether or not the seven year presumption should be shortened, and the effect a change might have on the evidence code).

8. Inheritance Tax (Mr. Carson, Mrs. Braun and Miss Lisbakken).

9. Uniform Simultaneous Death Act, as amended (Recommendation of Mr. Frohnmayer and Mr. Piazza of whether or not the Oregon law should be amended to reflect amendments made in the Uniform Act).

ADVISORY COMMITTEE
Probate Law Revision

Thirty-fifth Meeting, April 21 and 22, 1967
(Joint Meeting with Bar Committee on Probate Law and Procedure)

MINUTES

The thirty-fifth meeting of the advisory committee (a joint meeting with the Committee on Probate Law and Procedure, Oregon State Bar) was convened at 1:30 p.m., Friday, April 21, 1967, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Zollinger (Mr. Zollinger presided in Chairman Dickson's absence), Allison (left at 2:45 p.m.), Butler, Frohnmayer, Gooding, Jaureguy, Lisbakken (arrived at 3:30 p.m.) and Mapp. Dickson, Carson, Husband and Riddlesbarger were absent.

The following members of the Bar committee were present: Biggs, Braun, Gilley, Krause, Lovett, Meyers, Thalholfer, Pendergrass, Thomas, Richardson and Bettis. Copenhaver, Kraemer, McKay, McKenna, Mosser, Piazza, Silven and Warden were absent.

Also present: James Sorte from the staff of Legislative Counsel, William Keller and William Love.

Zollinger, who presided in the absence of Chairman Dickson, advised the committees that the proposed agenda would be varied somewhat so that Allison could discuss the Rights of Nonresident Aliens to Inherit as the first order of business.

Inheritance by Nonresident Aliens

Allison suggested that it would save time if he would first read the changes he made in the draft dated October 3, 1966. [Note: A copy of this draft is Appendix A of these minutes.] The changes suggested by Allison were as follows:

Section 1. (1) In the last sentence of subsection (1) of section 1 delete "other" between "of" and "property", and delete the next to last word of the sentence, i.e. "the" and add in place thereof "decedent's". (2) In subsection (2) of section 1, change the next to the last line after the comma to read: "...his attorney and the attorney and attorney in fact representing...", and delete the words "conversion and deposit."

Section 2. (3) In subsection 1 of section 2 delete the last sentence. Change subsection 2 of section 2 to subsection

(4); change subsection (3) to subsection (2); change subsection (4) to subsection (3).

Section 3. Section 3 was amended to read: "(1) If the money due an alien distributee deposited as provided in section 1 and interest accrued thereon is not withdrawn and paid as provided in section 2, the court that ordered the deposit shall order that the money deposited and interest be withdrawn and paid to any distributee of the estate, other than the alien distributee, who is found by the court to be entitled to receive the money and who has filed with the court, within one year after the expiration of the 10 year period specified in section 2 a petition requesting the withdrawal and payment." There was also added a section 4 which is as follows:

Section 4. "All proceedings hereunder shall be had under the register number of the estate in which the court order to deposit was made, and no order reopening the estate shall be required." Allison moved that the draft be approved, Zollinger seconded the motion, and the motion carried.

Minutes of the March Meeting

There being no objection, the minutes of the last meeting (March 17, 18, 1967) were approved as submitted.

Miscellaneous Matters

Sorte advised the committees that Riddlesbarger called to say that he was unable to attend the April meeting because of illness. Carson also contacted Legislative Counsel and indicated that he would not be in attendance at the Friday meeting.

Uniform Probate Code

Zollinger explained to the committees that he had discussed with Professor Mapp the possibility of Mapp attending the Summer meeting of the draftsmen of the Uniform Probate Code in Boulder, Colorado. Mapp explained to the committees that he had been in communication with the chairman of the committee, and that the chairman had indicated that he would allow Professor Mapp to attend the sessions. Mapp explained the probable costs that would be incurred by his travel to and return from Colorado. He explained the intended purpose was that after attending the sessions of the draftsmen, he would then, in future meetings of the Advisory and Bar committees, be in a position to advise the committees of the action by the Uniform Probate Code draftsmen and their reasons for the action. Zollinger expressed his belief that a program as

outlined by Mapp would be an excellent opportunity and would assist the Oregon probate project. Other members of the committees expressed approval. A motion was made, seconded and carried that the Advisory committee be on record as approving Mapp attending the sessions in Colorado.

The committees then considered the prospect of Mr. Allison assuming the responsibility of draftsman for the committees. Zollinger explained that Sorte would begin a two month leave of absence beginning in June. Zollinger outlined the experience Mr. Allison has from drafting legislation in Alaska and Oregon. He said that he had discussed the matter with Judge Dickson and that there is space available for Allison and a secretary in the Multnomah County Courthouse. Zollinger explained that Allison would be compensated at a rate to be agreed upon, and that he would arrange a meeting, after May 8, 1967, which is the date that Judge Dickson will return from vacation, with the Portland members of the Law Improvement Committee and with Lundy, Legislative Counsel. A motion was made, seconded and carried that the Advisory and Bar committees go on record as favoring Allison drafting the probate code under terms and compansation to be agreed upon.

Zollinger inquired of Sorte whether the drafts of everything that had been considered by the committees would be available at the May 1967 meeting, and he was assured that the drafts would be distributed prior to the meeting.

Partial Distribution (ORS 117.350 to 117.390)

Richardson requested that the committees vary the agenda to accommodate Mr. Keller, who had worked with Mr. Tassock and Richardson in preparing the draft on Partial Distribution. [Note: This draft is Appendix B to these minutes.] Richardson explained that by earlier committee action, a decision was made to use partial distributions, in place of a small estates provision, to speed up distribution of an estate, particularly where the widow was in need or where there were other exigencies that required prompt action. He indicated that there would be a time limitation and that some notice would have to be given. Keller explained that the provisions of the code would have to give notice to heirs and creditors and be consistent with the sections on claims and the time limits within which claims could be filed. Keller explained that what was intended was to give notice to the heirs and creditors of intent thereafter to petition the court for a partial distribution. Keller pointed out some difficulty with the term "distribution". He explained the difficulty was encountered when trying to reconcile that term with the

previous action of the committee adopting the concept that real and personal property vests in those entitled to it at the time of death. Keller said that the subcommittee had considered the use of the word "surrender" in place of "distribution". Zollinger indicated that the word "delivery" could be used in place of "distribution".

Keller explained that the notice requirement would be such that it would correspond with the time for filing claims. He indicated that notice by mail should be sufficient notice, and that notice would be sent only to those creditors not barred from payment. Zollinger said that subsection (4) of section 1, by using a period of four months, implied that a creditor could file a claim in the estate after that time. Allison expressed the opinion that there could not be a partial distribution if the estate was in an insolvent condition. Zollinger expressed the opinion that he would prefer the notice be sent to persons who had presented claims and claims that were not barred. Zollinger indicated that the absolute minimum waiting period should coincide with the final time for filing of claims against the estate. Pendergrass questioned waiting a long period of time. He said that usually the personal representative knows, shortly after being appointed, what the condition of the estate is in and whether there will be sufficient assets for payment of claims and expenses. He favored distribution as soon as possible under the factual circumstances. Pendergrass cited as an example a $150,000 estate and a legatee requesting distribution of a $1,000 legacy. Zollinger suggested that the requirement of the distributee to post a bond could be an alternative to waiting until the period for filing claims had expired. Pendergrass indicated that he was opposed to the idea of requiring the expense of obtaining a surety bond. He would favor leaving the safeguards to the discretion of the court. Pendergrass also noted that as a practical matter estates are usually partially distributed, subject to later confirmation by the decree of final distribution. As an example he cited the case where the family car, household furnishings and the house are used by the widow immediately after death. He indicated that most lawyers advise the widow to go ahead and use that kind of property. Krause said that he recently had a case where the Welfare Department filed a claim just before the running of time for filing claims in the amount of $3,800 in a $4,000 estate. Butler was of the opinion that the beneficiaries of an estate are the recipients of a gift, and that under such circumstances the committees should not be so concerned because the beneficiaries had to wait to receive the gift. Zollinger asked for an expression of opinion of the committees as to whether or not they favored shortening the minimum waiting

period to less than four months. Nine members favored shortening the period to less than four months and five members voted against shortening the period. Gilley directed the attention of the committees to section 11.72.002 of the Washington code and indicated his approval of the approach taken by Washington. Gilley noted that Washington makes a distinction between distribution of a specific piece of property and a general partial distribution. He noted that Washington would not allow a partial distribution of money. Gilley said that he would not be in favor of allowing partial distributions of money and intangibles. Keller said that it was his understanding that Washington would allow partial distribution of tangible personal or real property, and at any time. Butler suggested that another approach might be to distribute tangible property, taking a note from the distributee to be held until final distribution was authorized. Mapp pointed out that the Wisconsin provision was similar to Washington. Zollinger expressed the opinion that he was not aware of a reason to make a distinction between tangibles and intangibles. He pointed out that after the distribution of tangibles, the distributee could convert the property into intangibles. Richardson advised the committees that Iowa has a provision similar to Washington. Richardson suggested that the committees should follow the approach of Iowa. There followed a discussion of whether or not bond should be required of a distributee of a partial distribution. Frohnmayer expressed the opinion that whether or not a bond should be required should be left up to the discretion of the court. He indicated that one of the things the draftsmen of the Uniform Code would be strongly advocating is a nonintervention provision. He expressed the opinion that the more formalities required by a code the more arguments the advocates of nonintervention have. There followed a discussion concerning whether or not there should be notice of intention to make a partial distribution. Keller favored a provision requiring that there be such notice as ordered by the court. Judge Thalholfer expressed the view that if the matter of notice were left to a court, the first thing the Judge would do is start asking questions concerning the status of the estate. Zollinger asked for an expression of the committees' opinion as to whether or not there should be a provision describing the kind of notice to be given prior to a partial distribution. Five members voted in favor and nine opposed a specific provision of what notice should be given.

Richardson indicated that he would favor a showing of good cause before a partial distribution was authorized. Frohnmayer disagreed and indicated that he favored leaving to the discretion of the court the showing required prior to a

partial distribution. He said that if the court authorized the partial distribution, the court is in effect, saying that there is good cause. Thomas said that he would favor spelling out what is required to prove to the court on a hearing to determine whether there should be partial distribution.

A motion was made, seconded and carried to adopt the approach of Iowa with regard to partial distributions. Zollinger directed the subcommittee to redraft the draft following the approach of Iowa.

Definition of Ancillary Administration

Zollinger explained that he and Mr. Carson had been appointed to draft a definition of ancillary administration. [Note: This draft is appendix C to these minutes.]

Butler questioned the appropriateness of "ancillary administration" being an administration in Oregon. He suggested the word "the" replace the word "an". Zollinger agreed with Butler. A motion was made approving the draft with the amendment. Motion carried.

Presumption of Death after Seven Years of Absence

Mapp and Richardson were appointed members of a subcommittee at the March 1967 meeting to determine the relationship of the time limitation, before distribution, in the chapter on missing persons, and the evidentiary presumption of death after seven years absence. Mapp explained that although he had initially favored shortening the time lapse before the presumption of death would be available, he now questioned whether shortening the period of time was advisable. He said that he had reviewed the Washington and New York approach. Both of those states allow someone to immediately petition the court for an order to authorize management of business and protection of property when a person is missing. New York designates the person protecting the property the trustee. Both Washington and New York require that the property be administered for a period of five years, at which time a distribution may be made to the persons that would have been entitled to the property had the missing person been deceased. Both states allow, upon proof of death, a winding up of the administration. Both Washington and New York provide that the distribution is final after seven years. Mapp expressed his approval of authorizing administration immediately upon a person becoming missing, a waiting period of five years and provisional distribution at that time, and final distribution after seven years. Pendergrass asked if the

person administering the estate would have the same basic powers as a trustee or if it would be more like a conservator. Mapp expressed the view that the actual time of death would be established at the time the person appeared to be missing rather than after the passage of the seven year period. Gooding asked why the seven year presumption should be shortened, and Jaureguy said that it should be changed because of the changes in communication and transportation.

Uniform Simultaneous Death Act (As amended)

Frohnmayer explained to the committees that Oregon adopted the Model Act in 1947. In 1953 there were certain amendments to the Model Act, but Oregon did not adopt the amendments. [Note: A copy of a report of this subject is appendix D to these minutes] Frohnmayer explained the reasons for the changes made in the Uniform Act. He said that he and Mr. Piazza had discussed the matter in detail and both were of the opinion that Oregon should amend the Oregon law to conform to the amended Uniform Act. Zollinger was of the opinion that the second sentence of the added paragraph of section 2 of the draft conflicted with the first sentence. He suggested the insertion of "Upon the death of all of the beneficiaries" at the beginning of the second sentence. Krause suggested that the second sentence of the added paragraph to section 1 of the draft be amended to read: "If there is no sufficient evidence that all of two or more beneficiaries..." Zollinger and Frohnmayer agreed that the amendment of Krause would be more clear than the draft. Zollinger said the situation might arise where initially there were five remaindermen, but prior to the common calamity of three of them, two of them died. In that case the second sentence of the added paragraph of section 1 of the draft would apply to the three that were killed simultaneously. Gooding suggested that the result of the Miami case (see comment on the case after section 1 of the draft) might be the most just result. Frohnmayer moved the adoption of the amendment of section 2 suggested by Krause. The motion carried. Frohnmayer moved the adoption of section 3 of the draft. The motion carried. There followed a discussion of section 4 and the problems that arise because of the numerous people living in Oregon that own community property in another state, or who convert to sell community property and purchase property in Oregon with the proceeds from the sale of community property. A motion was made, seconded and carried to adopt section 4 of the draft. Zollinger moved that the amended portion of section 5 of the draft be amended to read "...except if the policy or any interest therein is community property...". Motion carried. Frohnmayer moved

the adoption of section 5 of the draft, which contains the amendments of the Uniform Act. The motion was seconded and carried.

The meeting recessed at 5:15 p.m.

The meeting was reconvened at 9:00 a.m., Saturday, April 22, 1967, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland, Vice-chairman Zollinger presiding in Judge Dickson's absence.

The following members of the advisory committee were present: Zollinger, Allison, Butler, Carson, Frohnmayer, Gooding (Arrived at 10:15 a.m.), Jaureguy and Mapp. Absent were Dickson, Husband, Lisbakken and Riddlesbarger.

The following members of the Bar committee were present: Biggs, Braun, Gilley, Krause, Lovett, Meyers, Thalholfer, Thomas, Richardson and Bettis. Absent were: Kraemer, Mckay, McKenna, Copenhaver, Pendergrass, Piazza, Mosser, Silven and Warden. Also present were Sorte from Legislative Counsel Comittee and Love.

Conserving Property of Missing Persons (Chapter 127)

Zollinger explained that Legislative Counsel had amended Chapter 127 to conform to the changes suggested by the committees at the March 1967 meeting, and that there were other minor housekeeping changes made. (The committees, at the March 1967 meeting, voted to remove any waiting period before a person could petition for appointment as administrator to take care of property of a missing person). Zollinger explained that Chapter 127 is similar to the draft of Allison on Missing Persons. Richardson expressed the opinion that the two chapters should be combined, as was done in Washington and New York, and the waiting period prior to petition for letters should be shortened. Allison agreed that the two chapters should be combined so that a trustee could be appointed when a person appeared to be missing, and after proof of actual death, or death because of the seven year presumption, there should be a relatively easy transition to change the status of the trustee to an administrator to wind up the affairs of the estate. Zollinger expressed concern over notice in the case of missing persons. He cited as an example the man returning after six years. In such a case, he asked, what would there be to protect the acts of the personal representative and the distributee or purchaser from either of them. Frohnmayer was of the opinion that there is a difference between the situation where there is a boat overturned, or an airplane goes down, and a situation where the

person is merely missing. In the former instance there should be a provision for immediate administration while in the latter the man might return. However, he would favor placing provisions for both situations in the same chapter of the revised code. Zollinger questioned whether the court has jurisdiction in a case where there is merely an allegation that a boat overturned and the petitioner believes the party to be dead. Zollinger indicated he believed there would be a due process problem with petitioning for letters without proof of actual death. There followed a discussion of when the missing persons rights to the property are extinguished. Allison suggested that if the committees retained the presumption, there would not be a due process question as to notice to the absentee. Mapp pointed out that Washington and New York follow the seven year waiting period, but at that point the rights of the missing person are cut off. Mapp pointed out that under Washington code the rights of an absentee person may be cut off sooner than seven years if it could be shown that the missing person is dead. Bettis favored shortening the period of time for distribution. Frohnmayer was opposed to using different periods of time to cut off the rights of an absentee, for, on the one hand a person disappears mysteriously, and on the other, circumstances from which death would be probable. Braun favored allowing the missing person to return and reclaim any property still in existence without regard to the time element. Frohnmayer favored a provision that all missing persons have the same rights upon their return, whether missing mysteriously or where there are circumstances from which death could be inferred, and that if the person appeared within five years he could reclaim property in existence, if beyond five years the rights would be extinguished. Zollinger indicated that he favored combining the chapters of Missing Persons (Allison's draft, Appendix __) with Chapter 127, or with the sections dealing with initiation of probate. Mapp explained the different approaches taken by the Uniform Probate code, New York code, and the Washington code. The Uniform code would allow the absentee to recover any property in existence irrespective of when the person returned. New York and Washington would cut off all rights of the absentee after a period of seven years. Washington also allows provisional distribution of the estate after five years, and if, during the absence, there were circumstances indicating death, the court allows final distribution. Allison expressed concern over whether or not there would be due process if there was a distribution prior to seven years. He suggested that if the period of time is to be shortened, it would require amending subsection (3) of section 1 of the draft on missing persons. Bettis was of the opinion that there was

no justifiable reason for a long period of time preceding the presumption of death. Bettis also indicated that a situation of a missing person returning would be infrequent.

Section 1 of draft on Missing Persons. A motion was made, seconded and carried to amend subsection (3) of section 1 of the draft on missing persons to shorten the time limit from three to one year.

Section 2. A motion was made, seconded and carried to strike the word "accidental" from section 2 of the draft.

Section 3. The first sentence of section 3 was designated subsection (1); subsection (1) was designated paragraph (a) and subsection (2) was designated paragraph (b). A motion was made, seconded and carried to delete the words "letters of" from the first sentence of section 3.

Section 4. A motion was made, seconded and carried to substitute the word "publications" for the word "periodicals" in subsection (1) of section 4.

Section 5. Section 5 was amended to read: "(1) Upon the hearing the court shall determine whether the absentee died, and if so, the date of his death and whether testate or intestate and shall issue letters accordingly, or, in the absence of such finding the court may deny the petition." Paragraph (a) of subsection (2) of section 5 was amended to read: "...; and that notice is given by postage prepaid letters to be forwarded through the United States Social Security Administration to his last address available to that agency." Paragraph (b) of subsection (2) of section 5 was amended to read: "(b) The court finds that diligent search was made."

Section 7. The first sentence of section 7 was amended to read: "Upon proof that the absentee is alive letters heretofore granted shall be revoked."

Section 8. Section 8 was amended to read: "...The absentee may be substituted as defendant upon his own application or that of the plaintiff in actions and suits brought against the personal representative. If the absentee is substituted as defendant he shall not be compelled to go to trial within less than three months from the date of the substitution." Subsection (2) of section 8 was deleted.

Section 9. The words "of administration" were deleted from section 9.

Section 10 of draft on Missing Persons. The words "of administration" were deleted from the lead line of section 10.

Zollinger called the attention of the committees that William Love, member of the Law Improvement Committee was present and had been attending the meetings of the April 1967 meeting. Mr. Love expressed appreciation for the work by the committees.

The meeting recessed at 12:25 p.m.

The meeting was reconvened at 1:55 p.m. The following members of the advisory committee were present: Zollinger (presiding in Judge Dickson's absence), Allison, Carson, Frohnmayer (arrived at 2:40 p.m.), Gooding, Jaureguy, Lisbakken and Mapp. The following members of the Bar committee were present: Biggs, Braun, Gilley, Krause, Meyers, Thomas (arrived at 2:50 p.m.) and Bettis. Also present were Sorte and Love.

Conserving Property of Missing Persons (Chapter 127)

After some discussion of the wording of Chapter 127, Braun suggested that the problem presented was closely akin to guardianship and that the chapter dealing with guardianship and missing persons should be combined. The committees agreed, and Zollinger referred the question to Braun and Gilley to report back to the committees. A question was asked about the relation of missing persons to the law dealing with conservatorships, and Zollinger expressed the view that conservatorships are only applicable when the ward consents, and that it was not a similar situation to missing persons.

Taxation

Mr. Carson discussed the various suggestions made in the draft that he submitted to the committees (Appendix __). Carson indicated that prior to serious consideration of the suggestions of his report, the committees should resolve the following policy considerations that would have a direct bearing on a draft relating to tax matters. The policy questions were: (1) Whether or not the so-called collateral tax should be abolished and tax be on the estate as a whole, (2) Whether the committees favored an administrative, rather than court determination, of inheritance tax. The committees were of the opinion that the collateral tax should be abolished and that tax should be determined administratively

rather than by the court. Carson explained that he had compared the Oregon code with that of about eight other states, but that he did not have specific recommendations because he first had to learn that administrative determination of the tax was desired by the committees. [Note: Copies of the laws of the other states are appended to these minutes]. He indicated that now that the policy question is resolved in favor of administrative determination of the tax, he would, at a later date, make specific recommendations. Carson also indicated that in California there was an advisory committee appointed to determine whether there was a necessity for improvement in the process of determining and collecting inheritance tax. Specifically, the committee had considered the possibility of abolishing the collateral tax and taxing only the estate. In addition the committee had considered having a contract with the Federal Government and other states, that would provide that the Federal Government would collect all of the tax, and reallocate the state's portion back to the state. The California committee considered not determining the tax until after the federal tax was determined. After consideration, the California committee abandoned the idea of having the Federal Government collect the tax and reapportion the state tax. The delay in payment to the state was a prime factor in abandoning the idea. Carson said that an argument raised by the opponents of abolition of the collateral tax was that the tax would then be on the immediate family of the decedent. He indicated that this argument could be met with the argument that a decedent would not be likely to be making gifts to collaterals if the decedent had immediate family. In response to a question by Frohnmayer Carson replied that about 40 states have a collateral tax in some form. Love suggested that the committees should consider whether or not Oregon should adopt a marital deduction and the amount that the deduction might be. Zollinger said that since the committees had taken the position of abolishing the collateral tax, that the tax on the estate would have to be raised to offset the loss of revenue from that source. Zollinger referred to the subcommittee (Carson, Braun and Lisbakken) the task of revising the tax laws to conform to the committees action, and, in addition, that the committees make a recommendation as to what changes will be necessary because of the abolition of the collateral tax.

The meeting was adjourned at 5 p.m.

APPENDIX A

INHERITANCE BY NONRESIDENT ALIENS

Rough Draft

Section 1. Deposits for nonresident alien distributees. (1) If, at the time of distribution of an estate, the court finds that a distributee is an alien not residing within the United States who would not receive the benefit, use or control of property due him, the court shall order the personal representative to convert the property into cash and deposit the money due the alien distributee to the credit of the alien distributee at interest in a savings account in a bank or banks in this state. Sale of the property shall be in the manner provided by law for the sale of other property of the estate.

(2) Before money is deposited as provided in subsection (1) of this section, there shall be deducted therefrom the expenses of any sale of the property and amounts the court may allow for the services of the personal representative, his attorney and the attorney in fact representing the alien distributee in the conversion and deposit proceeding.

(3) The pass book or other evidence of the deposit shall be delivered to the clerk of the court, who shall be custodian thereof until it is needed for withdrawal of the money deposited as provided in section 2 or 3.

(4) The money deposited and interest accrued thereon may be withdrawn and paid or disposed of only as provided in section 2 or 3. The deposit and interest are not subject to the Uniform Disposition of Unclaimed Property Act (ORS 98.302 to 98.436 and 98.991).

Section 2. Payment of deposits to nonresident alien distributees. (1) At any time within 10 years after the date of the court order to deposit money due an alien distributee as provided in section 1, the alien distributee or, if he is deceased, the personal representative of his estate appointed by a court of this state may file with the court that ordered the deposit a petition requesting withdrawal of the money deposited and interest accrued thereon and payment thereof to the petitioner or his attorney in fact. The petition shall be filed and all proceedings thereon shall be had under the register number of the estate proceeding in which the court order to deposit was made, but the estate need not be reopened for the purpose of the withdrawal proceeding.

(2) If a petition filed as provided in subsection (1) of this section is denied by the court, a subsequent petition so filed requesting withdrawal of the same money deposited

and interest shall allege the particulars of new or changed circumstances occurring after that denial that justify withdrawal and payment.

(3) The court, upon the filing of the petition, shall fix a time and date certain for a hearing on the petition, and shall order that written notice of the hearing be given not less than 30 days before the date thereof to the clerk of the State Land Board, the bank or banks in which the money is deposited and the consular representative of the county of which the alien distributee is or, if deceased, was a citizen.

(4) If it appears to the court at the hearing that the alien distributee or, if deceased, his heirs or beneficiaries would receive the benefit, use or control of the money deposited, the court shall order that the money deposited and interest accrued thereon be withdrawn and paid to petitioner or his attorney in fact, after deduction therefrom of the costs and expenses of the withdrawal proceeding allowed by the court.

Section 3. Payment of nonresident alien distributee deposits to other distributees; escheat. (1) If the money due an alien distributee deposited as provided in section 1 and interest accrued thereon is not withdrawn and paid as provided in section 2, the court that ordered the deposit shall order that the money deposited and interest be withdrawn and paid to any distributee of the estate, other than the alien distributee, who files with the court a petition requesting the withdrawal and payment within one year after the expiration of the 10-year period specified in section 2 and who is found by the court to be eligible to receive the money. The petition shall be filed and all proceedings thereon shall be had under the register number of the estate proceeding in which the court order to deposit was made, but the estate need not be reopened for the purpose of the wirhdrawal proceeding.

(2) If the money deposited and interest accrued thereon is not withdrawn and paid as provided in section 2 or subsection (1) of this section, the money and interest shall be disposed of as escheated property.

APPENDIX B

REPORT
April 19, 1967

To: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: William Keller, Campbell Richardson and
William Tassock

Subject: Draft on partial distributions which will
be discussed at the April 21, 22, 1967 meetings.

PARTIAL DISTRIBUTION

Sec. 1. At any time after the expiration of four months from the date of first publication of notice to creditors, the personal representative or any heir, legatee or devisee may mail written notice to the following at their respective last known addresses:

(1) The personal representative if the notice is given by an heir, legatee or devisee;

(2) Each heir, excluding the heir who gives the notice, if the decedent dies intestate;

(3) Each legatee and devisee, excluding the legatee or devisee who gives the notice, if the decedent died testate;

(4) Each creditor whose claim is not barred and is unpaid.

The notice shall state that after a date set forth therein, which date shall be at least 15 days after the mailing thereof, the personal representative will apply to the court for an order authorizing the surrender of possession of a legacy, devise or share of the estate or any portion or portions thereof to the heir, legatee or devisee entitled thereto, and shall also state that the time and place for the hearing upon said application shall be given by the personal representative to any interested party who has requested notice thereof. The personal representative shall furnish to any heir, legatee or devisee requesting the same, a list of all creditors whose claims are not barred and are unpaid.

Sec. 2. After the date set forth in said notice, the personal representative may file with the court an application for such partial distribution. The time and place for the hearing upon said application shall be given to any interested party who has requested notice thereof. If, upon the hearing, it appears that all inheritance taxes payable to the estate have been paid, or that the State Treasurer has consented in writing to the partial distribution in question, and that the legacy, devise or share of the estate or portion thereof may be distributed without loss to the creditors or injury to the estate or any person interested therein, the court in its discretion may grant the petition or some part thereof, either with or without bond of the distributee as the court may determine. If the distribution is to be made upon bond, the court shall authorize distribution upon the condition that the distributee files with the court, within a time specified in the order, an undertaking, with one or more sufficient sureties, any of whom may be required to justify, for the benefit of whom it may concern, in such sum as the court may designate, to be void upon the condition that such distributee will pay, when required, his proportion towards satisfying any claim against the estate, including determined and undetermined state and federal tax liability, not exceeding the amount of the legacy or portion of the estate so ordered to be distributed.

Sec. 3. The distribution and delivery of the assets in accordance with an order of the court issued pursuant hereto, shall be a full discharge of the personal representative with respect to all property embraced in such order.

Sec. 4. The sureties in the undertaking mentioned in Sec. 2 shall have the same qualifications as sureties in bail upon arrest, and shall qualify before the court or judge thereof in like manner.

Sec. 5. If, after any partial distribution, it becomes necessary to require the payment of all or any part of the sum or property distributed to satisfy any claim against the estate, the executor or administrator shall apply by petition to the court for a decree to that effect. Notice of the application shall be given to the distributee and to his sureties, if any, at least ten days before the application is made.

Sec. 6. If upon the hearing, it becomes necessary and proper that the payment mentioned in Sec. 5 be made, the court shall decree accordingly, specifying therein the amount to be paid, and within what time. If the amount is not paid within the time specified, the decree may be enforced against such party and the sureties in the undertaking, by execution, in the same manner as a decree in the Circuit Court.

Sec. 7. The costs of all proceedings under Sec. 1 to 7 hereof shall be borne or paid as the court in its discretion may determine.

APPENDIX C

REPORT: April 5, 1967

TO: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: Legislative Counsel

Subject: At the March 1967 meeting, Judge Dickson appointed Mr. Carson and Mr. Zollinger as a subcommittee to define the term "ancillary administration." This report is the definition drafted by the subcommittee.

An ancillary administration is an administration in Oregon of the estate of a nonresident decedent whose estate is also being administered in the state of his domicile. The term does not mean that the Oregon administration is subordinate or auxiliary to the domiciliary administration, or that the Oregon personal representative is accountable to the domiciliary personal representative except as the Oregon court shall order.

APPENDIX D

REPORT
April 4, 1967

To: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: Legislative Counsel

Subject: Uniform Simultaneous Death Act (as amended).

Note: Mr. Frohnmayer and Mr. Piazza will report on this subject at the April 21, 22, 1967 meeting of the committees.

The Uniform Simultaneous Death Act was proposed by the National Conference of Commissioners on Uniform State Laws in 1940. It was enacted in Oregon in 1947 (c. 555, secs. 1-9; ORS 112.010 to 112.080). In 1953 the Commissioners proposed amendments to the Act. As of December 31, 1965, 46 states, the District of Columbia and the Panama Canal Zone had enacted the original Uniform Simultaneous Death Act with 9 of the states and the District of Columbia having enacted the Act as amended in 1953.

UNIFORM SIMULTANEOUS DEATH ACT

Relating to the disposition of property where there is no sufficient evidence that persons have died otherwise than simultaneously.

Section 1. ORS 112.010. Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this chapter.

Comment: The 1953 amendments made no changes in this section.

Section 2. ORS 112.020. [Where two or more beneficiaries are designated to take successively by reason of

survivorship under another person's disposition of property and there is no sufficient evidence that these beneficiaries have died otherwise than simultaneously, the property thus disposed of shall be divided into as many equal portions as there are successive beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each designated beneficiary had survived.]

If property is so disposed of that the right of a beneficiary to succeed to any interest therein is conditional upon his surviving another person, and both persons die, and there is no sufficient evidence that the two have died otherwise than simultaneously, the beneficiary shall be deemed not to have survived. If there is no sufficient evidence that two or more beneficiaries have died otherwise than simultaneously and property has been disposed of in such a way that at the time of their death each of such beneficiaries would have been entitled to the property if he had survived the others, the property shall be divided into as many equal portions as there were such beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each of such beneficiaries had survived.

Comment: Section 2 was amended in 1953 to provide that if the holder of a life estate and a remainderman of the same estate die where there is no sufficient evidence that the two died otherwise than simultaneously, the remainderman will be deemed not to have survived and his estate will take nothing. This amendment was made as a result of the court's decision in Miami Beach First Nat'l Bank v. Miami Beach First Nat'l Bank, 52 So. 2d 893 (Fla. 1951). In that case T granted a life estate to A with the remainder in a class of persons of which B was a member. A and B were killed in a common accident. B's estate claimed B's share of T's estate under sec. 2 and the other remaindermen contented that the section did not apply. The court held that sec. 2 applied and that B's estate received B's share of T's estate. The Uniform Commissioners believed this to be a misinterpretation of sec. 2 and designed the first sentence of the amendment to nullify the result. The second sentence of the proposed amendment would continue the rule of the current section with slightly modified wording. It is meant to apply when all the beneficiaries die in a common accident by providing that the estates of each would receive the share that each beneficiary would have received had he survived.

Section 3. ORS 112.030. (1) Where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived. If there are more than two joint tenants and all of them so died the property thus distributed shall be in the proportion that one bears to the whole number of joint tenants.

(2) The term "joint tenants" includes owners of property held under circumstances which entitled one or more to the whole of the property on the death of the other or others.

Comment: Subsection (1) of section 3 remains unchanged. The 1953 amendments added subsection (2) to solve the problem created in states not having joint tenancy. Oregon abolished joint tenancies in ORS 93.180.

Section 4. Where a husband and wife have died, leaving community property, and there is no sufficient evidence that they have died otherwise than simultaneously, one-half of all the community property shall pass as if the husband survived and the other one-half thereof shall pass as if the wife had survived.

Comment: This section was proposed in 1953 to cover the situation where community property is involved. Unless Oregon adopts community property, there is no need for this new section.

Section 5. ORS 112.040. Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy shall be distributed as if the insured had survived the beneficiary, except if the policy is community property of the insured and his spouse, and there is no alternative beneficiary except the estate or personal representatives of the insured, the proceeds shall be distributed as community property under section 4.

Comment: This section remains the same as it was when adopted with the exception of the addition of the new provision to cover community property. As with sec. 4 the new provision is not necessary in Oregon in the absence of the adoption of community property.

Section 6. ORS 112.050. This chapter shall not apply

to the distribution of the property of a person who has died before July 5, 1947.

Comment: No provision for this section was made in the 1953 amendments. Two questions concerning it might be raised:
1) should this section be retained or can it be repealed,
2) should a new provision be added to prevent the 1953 amendments from being retroactively applied?

Section 7. ORS 112.060. This chapter shall not apply in the case of wills, living trusts, deeds, or contracts of insurance, or any other situation where [in] provision [has been] is made for distribution of the property different from the provisions of this chapter, or where provision is made for a presumption as to survivorship which results in a distribution of property different from that here provided.

Comment: The phrase "or other situation" was adopted from the Texas version of the Act. The clause "or where provision is made for a presumption as to survivorship which results in a distribution of property different from that here provided" was contained in Alabama's 1951 enactment. The committee was of the opinion that the courts would construe the original Act the same as the amended one, if a liberal construction was adopted, but that the amendment would clarify and be helpful. "Draftsmen of instruments listed in the Act quite often make provision for a presumption of survivorship. They may provide that a person shall not be deemed to have survived unless he shall survive by at least 30 days. They may, in connection with the so-called Marital Deduction in the Federal Estate Tax Law, provide that the beneficiary shall be deemed to have survived if there is no sufficient evidence that the testator and the beneficiary spouse died other than simultaneously."

Section 8. ORS 112.070. This chapter shall be so construed and interpreted as to effectuate its general purpose to make uniform the law in those states which enact the Uniform Simultaneous Death Act.

Comment: No changes were made in this section by the 1953 amendments.

Section 9. ORS 112.080. This chapter may be cited as the "Uniform Simultaneous Death Act."

Comment: No changes were made in this section by the 1953 amendments.

APPENDIX E

APRIL, 1967

ORS CHAPTER 118 (ESTATE AND INHERITANCE TAXATION)

REVISED STATEMENT OF ALTERATIONS CONSIDERED BY SUB-COMMITTEE COMPOSED OF PATRICIA A. LISBAKKEN, PATRICIA Y. BRAUN AND WALLACE P. CARSON

(1) 118.005 (Definitions): No alteration suggested.

(2) 118.010 (Property, transfers and interests subject to tax): Consider whether this section should, or should not, be amended to the extent of restoring the provisions relating to general powers of appointment to those that existed before the 1965 amendment of this section was made. It may be presumed that the State Inheritance and Gift Tax Division would appose an amendment of that kind.

(3) 118.020 (Transfers to governmental units and certain private institutions): Amend this section in such manner as to allow exemption of bequests and devises made in trust.

Since this recommendation originally was made, the Oregon Supreme Court has rendered opinions in two cases (United States National Bank of Oregon v. Straub, Or Adv Sh, v 84, p 285; and Straub v. First National Bank of Oregon, Or Adv Sh, v 84, p 309). Consequently, this recommendation now should be reconsidered in the light of those opinions.

(4) 118.030 and 118.040: No alteration suggested.

(5) 118.050 (Pension, retirement and social security benefits exempt from taxation): No alteration suggested.

(6) 118.060 (Reciprocal exemption of intangible property of nonresident decedent): No alteration suggested.

(7) 118.070 (Deductions): Consider further whether to amend the provisions of Section (2) "In unprobated estates", Subsection (a), in such manner as to permit deduction of all debts of the decedent paid by the surviving tenant by the entirety of real property or by the surviving owner(s) of personal property previously owned jointly by the decedent and another, or others, with rights

of survivorship. Evidently, the State Inheritance and Gift Tax Division would oppose that contemplated amendment.

(8) 118.075 to 118.090, inclusive: No alteration suggested.

(9) 118.100 (Rates of tax): Whether or not the rates of taxation should be altered depends upon the question (among others) whether the so-called collateral tax shall be abolished and taxation shall be limited to a tax on the estate, as a whole. If so, it may be presumed that the rate of taxation on the estate, as a whole, would be adjusted upward to such extent as would be necessary to produce approximately the same amount of revenue as would be produced under the presently existing statutes. In this connection, see a copy (when available) of the report concerning the study of a proposal of this nature that heretofore was made in California.

(10) 118.100 (Tax rate applicable to net estate after allowing deductions): No alteration suggested.

(11) 118.210 to 118.390, inclusive: Subject to qualifications appearing elsewhere herein, no alteration is suggested.

(12) 118.410 to 118.700, inclusive (Administration of Inheritance Tax Act): First consider, and determine, whether these sections should be repealed and, in lieu thereof, new statutes should be enacted for the purpose of substantially altering the procedure for determination of estate and inheritance taxes in all instances, and whether or not a personal representative is appointed, in a manner similar to that now prevailing in respect of so-called "unprobated estates", with appropriate provisions made for judicial determination only in the event that the State Treasurer, the personal representative, or any other interested party elects to cause an issue or issues to be determined judicially. If alteration of the procedure in a manner such as that indicated above is approved in principle, the matter of drafting the proposed legislation should follow. Presumably, the State Inheritance and Gift Tax Division should not oppose, in principle, enactment of legislation of this nature.

Herewith are submitted for consideration copies of the respective statutes of several states that provide for administrative determination of the tax in the first instance, subject to review by the court, if sought.

(13) 118.610 (Duty of representative; filing inventory and appraisement): Repeal.

(14) 118.620 (Extension of time to file appraisement): Repeal.

(15) 118.630 (Appointment of appraisers): Repeal.

(16) 118.640 (Immediate appraisal; avaluating particular interests):

(1) Delete that part thereof preceding the semicolon, and amend the remainder of this subsection substantially as was proposed by House Bill 1480 introduced on February 9, 1965.

(2) Delete "each *** in common" and insert in lieu thereof "the grantees or devisees took undivided halves of the real property as tenants in common".

(3) Delete "if" and insert "though" in lieu thereof.

(4) No alteration now is suggested, except deletion of "every" and insertion of "a" in lieu thereof; and substitute "the" for each "such".

(17) 118.650 (Fixing time and place of appraisement; notice; attendance of witnesses; report of appraisers; limitation on fees): Repeal.

(18) 118.660 (Delivery to State Treasurer of copy of inventory and appraisement and other information):

(1) Delete "executor, administrator" and insert "personal representative" in lieu thereof, in two places; and delete "beneficiary" and insert "beneficial" in lieu thereof.

(2) Delete "such executor, administrator" and insert "personal representative" in lieu thereof; delete "deceased" and insert "decedent" in lieu thereof; delete "beneficiary" and insert "beneficial" in lieu thereof; delete "full and true value" and insert "true cash value" in lieu thereof, in two places; delete "probated or"; and insert "the" between "of" and "decedent" in the twenty-second line of this subsection.

If administrative determination of the tax in the first instance is to be provided for, require that the "schedule, list or statement" (tax report) contain

computation of the tax payable, whether or not the estate is administered under judicial supervision.

(19) 118.670 (Court's duty to determine tax):

(1) Delete "from *** such" and insert "Based on the evidence relating to the estate that is before the court" in lieu thereof; delete "forthwith"; delete "full and true value of all such estates" and insert "true cash value of the estate" in lieu thereof; and delete "the same are" and insert "it is" in lieu thereof.

(2) Delete "full and true value of all such estates" and insert "true cash value of the estate" in lieu thereof; and delete "the same are" and insert "it is" in lieu thereof.

However, if administrative determination of the tax in the first instance is to be provided for, this section should, instead, be repealed.

(20) 118.680 (Court may act on first inventory): Delete "such" from sixth line of this section and insert "the" in lieu thereof; delete "executor, administrator" and insert "personal representative" in lieu thereof; delete "as provided in ORS 118.005 to 118.840"; and delete "full and true value" and insert "true cash value" in lieu thereof.

However, if administrative determination of the tax in the first instance is to be provided for, this section should, instead, be repealed.

(21) 118.690 (Court to give notice on determination of value): Delete "probate" from the first line of this section.

However, if administrative determination of the tax in the first instance is to be provided for, this section should, instead, be repealed.

(22) 118.700 (Reappraisement; appeal):

(1) Delete "assessment and" from the first line of this subsection; insert "probate" between "the" and "court" in the sixth and eighth lines of this subsection; delete "reassessment and" from the ninth line of this subsection; and delete "such" from the last line of this subsection and insert "the" in lieu thereof.

(2) Delete "objection" from the first line of this subsection and insert "objection's" in lieu thereof; at each appropriate place in this subsection delete "such" and insert "the" in lieu thereof; insert "to" between "and" and "all", and insert "other" between "all" and "parties", in the fifth line of this subsection; delete "reappraisement" from the eleventh line of this subsection and insert "redetermination" in lieu thereof; and delete the final sentence from this subsection and insert in lieu thereof:

"If, upon the hearing, the probate court finds that its previous determination of any tax imposed by ORS 118.005 to 118.840 was erroneous in any respect affecting the substantial rights of the State Treasurer, or of any other party interested, it shall, by order, set aside its previous determination and redetermine the tax."

(3) Delete all this subsection and insert in lieu thereof:

"(3) The State Treasurer, or any other party interested, may appeal from the whole, or from any part of the order of the probate court redetermining, or refusing to redetermine, any tax imposed by ORS 118.005 to 118.840 in the manner provided by law for prosecuting an appeal from the probate court. The appeal shall be heard and determined anew in the same manner, and with the same effect, as provided by law in respect of an appeal from a decree or other determinative order in a suit in equity. An appeal may be taken to the Supreme Court from the whole, or from any part, of a decree or other determinative order of the circuit court upon an appeal to the circuit court from an inferior probate court, as well as from the whole, or from any part, of a decree or other determinative order of a circuit court exercising original probate jurisdiction, which redetermines the tax, in the same manner, and with the same effect, as provided by law in respect of an appeal from the circuit court in a suit in equity."

However, if administrative determination of the tax in the first instance is to be provided for, this section should, instead, be repealed.

General:

If the so-called collateral tax shall be abolished and taxation shall be limited to a tax on the estate, as a whole, all existing Oregon statutes that are pertinent,

including, particularly, the entire ORS chapter 118, should be examined with that alteration in mind, and all provisions thereof, respectively, that are inconsistent with that alteration should be amended or repealed, as may be appropriate.

If administrative determination of the tax in the first instance is to be provided for, all existing Oregon statutes that are pertinent, including, particularly, the entire ORS chapter 118, should be examined with that alteration in mind and all provisions thereof, respectively, that are inconsistent with that alteration should be amended or repealed, as may be appropriate.

APPENDIX F

Colorado--Law

APPRAISAL AND ASSESSMENT

Sec. 138-3-46. (1) It shall be the duty of the inheritance tax commissioner to appraise the estate of every deceased person at its fair market value, and for that purpose the commissioner and each of his deputies is authorized to issue subpoenas for, and compel the attendance of witnesses before him, and to take the evidence of such witnesses under oath concerning such property and the value thereof; and he shall determine the fair market value of all of the estate belonging to the deceased at the time of his death and the description of the same; all debts, claims, fees, and commissions including the fees and commissions of the executor, and administrator; the names, relationship, and residence of all persons, corporations, or institutions, receiving or claiming any of the estate of the deceased; a description of any property belonging to the estate of said decedent alleged to have been transferred by deed, grant, sale, or gift, made in contemplation of death by the said decedent, or intended to take effect in possession or enjoyment at or after such death; a description of all estates left by said decedent whether an estate in fee, annuities, life estates, or for a term of years; whether such decedent died intestate or left a will; and upon such determination the inheritance tax commissioner, with the approval of the attorney general, shall compute and assess the tax or fee to which the estate or transferees are liable, and immediately shall give notice by mail to the executor, administrator, trustee, or person filing the application, and file in the court, if any, under whose jurisdiction the estate is undergoing administration, a report of the appraisement of the estate and the assessment of the tax.

(2) Any person including the attorney general, dissatisfied with the assessment made or tax fixed may object thereto, either upon the ground of erroneous valuation, appraisement or assessment, or otherwise, by a written objection filed in the district or probate court within ninety days after the filing of the report of assessment. The court, after a hearing wherein the attorney general shall represent the state, shall thereupon enter a judgment modifying or confirming in whole or in part, the appraisement and assessment. Witnesses subpoenaed under the provisions of this article shall have such fees as are now provided by law; provided, that on the petition of the attorney general and with the consent of the court, expert witnesses may be called, the amount of whose fees shall be

determined by the court. If no objections are filed or if objections filed are overruled by the court and no appeal is taken from such ruling, then said assessment order shall have the force and effect of a judgment, as in other cases provided, and execution may issue thereon to enforce the same by sale of the said property to satisfy said judgment. These provisions shall apply to all matters in custodia legis and all proceedings now pending for the collection and enforcement of any inheritance tax due the state of Colorado.

APPEAL FROM DISTRICT OR PROBATE COURT

Sec. 138-3-48. Nothing herein contained shall be construed to deny the right of appellate review by the supreme court.

ACTIONS TO QUIET TITLE

Sec. 138-3-49. Actions may be brought against the state by any interested person for the purpose of quieting the title to any property against the lien or claim of lien of any taxes under this article, or for the purpose of having it determined that any property is not subject to any lien for taxes, nor chargeable with any tax under this article. No such action shall be maintained where any proceedings are pending in any court of this state wherein the taxability of such transfer and the liability therefor, and the amount thereof, may be determined. All parties interested in said transfer and in the taxability thereof shall be made parties thereto, and any interested person who refuses to join as plaintiff therein may be a defendant. Summons for the state in said action shall be served upon the attorney general. Should the court determine that the property described in the complaint is subject to the lien of said tax and that said property has been transferred within the meaning of this article, the court shall award affirmative relief to the state in said action, and judgment shall be rendered therein in favor of the state ascertaining and determining the amount of said tax, the person liable therefor, and the property chargeable therewith or subject to lien therefor.

INVESTIGATIONS--ESTATE SUBJECT TO TAX

Sec. 138-3-50. It shall be the duty of said inheritance tax commissioner and each of his deputies upon learning of the death of any person known or supposed to have died possessed of property in this state or subject to the tax

imposed by this article, to make an immediate investigation and to take steps to secure the assessment of any inheritance tax due.

REFUSAL TO FURNISH INFORMATION

Sec. 138-3-51. Whenever an executor, administrator, trustee, or any other person who is liable to taxation under the provisions of this article refuses or neglects to furnish the inheritance tax commissioner with any information which in the opinion of the inheritance tax commissioner is necessary to the proper computation of the taxes payable by such executor, administrator, trustee, or person, after having been requested to so do, the inheritance tax commissioner shall certify such taxes at the highest rate at which they could in any event be computed.

LETTERS OF ADMINISTRATION

Sec. 138-3-52. In case letters testamentary or of administration shall not have been issued upon the estate of any deceased person and the tax provided for in this article shall not have been paid to the satisfaction of the attorney general within sixty days from the date of the death of any deceased person, the county court having jurisdiction in the matter may grant letters of administration or letters of administration with the will annexed, to any person upon the application of the attorney general. Nothing contained in this section shall be construed to compel the attorney general to apply for such appointment, unless he do desires, or to prevent the enforcement of the collection of any tax provided for herein in any other manner as may be provided by law.

CERTIFICATE OF NONLIABILITY--FEES

Sec. 138-3-53. (1) (a) Whenever the inheritance tax commissioner, upon investigation, shall be satisfied that the transfer of any property of a deceased person is not liable to taxation under this article, he shall make and sign a certificate with the approval of the attorney general, to that effect which shall be filed with the clerk of the court having jurisdiction of the administration of such estate. Such certificate shall be conclusive upon the state as to the liability of said estate to taxation, except as to property subsequently found to belong to said estate.

(b) For issuing such certificates, the following fees shall be assessed and collected:

On estates not in excess of $300--no fee;
On estates in excess of $300 but not in excess of $2,000--$1.00;
On estates in excess of $2,000 but not in excess of $5,000--$5.00;
On estates in excess of $5,000 but not in excess of $7,500--$7.50;
On estates in excess of $7,500 but not in excess of $10,000--$10.00;
On estates in excess of $10,000 but not in excess of $12,500--$12.50;
On estates in excess of $12,500 but not in excess of $15,000--$15.00;
On estates in excess of $15,000 but not in excess of $17,500--$17.50;
On estates in excess of $17,500 but not in excess of $20,000--$20.00;
On estates in excess of $20,000 but not in excess of $22,500--$22.50;
On estates in excess of $22,500 but not in excess of $25,000--$25.00;
On estates in excess of $25,000--$30.00.

(2) Such fees shall be computed on the gross value of the estate, as determined by the inheritance tax commissioner without deduction for encumbrances or any other deductions allowable.

(3) The provisions of this section shall apply only in the case of decedents dying after the effective date of this section.

FAILURE TO APPRAISE

Sec. 138-3-54. In case of the failure of the inheritance tax commissioner to make such appraisement of the property of the estate of any decedent or to make and file the certificate provided for in section 138-3-53, within one year after the attorney general has received the sworn statement provided for in section 138-3-42, the county court, upon motion of any person interested in said estate, as executor, administrator, trustee, heir, legatee, or devisee, upon giving twenty days' notice by mail to all persons known to be interested in said estate, including the attorney general and the inheritance tax commissioner, of the time and place of hearing, at the time so fixed may hear evidence and determine the value of such estate, and the amount of taxes to which the same is liable, with the same effect as if the value of such estate and the fixing of said tax were made by the commissioner as provided for in this article, and appeals from such order may be taken as provided by section 138-3-48.

OFFICERS TAKING FEES OR REWARD

Sec. 138-3-55. Any inheritance tax commissioner appointed under this article, any deputy inheritance tax commissioner or any inheritance tax appraiser, who shall take or demand for his own use any fees or reward, other than such as are authorized by law, from any person, association, or corporation, shall be guilty of a felony, and upon conviction hereof shall be punished by confinement in the penitentiary for a term of not less than one year nor more than five years.

JURISDICTION--DISTRICT OR PROBATE COURT

Sec. 138-3-56. The district or probate court of any county which has assumed lawful jurisdiction over the property of the decedent for general probate or administration purposes under the laws of Colorado, shall have jurisdiction to hear and determine all questions in relation to the tax arising under the provisions of this article. If no administration or probate proceedings have been taken out in any court of this state, the district or probate court of the county in which the decedent was a resident, if the decedent was domiciled in this state, or, if the decedent was not so domiciled, any court which had sufficient jurisdiction over the property the transfer of which is taxable, to have issued probate or administration proceedings thereon had the same been justified by the legal status of such property, or the same been applied for, shall have jurisdiction. The district or probate court first acquiring jurisdiction shall retain the same to the exclusion of every other.

Wyoming--Law

PAYMENT OF TAX BY FOREIGN ESTATE;DEDUCTIONS

Sec. 39-358. In case of any property belonging to a foreign estate, which estate, in whole or in part is liable to pay an inheritance tax in this state, the said tax shall be assessed upon actual value of said property remaining after the payment of such debts and expenses as are chargeable to the property under the laws of this state. If the executor, administrator, or trustee of such foreign estate files with the board a duly certified statement, exhibiting the appraised value of the entire estate of the decedent owner, and the indebtedness for which the said estate has been adjudged liable, which statements shall be duly attested by the judge of the court having original jurisdiction, the beneficiaries of the estate shall then be entitled to have deducted such proportion of the said indebtedness of the decedent from the value of the property as the value of the property within this state bears to the whole estate.

EXECUTOR OR ADMINISTRATOR NOT TO BE DISCHARGED UNTIL CERTIFICATE FILED; EXCEPTION; BOARD ELIGIBLE FOR LETTERS OF ADMINISTRATION

Sec. 39-359. The district court having jurisdiction of any estate shall in no case discharge the administrator, executor or trustee or other legal representative, or release the bond of such person or issue an order or final decree of distribution until such person shall have presented

a receipt or a certificate properly signed and sealed by the board of equalization of the State of Wyoming showing that such estate has been reviewed by it and the tax paid or that no tax has accrued or that a bond has been filed as herein provided, unless the court shall find that no inheritance tax is chargeable in such estate and shall, by its order, excuse the filing of a certificate of the board. The board shall have the same right to apply for letters of administration as that conferred by law upon creditors.

ASSESSMENT SUBJECT TO APPEAL; NOTICE OF AMOUNT

Sec. 39-360. All taxes imposed by this act [§§ 39-336, 39-337, 39-342 to 39-369] shall be assessed and determined, subject to the right of appeal as hereinafter provided, and collected by the board upon the actual value of the property transferred as hereinbefore provided and at the rates provided herein. Notice of the amount of said taxes shall be mailed to the executor, administrator, or trustee or other person liable therefor, or to his or their attorney, by said board, and upon request to any other person by whom said taxes are payable. But a failure to receive said notice shall not excuse the non-payment of or invalidate said taxes.

HEARINGS BY BOARD; ATTENDANCE, EXAMINATION AND FEES OF WITNESSES

Sec. 39-361. The board shall have the power to conduct hearings, and to adjourn the same from time to time, upon reasonable notice to all parties interested, for the purpose of assessing taxes imposed by this act [§§ 39-336, 39-337, 39-342 to 39-369], and to summon and examine on oath any person supposed to know, or to have means of knowing, any material fact touching the subject of such assessment, and to issue subpoenas and compel the attendance of witnesses to testify at such hearings, which subpoenas will be served in the same manner as subpoenas issued out of the district courts of the state, and shall have power to compel such witnesses so subpoenaed to testify and give evidence. The board shall summon and have examined in any hearing the witnesses whose presence is desired by any party interested in such hearing, and all witnesses shall receive fees as in civil cases, the said fees of all witnesses summoned by the board upon its own motion to be paid by the state out of the inheritance tax fund; the fees of all other witnesses to be paid by the party requesting that they be summoned. The examination of any or all witnesses may be reduced to writing, and false swearing by any witness shall be deemed perjury and punished as such. A judge of the district court upon application of the board may compel the attendance of any witness at a

hearing before the board and the giving of testimony at such hearing in the same manner and to the same extent as the attendance of witnesses and the giving of testimony may be compelled before said court.

APPEAL TO DISTRICT COURT

Sec. 39-362. An executor, administrator, trustee, grantee, donee, or survivor aggrieved by any determination of the board of equalization of the State of Wyoming, or any person or number of persons acting jointly who may feel themselves aggrieved by any determination of the board shall have an appeal either to the district court of the county within the State of Wyoming in which the estate of the decedent is being probated or to the district court of Laramie County. The person or persons appealing shall, within sixty (60) days of the determination of the board from which the appeal is being taken, file in the court to which the appeal is taken a notice in writing stating that such person or persons appeals to such court from the determination and order of the board, and upon filing of such notice the appeal shall be deemed to have been taken; provided, however, that the person or persons appealing shall within the sixty (60) days mentioned enter into an undertaking to be approved by the clerk of the court or judge thereof, running to the board of equalization of the State of Wyoming for the use and benefit of the State of Wyoming, in such amount as the court or judge shall fix, conditioned that the persons giving their said undertaking shall diligently prosecute their appeal and without unnecessary delay, and will pay all inheritance taxes found due by the court and such other costs and interest as the court may assess against them. The clerk of the court to which such appeal is taken shall immediately upon the filing of said notice of appeal and of the approval of the bond mentioned in this section transmit to the board a notice, over the seal of the court, to the effect that said appeal has been perfected. The appellant or appellants shall, within sixty (60) days after the appeal as provided for is perfected, file in the office of the clerk of said court a certified transcript of the order of determination made by the board which is appealed from, together with a certified copy of all of the records of the board relating to such determination, and their petition setting forth the grounds upon which such appeal is based. The board shall file such answer, demurrer or other pleading to said petition as may be proper under the code of civil procedure. The appellant or appellants shall be the plaintiff or plaintiffs in said court and the board shall be the defendant. The case shall be tried de novo and the trial shall be had upon the issues raised by the pleadings filed in the district court by said plaintiffs and defendants, and all proceedings shall be conducted

according to the provisions of the civil code of procedure. Either party shall have the right of appeal from the judgment or decree of said court as in other civil cases.

Washington--Law

DETERMINATION OF TAX WITHOUT ADMINISTRATION

Sec. 83.24.010. When any person dies leaving property within the jurisdiction of the state of Washington, which shall pass by the statutes of inheritance of this or any other state, or by deed, grant, sale or gift made in contemplation of the death of the grantor or donor, or by deed, grant, sale or gift made or intended to take effect in possession or in enjoyment after the death of the grantor or donor, to any person in trust or otherwise, and there has been no application for letters of administration of the estate of such deceased person, or when administration of any estate has been completed without an adjudication of the inheritance tax, the liability of such property for the payment of an inheritance tax may be determined without administration in the manner hereinafter provided.

Any person interested in such property may file an affidavit with the inheritance tax division of the tax commission and request a determination of the questions arising under the inheritance tax provisions of this title. Such affidavit shall contain the name and date of death of decedent, the description and estimated value of all property involved, the names and places of residence of all persons interested in the same, and such other facts as are necessary for a determination of such questions.

Upon the receipt of such affidavit, and after such investigation as is necessary to determine the fair market value of all of the property becoming subject to the inheritance tax laws, the tax commission through its inheritance tax division shall determine the amount of inheritance tax due, if any.

Where the tax commission, through its inheritance tax division, has determined that no tax is due, or that the amount of tax as determined has been fully paid, it may issue its release and receipt, but such release shall be only as to the assets of the estate shown and disclosed by such affidavit and supplementary exhibits filed in such proceedings.

In any such case the supervisor of the inheritance tax division may compromise such tax and issue a satisfaction therefor, without probate proceedings, where the necessary facts are furnished and filed by affidavit, but such release shall be only as to the assets of the estate shown and disclosed by such proceedings.

JUDICIAL APPEAL

Sec. 83.24.020. Any person who may feel aggrieved by the determination of the tax commission as provided for in RCW 83.24.010 may file a petition with the Superior Court of the County wherein the decedent resided, which petition shall contain the name and date of death of decedent, the description and estimated value of all property involved, the names and places of residence of all persons interested in the same, and such other facts as are necessary to give the court jurisdiction. The court shall thereupon set a day for heaing said petition and a copy thereof, together with a notice of the time and place of such hearing, shall be served by the petitioner or his attorney upon the supervisor of the inheritance tax division and on each person interested in said property at least twenty days before the date of hearing, if served personally, and if served by publication the service shall be the same as the service of summons by publication in civil action. The court shall hear said matter upon the relation of the parties, the testimony of witnesses and evidence produced in open court, and, if it shall be found that the property is not subject to any tax, the court shall make and enter an order determining that fact, but, if it shall appear that the whole or any part of said property is subject to a tax, the same shall be appraised and the tax levied and collected as in other cases. An adjudication by the superior court, as herein provided, shall be conclusive as to the lien of said tax, subject to the right of appeal to the supreme court allowed by the laws of the state.

POWERS OF COMMISSION AND SUPERVISOR

Sec. 83.28.010. All the powers of a referee of the superior court having jurisdiction of the estate of a decedent shall be vested in the tax commission and its supervisor shall have jurisdiction to require the attendance before him of the executor or administrator of said estate or any person interested therein or any other person whom he may have reason to believe possesses knowledge of the estate of said decedent or knowledge of any property transferred by said decedent within the meaning of the inheritance tax provisions of this title or knowledge of any facts that will aid the supervisor or the court in the determination of said tax, but no person shall be required to attend at any place outside of the county in which such decedent resided at the time of his death or in which letters of administration could lawfully issue upon the estate of such decedent.

EXAMINATION BY SUPERVISOR

Sec. 83.28.020. For the purpose of compelling the attendance of such person or persons, and for the purpose of appraising any property or interest subject to or liable for any inheritance tax hereunder, and for the purpose of determining the amount of tax due thereon, the tax commission through its supervisor is hereby authorized to issue subpoenas compelling the attendance of witnesses before said supervisor. The supervisor may examine and take evidence of such witnesses or of such executor or administrator or other person under oath concerning such property and the value thereof, and concerning the property or the estate of such decedent subject to probate. Any person or persons who shall be subpoenaed by the said supervisor to appear and testify or to produce books and papers and who shall refuse and neglect to appear and produce books relative to such appraisement shall be guilty of contempt.

FINDINGS FILED IN COURT

Sec. 83.28.030. Upon the completion of the investigation by the supervisor he shall file his findings with the clerk of the superior court in the matter of the estate of the decedent, showing the value of the estate and the amount of inheritance tax chargeable against or a lien upon such interest, acquired by virtue of said probate proceedings or by any transfer within the meaning of the inheritance tax provisions of this title, to any person, institution or corporation acquiring any property by virtue of said probate proceedings, or by any transfer within the meaning of the inheritance tax provisions of this title, and shall find the total amount of tax due the state of Washington, which shall be a claim against the estate and a lien upon all the property of the estate until same is paid.

CLERK TO GIVE NOTICE OF FINDINGS

Sec. 83.28.040. Upon filing said report the clerk of said superior court shall on said day or the next succeeding judicial day give notice of such filing to all persons interested in such proceeding by causing notice thereof to be posted at the courthouse in the county where the court is held, and in addition thereto shall mail to all persons chargeable with any tax in said report, who have appeared in such proceedings, a copy of said notice.

COURT ORDER

Sec. 83.28.050. At any time after the expiration of thirty days thereafter, if no objection to said report be

filed, the said Superior court or a judge thereof, shall, without further notice, give and make its order confirming said report and fixing the tax in accordance therewith.

OBJECTIONS

Sec. 83.28.060. At any time prior to the making of such order any person interested in such proceeding may file objections in writing with the clerk of the superior court, and serve a copy thereof upon the supervisor, and the same shall be noted for trial before the court and a hearing had thereon as provided for hearings in probate matters.

HEARING BY COURT

Sec. 83.28.070. Upon the hearing of said objections, the court shall make such order as to it may seem meet and proper in the premises: PROVIDED, That for the purposes of said hearing the report of the supervisor shall be presumed to be correct and it shall be the duty of the objector or objectors to proceed in support of said objection or objections.

Virginia--Law

ASSESSMENT AND VALUATION OF TEMPORARY INTERESTS AND REMAINDERS

Sec. 58-173. In every case in which there shall be a devise, descent, bequest or grant, in trust or otherwise, of a remainder in any property or fund to take effect in possession or enjoyment after the expiration of one or more interests in income, or estate for years or for life, or other temporary interests or estates in such property or fund, the tax shall be assessed on the actual value of such remainder at the time when the beneficiary becomes entitled to the same in possession or enjoyment. The value of all such temporary interests or estates shall be determined as of the death of the decedent in accordance with the applicable provisions of §55-269 to §55-274, inclusive, and where none of said sections shall be applicable, such value shall be determined in such manner as the Department of Taxation may by regulation prescribe. In every case in which it is impossible to compute the present value of any interest or estate in property so passing, the Department of Taxation may effect such settlement of the tax as it shall deem to be for the best interest of the Commonwealth and payment of the same so agreed upon shall be a full satisfaction of such taxes; and, notwithstanding the provisions of the first sentence of this section, such Department may effect like

settlement of the entire tax on estates in which remainders are involved, without awaiting the termination of precedent temporary interests or estates.

NOTICE OF DETERMINATION OF TAXES

Sec. 58-174. The Department of Taxation shall determine all taxes assessable under this chapter and immediately upon the determination of same shall forward a statement of the taxes determined to the person or persons chargeable with the payment thereof and shall give advice thereof to the Comptroller.

APPLICATION TO DEPARTMENT FOR CORRECTION OF DETERMINATION

Sec. 58-175. Within one year after the tax has been determined, any person aggrieved by the determination may apply to the Department, which may make such corrections of the taxes as it may determine proper; provided, however, that the rejection of the application in whole or in part by the Department shall not prevent any person from applying to the court, as hereinafter provided, for the correction of the said taxes.

PAYMENT OF TAX--WHEN DUE

Sec. 58-176. Taxes imposed by the provisions of this chapter shall be payable into the State treasury at the expiration of one year after the death of the decedent; provided, however, that the Department may, upon the application of the personal representative of the decedent, extend the time of payment of such taxes so that the same shall be payable at the expiration of fifteen months after the death of the decedent, if the Department be of the opinion that the gross value of the decedent's estate will be of such amount as to require the filing of a federal estate tax return. In all cases in which there shall be a grant, devise, descent or bequest, in trust or otherwise, of a remainder in any property or fund to take effect in possession or enjoyment after the expiration of one or more interests in income, or estates for years or for life, or other temporary interests or estates in such property or fund, the taxes on such remainder shall, subject to the provisions of § 58-173, be payable by the executors, administrators or trustees in office when such right of possession or enjoyment accrues and no distribution shall be made of the estate until such taxes have been paid, or, if there is no such executor, administrator or trustee, by the person or persons so entitled thereto, and at the expiration of one year after the date when the right of possession or enjoyment accrues to the person or persons so entitled.

PENALTY AND INTEREST FOR NONPAYMENT

Sec. 58-177. If the taxes are not paid when due, one per centum interest for each month or portion of a month from the date when the same were due until paid shall be added to the amount of the taxes and collected as a part of the same; provided, however, that when the estate of any decedent is being administered in a suit, or when for any other cause, the amount of such tax is not determinable until more than eleven months after the death of such decedent, then such penalty shall not be added until thirty days after such tax is determinable.

RECEIPTS FOR TAXES AND CERTIFICATION OF PAYMENT

Sec. 58-178. Upon the payment of the tax the State Treasurer shall receipt to the person or persons paying the same, and the Comptroller shall certify the fact of such payment to the Department of Taxation; and the Department, upon the basis of such certification, shall certify such fact to the proper clerk or clerks, who shall record the same in the book in which the accounts of personal representatives are recorded. The Department of Taxation shall further certify such fact to the clerk of court of any city or county wherein deeds are recorded, in which the decedent died seized of any real estate.

COLLECTION BY WARRANT--LEVY AND SALE OR LEASE

Sec. 58-181. If the taxes are not paid within thirty days after they shall have become due, the Department of Taxation shall issue a warrant for the collection of the same to the sheriff of the county or the sergeant of the city in which any property belonging to the estate is located, and the sheriff or sergeant shall immediately levy upon and sell so much of the said property, real or personal, as shall be sufficient to pay the taxes and expenses of sale, including the regular sheriff's or sergeant's fees for sale of property under an execution, or he may rent or lease any property charged with taxes for cash sufficient to pay the amount of taxes due, expenses and fees.

Maine--Law

TAX ASSESSOR TO ADMINISTER LAW; ABSENCE OR DISABILITY

Sec. 3521. The assessment and collection of all taxes on inheritance and successions and of all estate taxes and

the enforcement and administration of all the provisions of law relating thereto shall be vested in the State Tax Assessor.

AUTHORITY OF STATE TAX ASSESSOR

Sec. 3522. The State Tax Assessor shall collect all taxes, interest and penalties provided by chapters 551 to 567 and is given authority to institute proceedings of any nature necessary or desirable for that purpose, including such proceedings as may be necessary or desirable for the removal of executors, administrators and trustees who have failed to pay the taxes due from estates in their hands.

The State Tax Assessor is given authority to enforce the collection of any taxes secured by bond in a civil action brought thereon regardless of the fact that some other official may be named as obligee therein.

The State Tax Assessor shall pay over all receipts from such taxes, interest and penalties to the Treasurer of State daily.

VALUE OF PROPERTY DETERMINED; APPEAL

Sec. 3523. The value of the property upon which the tax is computed shall be determined by the State Tax Assessor and certified by him to the persons by whom the tax is payable, and such determination shall be final unless the value so determined shall be reduced by proceedings as hereinafter provided. At any time within 90 days after such certification any party interested in the succession, or the executor, administrator or trustee may appeal from the decision of the State Tax Assessor to the probate court in the county where the estate is being administered as provided in section 3801.

At any time within said 90 days the State Tax Assessor may, at the request or with the consent of the persons by whom the tax is payable, alter his determination of value. When an alteration is made, the State Tax Assessor shall notify the persons by whom the tax is payable and the appeal may be taken within 90 days thereafter.

AMOUNT OF TAX DETERMINED

Sec. 3524. The State Tax Assessor shall determine the amount of tax due and payable upon any estate or part thereof and shall certify the amount so due and payable to the persons by whom the tax is payable. Such determination and certification may be made upon account of the tax payable upon the estate generally or upon account or in full for any part thereof or any interest therein. Payment of the amount

so certified upon account shall be a discharge of the tax to the extent of said certification and upon subsequent determination and certification of the full amount of the tax payable upon the estate generally or upon any interest therein or part thereof, payment of the full amount of said tax shall, except as otherwise provided, be a discharge of the tax. In determining the amount of any tax payable under chapters 551 to 567, the State Tax Assessor shall not be required to consider any payments on account of debts, funeral expenses or expenses of administration which have not been allowed by the probate court having jurisdiction of said estate. The amount paid on account of federal estate taxes shall be allowed as a deduction in resident estates. If after determination and certification of the full amount of the tax upon an estate or any interest therein or part thereof the estate shall receive or become entitled to property in addition to that shown in the inventory or disclosed to the State Tax Assessor, the executor, administrator, trustee or other fiduciary shall forthwith notify the State Tax Assessor who shall upon being thus or otherwise informed determine the amount of additional tax, if any, due and payable thereon and shall certify the said amount to the person by whom such tax is payable, which amount shall be due and payable 30 days from the date of the certification. A fiduciary shall be personally liable to pay only so much of said additional tax as is computed on the additional property actually received by him and a beneficiary receiving any part of such additional property shall be liable to pay so much of the tax thereon as is not chargeable as aforesaid to a fiduciary.

PREPARATION OF FORMS AND MAKING OF RULES BY TAX ASSESSOR

Sec. 3525. The State Tax Assessor shall prepare all blanks, forms, books and papers necessary for or incident to the securing of full information with reference to all estates and may prescribe and establish such rules of practice and procedure, not inconsistent with law, as may be desirable in the economical and efficient administration of chapters 551 to 567.

DUE DATE

Sec. 3742. Said estate tax shall become payable at the expiration of 15 months from the date of death of the decedent, and executors, administrators, trustees, grantees, donees, beneficiaries, and surviving joint owners shall be and remain liable for the tax until it is paid. If the tax is not paid when due, interest at the rate of 10% annually shall be charged and collected from the time the same became due. The State Tax Assessor may, for cause, extend the time

of payment. The State Tax Assessor shall pay over all receipts from such taxes and interest to the Treasurer of State daily.

INTENT OF PROVISIONS

Sec. 3743. The intent and purpose of this chapter, imposing an estate tax, is to obtain for this State the benefit of the credit allowed under Title III, section 301, subsection (b) of the Federal Revenue Act of 1926 to the extent that this State may be entitled by this chapter by imposing an additional tax, and the same shall be liberally construed to effect this purpose. The State Tax Assessor may make such regulations relative to the assessment and the collection of the tax provided by this chapter, not inconsistent with law, as may be necessary to carry out this intent.

EXCEPTIONS

Sec. 3744. This chapter shall become void and of no effect in respect to the estates of persons who die subsequent to the effective date of the repeal of Title III of said Federal Revenue Act or of the provisions thereof providing for a credit of the taxes paid to the several states of the United States not exceeding 80% of the tax imposed by said Title III. If any portion of this chapter relating to said estate tax is held unconstitutional such decision shall not invalidate the portions unaffected thereby. In the event that any part of the Federal Revenue Act or federal Estate Tax Law, hereinbefore referred to, shall be declared to be in violation of the Constitution of the United States, such declaration shall not be construed to affect this chapter relating to estate tax.

INHERITANCE TAX LAW AS APPLICABLE
TO ESTATE TAX LAW

Sec. 3745. Chapters 551 to 567, relating to inheritance taxes, shall apply to the sections relating to estate taxes wherever the same are applicable.

PETITION FOR ABATEMENT

Sec. 3801. An executor, administrator, trustee, grantee, donee, survivor or beneficiary aggrieved by the determination of the State Tax Assessor may within 90 days after the certification of any tax apply to the probate court in the county where the estate is being administered for the abatement of the tax determined or any part thereof and if the court adjudges that the tax or any part thereof was wrongly determined, it shall order an abatement

of such part thereof as was determined without authority of law. Questions of law may be reported by the probate court to the Supreme Judicial Court sitting as a court of law. Upon a final decision ordering an abatement of any part of a tax determined, the determination of the State Tax Assessor shall be amended in accordance with the decree of the court.

REFUNDS

Sec. 3802. Whenever a devisee, legatee or heir refunds any portion of the property on which a tax has been paid by him or it is judicially determined that the whole or any part of such tax ought not to have been paid, said tax, or the due proportional part thereof, shall be refunded to him by the executor, administrator or trustee.

REPORTS BY BANKS AND BUILDING AND LOAN COMPANIES

Sec. 3851. Whenever there shall be a certificate of deposit or account in any bank, savings bank or trust company, or a share account in any loan and building association, and any officer or employee of any such institution, who has charge of any such deposit or account, is informed or has knowledge of the death of any person carried on its records as owner or co-owner thereof, then he shall, within 40 days from the receipt of such information or knowledge, notify the State Tax Assessor of such death, giving the name of the deceased person, the value as of the date of his death of all accounts and shares in such institution on which his name appears and the names and addresses of any surviving co-owner or co-depositor. No such report shall be required if the total of the accounts or shares in such institution does not exceed $200. The State Tax Assessor shall supply blanks for such reports upon request. Willful failure to comply shall render such bank, savings bank, trust company or loan and building association liable to a penalty not to exceed $10 to be collected in a civil action brought by the Attorney General. It shall be a complete defense to such action that such officer or employee of the banking institution in charge of such account or accounts did not know of the depositor's death or no inheritance or estate tax was payable.

The State Tax Assessor shall pay to each bank and loan building association the sum of 25¢ for each report concerning all the accounts of any one decedent in the reporting institution. Where the decedent has a deposit or deposits in more than one branch of the same bank or in the main bank and

one or more branches, a separate fee shall be payable on account of each bank and branch reporting.

REGISTERS OF PROBATE REPORT TO TAX ASSESSOR

Sec. 3852. The registers of probate in the several counties shall send to the State Tax Assessor, on forms to be prescribed and furnished by him, a record of every appointment of an executor, administrator or trustee made in his court, immediately following any such appointment. For failure to make any such report any register of probate shall be liable to a penalty of not more than $50.

SHORT TITLE

Sec. 3911. This chapter may be cited as the "Uniform Act on Interstate Arbitration of Death Taxes".

STATE DEFINED

Sec. 3912. As used in this chapter, the word "state" means any state, territory or possession of the United States and the District of Columbia.

INTERPRETATION OF PROVISIONS

Sec. 3913. This chapter shall be so interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Tennessee--Law SWORN RETURN AND INVENTORY--EXECUTION BY REPRESENTATIVE OF ESTATE

Sec. 30-1619. Upon receipt of the aforesaid bond and/or statement from the county court clerk, the commissioner shall furnish the representative of the estate all necessary forms and information for the proper inventorying of the property of the estate and shall furnish such representative with a copy of §§ 30-1601--30-1637 and all instructions and information promulgated for the guidance of such representative of the estate in the performance of the duties required of him by §§ 30-1601--30-1637.

Such executor, administrator or trustee shall, within fifteen (15) months from the death of the decedent, prepare and file with the commissioner a copy of the will, if will there be, and a sworn return and inventory of the gross estate in duplicate and shall set forth therein each item of real and personal property separately, showing its full and actual cash value at the date of decedent's death,

together with the names, addresses and relationships of the several beneficiaries, the allowable deductions in detail and the costs of administration, separately set forth; provided, however, that the commissioner may, upon application of the executor, administrator or trustee showing good cause, grant additional time within which the said sworn return and inventory may be filed. If the personal representative is unable to make a complete return as to any part of the gross estate of decedent, he shall include in his return a description of such part and the name of every person holding a legal or beneficial interest therein, and upon notice from the commissioner such person shall in like manner make a return as to such part of the gross estate.

APPRAISAL OF ESTATE BY COMMISSIONER--
FAILURE TO FILE RETURN AND INVENTORY--PENALTY ADDED TO TAX

Sec. 30-1620. Upon receipt of such sworn return and inventory from the executor, administrator or trustee, the commissioner shall proceed to make an appraisal of the various items of the gross estate and to investigate deductions claimed by such representative of the estate.

In making such appraisal, the commissioner shall direct his deputies, agents or assistants to investigate the valuation placed upon each item of the estate, with a view to determining its fullness and fairness, and, in the absence of written objection upon the part of the representative of the estate, his appraisal shall be final and binding upon the estate; provided, however, that such representative shall have the right to file with the commissioner, within thirty (30) days from the date of such appraisal, an appeal from his appraisal, addressed to a board composed of the governor, the treasurer, the secretary of state, the comptroller, and the commissioner of finance and taxation of the state, which said board shall have authority to consider the exceptions filed, hear proof and determine the valuation in dispute, and the findings, by a majority vote, of said board shall be conclusive as to all parties in interest, subject only to the constitutional right of review in the courts.

When any executor, administrator or trustee shall neglect or refuse to file the sworn return and inventory required under 30-1619, the commissioner is authorized to appraise the estate and to assess the tax upon the basis of all information available. Notice of such appraisal and tax assessment shall be given by the commissioner in accordance with the subsequent provisions of this section and the procedure thereafter with reference to an appeal from the appraisal and with reference to the collection of the tax shall be

the same as in other cases.

In the assessment of any tax when the sworn return and inventory have not been filed in accordance with §§30-1619, there shall be added to the amount of tax found to be due a penalty of five per cent (5%). Notwithstanding that the assessment made by the commissioner in the absence of the sworn return and inventory required shall be altered or revised upon appeal or in litigation, a penalty of five per cent (5%) upon the tax ultimately found to be due shall be added and collected in all cases when the sworn return and inventory are not filed.

In event the return and inventory required by §§30-1619 are not filed until fifteen (15) months from the date of the death of the decedent, the tax shall be paid at the time the return and inventory are filed, unless an extension of time for the payment thereof is granted by the commissioner.

Provided, however, that the representative of the estate, in his discretion, may file the return and inventory earlier and permit the commissioner to proceed with the appraisal of the estate prior to the payment of the tax. In the latter event the commissioner shall, at the completion of the appraisal, notify the representative of the estate by mail of his appraisal and the assessment of the tax. Such notice shall be sent by registered mail to the last known address of such representative and such mailing shall constitute good and sufficient notice.

In event the tax is paid at the time the return and inventory are filed, the commissioner shall proceed with the appraisal and investigation of the estate as hereinabove provided, and upon the completion thereof, shall make an assessment of any additional amounts found to be due, giving notice of the representative as hereinabove required.

BASIS OF APPRAISAL

Sec. 30-1621. All property, real and personal, shall be appraised at its full and true value at the date of death of the decedent.

Stocks and bonds listed on recognized exchanges shall be appraised by ascertaining their quoted value on the date of death of the decedent, or on the nearest business day of such exchange to such date.

LIEN FOR TAXES--ENFORCEMENT--PERIOD OF LIMITATION

Sec. 30-1622. The tax imposed by 30-1601--30-1637 shall be and remain a lien upon the property transferred, and upon all property acquired by the representative of the estate, or transferees, in exchange or substitution therefor, from the date of decedent's death, until the same is paid, but such lien shall not follow personal property after it has passed to a bona fide purchaser for value provided, however, that the provisions of this section shall not authorize any transfer without the consent of the commissioner, if such consent be a prerequisite to the transfer thereof.

The lien upon all real estate transferred, or any portion thereof, may be discharged by the payment of such amount of tax as the commissioner may specify and require, provided, the lien shall expire and be void unless action is brought for its enforcement within two and one-half (2 1/2) years from the date of administration, and within four (4) years from the death of the decedent where no administration was granted.

Delaware--Law

DETERMINATION OF TAX DUE; SUSPENSION PENDING LITIGATION; NOTICE

Sec. 1330. (a) The Tax Department shall, within 14 months after the death of the donor, grantor, devisor, or intestate, compute and determine all taxes assessable under this chapter. In case an estate shall, before the expiration of said period, become involved in litigation the determination of which may affect the computation of the tax imposed by this chapter, the Tax Department may suspend the computation and determination of taxes assessable under this chapter on the disputed items, until the conclusion of the litigation.

(b) Immediately upon the determination of all taxes assessable under this chapter, the Tax Department shall give notice to the parties in interest, or to their attorneys of record, by posting the same in its offices and by registered mail.

EXTENSION OF TIME FOR DETERMINATION OF TAX; ASSESSMENT OF DEFICIENCY

Sec. 1331. (a) No limitation of time upon the making of any assessment of inheritance tax shall limit the Tax Department in making any assessment if the information necessary to complete and determine the true and proper tax has not been furnished to the Tax Department within the time prescribed by law or if any report, inventory, list and statement, or schedule of deductions has not been filed within the time prescribed by law.

(b) If the Tax Department discovers from information submitted to it or obtained in any other manner subsequent to the assessment of the inheritance tax under this chapter, that any property of any estate or any portion thereof or any taxable interest therein has not been included or has been included in an amount substantially less than the market value of the property in any inheritance tax report filed with the Tax Department, it may at any time within 3 years after the date of any previous assessment of tax make an assessment of tax and/or an assessment of additional tax and give notice of such assessment in the same manner as is provided by law for original assessments.

REVIEW BY TAX BOARD; HEARINGS

Sec. 1332. (a) Within 30 days after the date of mailing of the notice required by subsection (b) of section 1330 of this title, any person aggrieved by the determination of tax by the Tax Department, may apply to the Tax Board, which may make such corrections of the taxes as it may determine proper.

(b) The Tax Board and the Tax Commissioner may hold hearings, summon witnesses and take testimony relative to the determination of tax under this chapter.

APPEALS FROM DECISIONS OF TAX COMMISSIONER AND OF TAX BOARD; PROCEDURE

Sec. 1333. (a) In all cases arising under this chapter the executor, administrator or taxable, may appeal to the Tax Board from the decisions or rulings of the Tax Commissioner. The Tax Board may affirm, modify, or reverse such decisions or rulings of the Tax Commissioner.

(b) Hearings may be informal but a record shall be made of the decisions reached. If the informal hearings shall prove unsatisfactory to the complainant, or to the Tax Commissioner, such complainant or the Tax Commissioner may, within 30 days ask for a formal hearing for the completion of the record and may, within 30 days after notice of a decision upon such formal hearing, appeal to the Superior Court from the determination of the Tax Board as to the amount of taxes to be paid under the provisions of this chapter.

(c) The Superior Court for the several counties of the State is vested with jurisdiction to hear and determine all such appeals from the determination of the Tax Board and may by proper rulings prescribe the procedure to be followed in such appeals. Every such appeal shall be determined by the court without the aid of a jury. In any such appeal the court shall determine what part of the costs shall be paid by the State and what part shall be paid by the executor, administrator or taxable as to it may appear just and equitable.

(d) The Tax Commissioner shall notify the Attorney General whenever such appeal is taken by the executor, administrator or taxable and the Attorney General, or one of his deputies, shall represent the State in the hearings on the appeal.

DATE DUE AND PAYABLE; LIEN ON PROPERTY

Sec. 1341. All taxes imposed by this chapter shall be due and payable within 30 days after the amount of tax has been finally determined in accordance with the provisions of this chapter. Every such tax shall be and remain in lien upon the property subject to the tax until paid.

INTEREST ON UNPAID TAXES

Sec. 1342. From 15 months after date of death, and until paid, the taxes determined to be due shall bear interest at the rate of 6% per annum. Where an estate becomes involved in litigation referred to in section 1330 of this title, no interest shall be charged until one month after adjudication.

EXTENSION OF TIME FOR FILING REPORT OR PAYMENT OF TAX

Sec. 1343. The Tax Board upon written request may, by agreement in meeting or by written assent, extent the time for the filing of any report which may include inventory, list and statement or schedule of deductions, and for the payment of any tax. Such extension shall extend the time within which any assessment and any payment of tax may be made for a period equal to the time so extended and all such extensions shall be recorded in the minutes of the Tax Board. The extension for payment of tax shall be conditioned upon the payment of interest upon the tax at the rate of 6% per annum as otherwise provided by law. The request and allowance of any extension of time under the provisions of this section shall in no way relieve any executor, administrator, beneficiary or other person in interest from the payment of the tax.

Minnesota--Law

DETERMINATION OF TAX
[Representative to File Return]

Sec. 291.09. Subdivision 1. (a) Every representative at the time of filing with the probate court a verified inventory and appraisal of the probate assets of the decedent as prescribed in chapter 525 shall submit to the court a true and complete schedule of non-probate assets, on a form prescribed by the commissioner.

(b) Every representative shall file with the commissioner, on a form prescribed by the commissioner, an inheritance tax return showing the values contained in the inventory and appraisal and schedule of non-probate assets and deductions and exemptions claimed by the representative, and containing a computation of the inheritance tax due under the provisions of this chapter. The representative shall file a true copy of such return with the probate court.

(c) Except as hereinafter provided, such inheritance tax return shall be conclusive as to the valuation of both probate and non-probate assets and as to all other matters relating to the taxability of probate assets, unless, within 90 days after such filing, the commissioner, the representative or any other person from whom any portion of such tax is due has filed with the probate court written objections to any such matter reflected in such return. Upon the filing of such objections, the probate court shall fix the time and place of a hearing thereon and shall give 30 days mailed notice thereof to the commissioner, to the representative and to each person from whom any portion of such tax is due. At such hearing the court shall hear such objections and shall make its order determining the matter so objected to.

(d) If the probate court upon a hearing on a representative's account allows a deduction different in amount than that used in the determination of the inheritance tax return as provided in the preceding subparagraph (b), or if the probate court in its decree assigning the property:

(i) assigns such property to a person or persons other than the person or persons reported on the inheritance tax return; or

(ii) distributes such property to the person or persons reported on the inheritance tax return in amounts or shares different than those reported thereon; or

(iii) determines the relationship between the decedent and any person to whom property is assigned as other than the relationship reported on the inheritance tax return,

the commissioner not later than 90 days after receipt of a copy of the court's order or decree adjusting, settling or allowing the account or assigning the property may issue an order adjusting the computation of the inheritance tax due in accordance therewith.

(e) The probate court may waive the filing of any inheritance tax return required by subparagraph (b) where it appears that no inheritance tax is due, but such waiver shall

not limit the right of the commissioner to file a return pursuant to subdivision 3 hereof.

[Others to File Returns]

Subdivision 2. (a) When no representative has been appointed by the probate court, every person from whom a tax is due under the provisions of this chapter shall file with the commissioner, on forms prescribed by the commissioner, a schedule of non-probate assets listing the transfers on account of which such tax is due and an inheritance tax return showing the values contained in such schedule and all claimed deductions and exemptions and containing a computation of such tax.

(b) When no representative has been appointed by the probate court, and in cases where a representative has been appointed, as to matters reflected in the inheritance tax return which are not to be determined as prescribed in subdivision 1, subparagraph (c) hereof, the tax as computed on the return shall be the inheritance tax imposed by this chapter upon the transfers reported therein unless within 90 days after such filing the commissioner or any other person from whom any portion of such tax is due mails a written notice to the commissioner, to the person so filing such return, and to each person from whom any part of such tax is due, objecting to such matters and fixing the time and place of a hearing thereon at least 30 days subsequent to the date of such notice. At such hearing the commissioner shall hear such objections, and within 30 days after such hearing, shall make his order determining the inheritance tax imposed by this chapter.

(c) The filing of an inheritance tax return shall not be required under the preceding subparagraph (a) where the transfers resulting in the tax were included in a schedule of non-probate assets and an inheritance tax return previously filed with the commissioner.

[Commissioner to File Return]

Subdivision 3. Where any inheritance tax return required by the preceding provisions of this section has not been filed within 18 months after the decedent's death, the commissioner may make and file such return including a computation of the tax resulting from the transfers therein reported and at the time of such filing shall mail copies of such return to the representative, if any, and to each person from whom any portion of such tax is due. Such return may be objected to and a hearing held on such objections in the manner elsewhere provided in this section where the return is not made by the commissioner.

[Filing Other Documents]

Subdivision 4. In all cases where a federal estate tax return is filed, a true copy thereof shall be filed with the commissioner at the time of filing the original and likewise any changes, corrections, assessments of deficiency or amendments made therein after filing shall be promptly reported to the commissioner. The probate court shall file, with the commissioner, promptly upon their entry, true copies of all orders adjusting, settling or allowing any representative's intermediate, final or other account and all decrees of descent or partial or final distribution and all interlocutory decrees entered by it in any case where it has not waived the filing of an inheritance tax return pursuant to this section. Every representative at the time of filing any intermediate, final or other account with the probate court shall file a true copy thereof with the commissioner unless the filing of an inheritance tax return has been waived.

[Determination of Values]

Subdivision 5. Notwithstanding other provisions of this chapter, when agreed in writing between the commissioner and the representative, values for purposes of the inheritance tax on both probate and non-probate assets shall be the same as those finally determined for purposes of the federal estate tax on a decedent's estate.

[Tax Imposed]

Subdivision 6. Except as otherwise provided, the tax as determined and adjusted by the commissioner under the provisions of this chapter shall be the tax imposed thereunder.

MAINTENANCE OF FAMILY IN INHERITANCE TAX CASES

Sec. 291.10. In determining the value of any estate subject to an inheritance tax, the amount deducted for the maintenance of the family shall not be greater than the amount allowed by the probate court for one year, and which is reasonably required or actually expended for their support during the settlement of the estate, not exceeding in any event the sum of $5,000.

TIME EFFECTIVE

Upon Death

Sec. 291.11. Subdivision 1. (a) All taxes imposed by this chapter shall take effect at and upon the death of the person from whom the transfer is made and shall be due and payable at the expiration of 18 months from such death, except as otherwise provided in this chapter.

(b) (A) False return--in the case of a false or fraudulent return with the intent to evade tax, any additional tax resulting therefrom may be assessed at any time.

(B) No return--in the case of failure to file a return, the tax may be assessed at any time.

(C) Omissions--in the case where there is omitted from the estate items subject to tax under this chapter the tax on such omitted items may be assessed at any time.

In determining the items omitted, there shall not be taken into account any item which has been disclosed in the return or in a statement attached to the return in a manner adequate to apprise the commissioner of the nature and amount of such item.

(c) Where, before the expiration of the time prescribed in this chapter for the determination or adjustment of the tax, the commissioner and the taxpayer shall consent in writing to the extension of time for such determination or adjustment the tax may be determined at any time prior to the expiration agreed upon and in the manner agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon.

(d) The estate tax prescribed in section 291.34, notwithstanding the period of limitations prescribed for determination of the inheritance tax in this chapter shall be determined by the commissioner not later than 90 days following the filing of the Minnesota estate tax return with the commissioner, together with a copy of the federal audit report or the closing letter accepting the federal return as originally filed.

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
RIGHTS OF NONRESIDENT ALIEN TO TAKE PROPERTY
BY SUCCESSION OR TESTAMENTARY DISPOSITION
1st Draft
October 3, 1966

This draft is based primarily on a draft of a subcommittee consisting of Mr. Allison, Miss Lisbakken, Mr. Lovett, Mr. Barrie and Mr. Schwabe.

Section 1. Deposits for nonresident alien distributees. (1) If, at the time of distribution of an estate, the court finds that a distributee is an alien not residing within the United States who would not receive the benefit, use or control of property due him, the court shall order the personal representative to convert the property into cash and deposit the money due the alien distributee to the credit of the alien distributee at interest in a savings account in a bank or banks in this state. Sale of the property shall be in the manner provided by law for the sale of other property of the estate.

(2) Before money is deposited as provided in subsection (1) of this section, there shall be deducted therefrom the expenses of any sale of the property and amounts the court may allow for the services of the personal representative, his attorney and the attorney in fact representing the alien distributee in the conversion and deposit proceeding.

(3) The pass book or other evidence of the deposit shall be delivered to the clerk of the court, who shall be custodian thereof until it is needed for withdrawal of the money deposited as provided in section 2 or 3.

(4) The money deposited and interest accrued thereon may be withdrawn and paid or disposed of only as provided in section 2 or 3. The deposit and interest are not subject to the Uniform Disposition of Unclaimed Property Act (ORS 98.302 to 98.436 and 98.991).

Section 2. Payment of deposits to nonresident alien distributees. (1) At any time within 10 years after the date of the court order to deposit money due an alien distributee as provided in section 1, the alien distributee or, if he is deceased, the personal representative of his estate appointed by a court of this state may file with the court that ordered the deposit a petition requesting withdrawal of the money deposited and interest accrued thereon and payment thereof to the petitioner or his attorney in fact. The petition shall be filed and all proceedings thereon shall be had under the register number of the estate proceeding in which the court order to deposit was made, but the estate need not be reopened for the purpose of the withdrawal proceeding.

(2) If a petition filed as provided in subsection (1) of this section is denied by the court, a subsequent petition so filed requesting withdrawal of the same money deposited and interest shall allege the particulars of new or changed circumstances occurring after that denial that justify withdrawal and payment.

(3) The court, upon the filing of the petition, shall fix a time and date certain for a hearing on the petition, and shall

order that written notice of the hearing be given not less than 30 days before the date thereof to the clerk of the State Land Board, the bank or banks in which the money is deposited and the consular representative of the country of which the alien distributee is or, if deceased, was a citizen.

(4) If it appears to the court at the hearing that the alien distributee or, if deceased, his heirs or beneficiaries would receive the benefit, use or control of the money deposited, the court shall order that the money deposited and interest accrued thereon be withdrawn and paid to petitioner or his attorney in fact, after deduction therefrom of the costs and expenses of the withdrawal proceeding allowed by the court.

Section 3. Payment of nonresident alien distributee deposits to other distributees; escheat. (1) If the money due an alien distributee deposited as provided in section 1 and interest accrued thereon is not withdrawn and paid as provided in section 2, the court that ordered the deposit shall order that the money deposited and interest be withdrawn and paid to any distributee of the estate, other than the alien distributee, who files with the court a petition requesting the withdrawal and payment within one year after the expiration of the 10-year period specified in section 2 and who is found by the court to be eligible to receive the money. The petition shall be filed and all proceedings thereon shall be had under the register number of the estate proceeding in which the court order to deposit was made, but the estate need

not be reopened for the purpose of the withdrawal proceeding.

(2) If the money deposited and interest accrued thereon is not withdrawn and paid as provided in section 2 or subsection (1) of this section, the money and interest shall be disposed of as escheated property.

References: Advisory Committee Minutes:
12/17, 18/65 pp. 1 to 4
2/18, 19/66 pp. 3 to 9

Lundy's memorandum dated February 7, 1966
3/18, 19/66 pp. 3 to 6
4/15, 16/66 pp. 3 to 6

ORS 111.070

Section 4. Repeal of existing statute. ORS 111.070 is repealed.

REPORT
October 3, 1966

To: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: Robert W. Lundy

Subject: Rough Draft on Inheritance by Nonresident Aliens

This report is submitted in response to a request by Mr. Allison that I expedite, in so far as possible, the drafting of proposed statutory provisions on inheritance by nonresident aliens based upon committee action on this subject.

The rough draft contained in this report, I am sure, can be improved in several respects. A number of questions occurred to me in the process of drafting, and questions probably will occur to you as you review the draft. Also, some terminology used in the draft ultimately may need to be altered to achieve consistency with terminology used throughout the final version of the proposed revised Oregon probate code.

The rough draft is based primarily on the draft prepared by the subcommittee consisting of Mr. Allison, Miss Lisbakken, Mr. Lovett, Mr. Barrie and Mr. Schwabe, and reviewed and acted upon by the committees at the March and April 1966 meetings. See Minutes, 3/18,19/66, pages 3 to 6; and Minutes, 4/15,16/66, pages 3 to 6.

For the record of discussion on the subject by the committees prior to the March 1966 meeting, see Minutes, 2/18,19/66, pages 3 to 9; and Minutes, 12/17,18/66, pages 1 to 4. For letters on the subject addressed to Judge Dickson by Mr. Barrie and Mr. Schwabe, see the memorandums dated February 7, 1966, and December 14, 1965.

The rough draft presupposes repeal of ORS 111.070, the present Oregon statute on inheritance by nonresident aliens, but does not contain a section specifically repealing this present statute. It is contemplated that this repeal, together with the repeal of other present Oregon statutes necessitated by the proposed revised Oregon probate code, will be accomplished by a single section of the revision bill.

ROUGH DRAFT

Section 1. Deposits for nonresident alien distributees. (1) If, at the time of distribution of an estate, the court finds that a distributee is an alien not residing within the United States who would not receive the benefit, use or control of property due him, the court shall order the personal representative to convert the property into cash and desposit the money due the alien distributee to the credit of the alien distributee at interest in a savings account in a bank or banks in this state. Sale of the property shall be in the manner provided by law for the sale of other property of the estate.

(2) Before money is deposited as provided in subsection (1) of this section, there shall be deducted therefrom the expenses of any sale of the property and amounts the court may allow for the services of the personal representative, his attorney and the attorney in fact representing the alien distributee in the conversion and deposit proceeding.

(3) The pass book or other evidence of the deposit shall be delivered to the clerk of the court, who shall be custodian thereof until it is needed for withdrawal of the money deposited as provided in section 2 or 3.

(4) The money deposited and interest accrued thereon may be withdrawn and paid or disposed of only as provided in section 2 or 3. The deposit and interest are not subject to the Uniform Disposition of Unclaimed Property Act (ORS 98.302 to 98.436 and 98.991).

Section 2. Payment of deposits to nonresident alien distributees. (1) At any time within 10 years after the date of the court order to deposit

money due an alien distributee as provided in section 1, the alien distributee or, if he is deceased, the personal representative of his estate appointed by a court of this state may file with the court that ordered the deposit a petition requesting withdrawal of the money deposited and interest accrued thereon and payment thereof to the petitioner or his attorney in fact. The petition shall be filed and all proceedings thereon shall be had under the register number of the estate proceeding in which the court order to deposit was made, but the estate need not be reopened for the purpose of the withdrawal proceeding.

(2) If a petition filed as provided in subsection (1) of this section is denied by the court, a subsequent petition so filed requesting withdrawal of the same money deposited and interest shall allege the particulars of new or changed circumstances occurring after that denial that justify withdrawal and payment.

(3) The court, upon the filing of the petition, shall fix a time and date certain for a hearing on the petition, and shall order that written notice of the hearing be given not less than 30 days before the date thereof to the clerk of the State Land Board, the bank or banks in which the money is deposited and the consular representative of the country of which the alien distributee is or, if deceased, was a citizen.

(4) If it appears to the court at the hearing that the alien distributee or, if deceased, his heirs or beneficiaries would receive the benefit, use or control of the money deposited, the court shall order that the

money deposited and interest accrued thereon be withdrawn and paid to petitioner or his attorney in fact, after deduction therefrom of the costs and expenses of the withdrawal proceeding allowed by the court.

Section 3. Payment of nonresident alien distributee deposits to other distributees; escheat. (1) If the money due an alien distributee deposited as provided in section 1 and interest accrued thereon is not withdrawn and paid as provided in section 2, the court that ordered the deposit shall order that the money deposited and interest be withdrawn and paid to any distributee of the estate, other than the alien distributee, who files with the court a petition requesting the withdrawal and payment within one year after the expiration of the 10-year period specified in section 2 and who is found by the court to be eligible to receive the money. The petition shall be filed and all proceedings thereon shall be had under the register number of the estate proceeding in which the court order to deposit was made, but the estate need not be reopened for the purpose of the withdrawal proceeding.

(2) If the money deposited and interest accrued thereon is not withdrawn and paid as provided in section 2 or subsection (1) of this section, the money and interest shall be disposed of as escheated property.

COMMENT

Section 1

Subsection (1) of section 1 refers to a court finding "at the time of distribution of an estate." Is this reference sufficiently specific? Also, should the manner in which the occasion for the court finding is initiated be specified; for example, on petition by the personal representative or a person interested in the estate or by the court on its own motion? Should provision be made for hearing and notice thereof in connection with the conversion and deposit order?

"Distributee" is used in subsection (1), and elsewhere in the draft, instead of "heir, legatee, devisee or distributee." It is contemplated that the proposed revised Oregon probate code will contain a definition of "distributee," to be applicable throughout the code, that will encompass persons entitled to any property of a decedent under his will or under the statutes of intestate succession. See, for example, the definitions of "distributee" in section 3, 1963 Iowa Probate Code, and section 3, Model Probate Code (1946).

Subsection (1) refers to "United States," rather than "United States or its territories." ORS 174.100(5) defines "United States" as including "territories, outlying possessions and the District of Columbia" generally for purposes of the statute laws of this state.

Subsection (1) uses "property" instead of "money or other property," and "convert the property into cash" instead of "sell and convert said property into cash." It is hoped that the terminology used satisfactorily avoids specific provisions distinguishing between the treatment of property that already is cash and property that must be sold for cash.

Subsection (1) provides for deposit in a "bank or banks." Is it contemplated that the money due a particular alien distributee be deposited in more than one bank? Also, should deposits in trust companies, as well as banks, be authorized? "Bank or trust company" appears to be common terminology in the Oregon banking statutes. See, for example, ORS 708.015 and 708.025.

Subsection (4) refers to the Uniform Disposition of Unclaimed Property Act (ORS 98.302 to 98.436 and 98.991). For the purpose of exempting deposits under the draft from that Act, a reference to ORS 98.306 only may be sufficient.

The present Oregon statute on inheritance by nonresident aliens (i.e., ORS 111.070) specifies that the burden to establish the fact of existence of

reciprocal rights set forth therein is upon the nonresident alien. Should the draft contain a comparable provision as to the burden of establishing the fact of an alien distributee receiving the benefit, use or control of property or money deposited due him?

Section 2

Subsection (1) of section 2 provides that the estate need not be reopened for the purpose of the withdrawal proceeding. The wording "estate need not be reopened" appears to imply that the estate may be reopened in appropriate cases, is this intended? Also, is it necessary or desirable that it be specified that the personal representative of the estate need not be made a party to the withdrawal proceeding?

Subsection (3) provides for hearing and notice thereof on a petition to withdraw on the "day certain" approach. Is this approach preferable to hearing and notice on the "appearance" approach? Some hearings with notice involved in estate proceedings, such as that for sale or lease of property (see ORS 116.745), employ the "appearance" approach. It is possible that the proposed revised Oregon probate code will contain general provisions applicable to the various hearings with notice involved in estate proceedings. Perhaps such general provisions might be written in such a way as to be appropriate for deposit and withdrawal proceedings under the draft, thus facilitating reference thereto in the draft instead of specific provisions in the draft on this matter.

Subsection (4) refers to "costs and expenses of the withdrawal proceeding allowed by the court." Is this reference sufficiently specific? For example, whose "costs and expenses"? And, does "costs and expenses" contemplate something different than the customary "costs and disbursements" allowed in actions and suits? Perhaps the proposed revised Oregon probate code should contain some general provision on this subject also.

Section 3

Subsection (1) of section 3 provides for withdrawal of deposits on petitions of distributees other than alien distributees after the 10-year period has expired. Should provision be made for hearing and notice thereof on such petitions? Also, should eligible distributees other than a petitioner be permitted to intervene in the proceeding, and should the court be permitted to order withdrawal and payment to eligible distributees other than the petitioner?

Generally

Should the draft make any provision for nonresident aliens who are

beneficiaries under testamentary trusts?

Should the draft make any specific provision for property due nonresident aliens in circumstances involving present and future estates; that is, where the alien's interest is a present estate, with the future estate in someone else, or where the alien's interest is a future estate, with the present estate in someone else? Perhaps conversion into cash of the property due the alien under subsection (1) of section 1 encompasses these situations.

Should the draft be made applicable only to estates of persons dying after the effective date of the draft? Under present Oregon law, for example, title to real property of a decedent vests in his heirs immediately on his death. Does title vest immediately in other heirs if a nonresident alien heir is found ineligible under ORS 111.070? If the answer to this question is affirmative, and if such a vesting occurred before the effective date of the draft but distribution was not made until after that date, might the application in this situation of the deposit and withdrawal proceedings under the draft be considered an unconstitutional deprivation of vested property rights?

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
ESTATES OF ABSENTEES
1st Draft
April 21, 1967

This draft is based primarily on a draft by Stanton Allison distributed at the March 1967 meeting and the action by the committee at the February 17, 18, 1967 and March 17, 18, 1967 meeting.

Section 1. Contents of petition for letters of administration of estate of an absentee. Administration may be had upon the estate of an absentee. A petition for letters of administration shall state, in addition to the applicable facts required by ORS _____;

(1) Whether the absentee, when last heard from, was a resident or nonresident of this state;

(2) The address of the absentee at his last known domicile;

(3) That, to the best knowledge of the petitioner, and after diligent search, the whereabouts of the absentee is and has been unknown for a period of three years.

Section 2. Administration when circumstances indicate death probable. Administration may also be had upon the estate of an absentee when the petition therefor alleges, in addition to the applicable facts required by ORS _____, that his accidental death at a stated time, location and circumstance is probable but the fact of the death may be in doubt solely by reason of failure to find or identify the remains of the absentee.

Section 3. Hearing on petition; notice to absentee. Upon filing the petition for letters of administration the clerk of court shall set a day for hearing not less than 30 days from the date of filing the petition unless the court shall set an earlier day. A copy of the notice of the hearing shall be sent:

(1) To the absentee at his last known address by registered mail and by postage prepaid letter to be forwarded through the United States Social Security Administration to his last address available to that agency;

(2) To the heirs named in the petition.

The court may order that additional notice of the hearing be given by publication or by other means. Proof of mailing may be made by the petitioner by affidavit.

Section 4. Appointment of person to represent absentee. The court may appoint some disinterested person as guardian ad litem to appear at the hearing for the absentee. The court may direct the petitioner or the guardian ad litem to make search for the absentee in any manner which the court may deem advisable, including any or all of the following methods:

(1) By inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the alleged decedent;

(2) By notifying officers of justice and public welfare

agencies in appropriate locations of the disappearance of the absentee;

(3) By engaging the services of an investigation agency.

Section 5. Hearing; findings of court conclusive-exceptions. (1) Upon the hearing the court shall determine the fact and date of death and whether the deceased died testate or intestate and shall grant letters accordingly, or, on proper grounds, may deny the petition.

(2) The finding of the fact of death shall be conclusive as to the absentee only if:

(a) The notice of the hearing on the petition for probate or for the appointment of a personal representative is sent by registered mail addressed to the absentee at his last known address; and

(b) The court finds that the search was made as ordered by the court.

Section 6. Mode of procedure, generally. Upon the entry of the order establishing death of the absentee, administration of the estate of such absentee, whether testate or intestate, shall proceed as provided for the estates of other decedents except as otherwise provided in this chapter.

Section 7. Revocation of letters; settlement of account upon revocation. The court shall revoke letters of administration at any time upon proof that the absentee is in fact alive. Acts of a personal representative taken prior to

revocation of letters shall be valid for all purposes, but after revocation the personal representative shall have no further power in the capacity of personal representative. The personal representative shall pay claims allowed and proved and shall settle an account of his administration for the period of time preceding revocation and shall transfer any property in his hands to the person for whose estate he acted or to the duly authorized agent of that person. In the event a sale of property has been conducted by the personal representative, the absentee shall have no right, title, or interest in or to the property sold but only to the proceeds realized therefrom or so much thereof as may remain in the hands of the personal representative upon the closing of the estate of the absentee. The absentee shall have, for a period of five years after distribution of the estate, a right to recover from the distributees any estate or proceeds of any estate of the absentee that remains in their hands but there shall be no right of recovery from purchasers of property sold by the distributees.

Section 8. Substitution of parties--absentee for personal representative. (1) After revocation of letters of administration the absentee may be substituted as plaintiff in actions and suits brought by the personal representative. The absentee may be substituted as defendant upon his own application or that of the plaintiff. If the absentee is

substituted as defendant he shall not be compelled to go to trial within less than three months from the date of the substitution in actions and suits brought against the personal representative.

(2) A judgment or decree against the personal representative shall constitute a judgment or decree against the absentee if he is alive, but the judgment or decree may be vacated upon application of the absentee made within three months after the absentee has knowledge of the existence thereof. The application of the absentee to vacate a judgment or decree shall be accompanied by an affidavit denying material facts upon which the right of suit or action was based or alleging facts which would constitute a defense.

Section 9. Costs when letters granted. The costs, expenses and charges attending the issuance of letters of administration or their revocation shall be paid out of the estate of the absentee.

Section 10. Costs when letters of administration not issued. If the petition for letters is not granted the applicant shall pay the costs, expenses and charges.

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
MISSING PERSONS GENERALLY
1st Draft
April 19, 1967

Section 1. ORS 127.010 is amended to read:

127.010. Petition that property of missing person requires attention. Whenever any person[, resident or non-resident of this state,] who owns or is entitled to the possession of any [real or personal] property situate in this state[,] is missing or his whereabouts is unknown [for 90 days], upon presentation of a verified petition of a member of his family, business associate or friend to the court [having probate jurisdiction] in the county of the residence of [such] the missing person, or in the county in which the property, or the major portion thereof, of the missing person is situate, representing that his whereabouts has been for such time and still is unknown and that his property requires attention, supervision and care, the court shall appoint a day for hearing, [not less than 15 days from the date of the order directing such hearing.] the matter.

Section 2. ORS 127.020 is amended to read:

127.020. Notice of hearing; publication. Upon the filing of [such] the petition, the clerk of the court shall cause to be published prior to the date of hearing in a newspaper published in the county, [once a week for two successive weeks,] a notice that [such] the petition will be heard at the court room of the court at the time appointed

by the court. The court may direct [further] other notice of the application to be given in [such] the manner and to [such] the persons as it may deem proper. Proof of publication shall be by affidavit filed with the clerk of the court. The notice requirements of this section shall not apply where accidental death of the owner of property is probable but the fact of death may be in doubt solely by reason of failure to find or identify the remains.

Section 3. ORS 127.030 is amended to read:

127.030. Hearing by court; appointment of trustee of property. At the time designated for the hearing, or at any subsequent time to which the hearing may be postponed, the court shall hear the petition and the evidence offered in support of or in opposition thereto, and, [if] after the hearing if the court is satisfied that the allegations [thereof] of the petition are true and that [such] the person remains missing and his whereabouts unknown, the court shall appoint some suitable person to take charge and possession of all of the property of the missing person, to manage and control it under the direction of the court.

Section 4. ORS 127.040 is amended to read:

127.040. Qualification and bond of trustee. (1) The trustee appointed pursuant to ORS 127.030 shall be a

resident of the county in which the application is filed and shall have all the qualifications prescribed by law for [an administrator or executor] a personal representative of an estate of a deceased person. The preference for the appointment shall be the same declared by law for [administrators.] personal representatives.

(2) Every trustee appointed under the provisions of ORS 127.010 to 127.190 shall give bond in a sum to be fixed by the court with either two or more competent personal sureties or a qualified corporate surety, conditioned that the trustee will at all times obey the orders of the court and faithfully account for all moneys and property of the trust.

Section 5. ORS 127.050 is amended to read:

127.050. Inventory and appraisal of property. The trustee shall, within 15 days after his appointment, or within such further time as the court may allow, make and file with the clerk of the court an inventory [verified by his own oath of all the real and personal] of the property, moneys, notes, choses in action and accounts owned by or due to the missing person[, specifying each item separately,] which shall come to his possession or knowledge, and shall cause all of [such] the property to be separately appraised at its true cash value by three disinterested and competent

persons, appointed by the court irrespective of the situs of the property[, who shall each take and subscribe an oath to be filed with the inventory to the effect that he will impartially appraise the property of the missing person according to the best of his knowledge and ability].

Section 6. ORS 127.060 is amended to read:

127.060. Duties and powers of trustee. The trustee shall:

(1) Take possession of the property within this state of the missing person and shall collect and receive the rents, income and profits thereof; [and]

(2) Collect all debts, dues and credits owned by the missing person[,] ; [and]

(3) Pay the expenses thereof out of the trust funds;

(4) Pay all indebtedness of the missing person if and when authorized by the court;

(5) Operate the property of the missing person if operation thereof is advisable, and pay all expenses of such operation;

(6) Sell all or any portion of the property of the missing person, when authorized by the court, in the manner provided in ORS 127.090 to 127.130, and may mortgage and hypothecate the [real and personal] property of the missing person when duly authorized so to do by the court. The

court may direct the trustee to pay to the person or persons constituting the dependent members of the family of the missing person [such] any sum or sums of money for family expenses and support from the income of the estate, or from the proceeds of the sale or hypothecation of the property of the estate, as it may from time to time determine.

Section 7. ORS 127.070 is amended to read:

127.070. Contract by missing person to convey realty; deed by trustee. If any missing person was, at the time of his or her disappearance, a party to a bond for a deed or other enforcible contract requiring the missing person to convey real estate, the interest and title of the missing person may be conveyed by the trustee appointed under the terms of ORS 127.010 to 127.190 upon full compliance with the terms and conditions of [such] the bond or contract by the other party thereto, and a deed so made shall transfer the same title as though made by the missing person.

Section 8. ORS 127.080 is amended to read:

127.080. Borrowing of money by trustee; security. A trustee appointed under the terms of ORS 127.010 to 127.190 may, with the consent of the court making the appointment, borrow money upon any property belonging to the estate and execute a mortgage thereon as security for the loan at [such] the rate of interest and upon [such] the terms as the court shall prescribe, for the purpose of funding the

indebtedness against the missing person or for the purpose of paying interest on outstanding obligations that are liens upon the premises to be mortgaged, or for the purpose of securing funds for the payment of the expenses of administration, taxes or indebtedness of the missing person, or for the purpose of securing funds to support the dependent members of the family of the missing person, when it is shown by verified petition to the satisfaction of the court to be necessary, whether the property has or has not before that time been mortgaged by the missing person.

Section 9. 127.090. Sale of corpus by order of court. When the rents, income and profits of operation of the property of the missing person are exhausted or insufficient to pay the charges, expenses, claims and indebtedness and the support of the dependent members of the family of the missing person, the trustee may sell the property of the estate, or so much thereof as may be necessary for that purpose; provided, that whenever it appears to the satisfaction of the court that it is for the best interests of the estate of the missing person that the property, or any part thereof, should be sold, the court may order the property, or any part thereof, to be sold for the purpose of reducing the property into cash.

Section 10. 127.100. Petition for sale of property; citation of interested persons. Upon the filing of a petition for the sale of property, a citation shall issue

directed to each dependent member of the family of the missing person and to every person who would be an heir at law of the missing person if he were dead, and, if it appears that the missing person left a will, to each legatee and devisee mentioned in the will, and to all other persons, if any, interested in the property of the estate to appear within 10 days from the date of the service of such citation if served within the county wherein the proceeding is pending, or within 20 days if served within any other county in this state if personally served, or, if served by publication or personal service without the state, within 28 days from the date of the first publication thereof or date of service of the citation without the state, to show cause, if any exists, why an order of sale should not be made as prayed for in the petition.

Section 11. ORS 127.110 is amended to read:

127.110. Order of sale; filing of additional undertaking by trustee. If, upon the hearing, the court finds that it is necessary or expedient that any portion of the property be sold, it shall make the order accordingly and prescribe the terms of the sale, whether cash or credit, or both. Unless it appears to the satisfaction of the court that the amount of the undertaking of the trustee previously given is equal to the probable value of the property ordered sold, the court must require the trustee to give an additional undertaking in such sum as it may fix, to be void upon the condition that the trustee accounts for and

disposes of the proceeds of the sale according to law. Before proceeding to sell any property of the missing person under [such] an order of sale, the trustee [must] shall file with the clerk of the court any additional undertaking so required of him, duly approved by the court.

Section 12. ORS 127.120 is amended to read:

127.120. Notice of sale; mode of selling. If the sale is of personal property, notice thereof shall be given in the manner and for and during the time prescribed by law for sales of personal property upon execution. If the sale is of real property, [such] the property shall be sold at public auction as like property is sold on execution, after giving notice once a week for four weeks successively in a newspaper published in the county in which the property to be sold is situate, which notice shall state the terms of sale and that the same is subject to confirmation by the court.

Section 13. ORS 127.130 is amended to read:

127.130. Report of sales by trustee; confirmation; conveyance of property. The trustee shall report to the court [such] any sale or sales of the property of the missing person and if the court is satisfied that the proceedings are regular and that the sum for which the property was sold is not disproportionate to the value thereof, the court shall confirm [such] the sale or sales and direct the trustee to make a proper bill of sale of the personal

property and a proper conveyance of the real property to the purchaser or purchasers thereof.

Section 14. 127.140. Accounting by trustee. The trustee, on the first Monday in April and the first Monday in October of each year, shall file with the court a semi-annual account exhibiting all receipts and expenditures during the preceding six-months' period and shall show therein the condition of all the property of the missing person.

Section 15. ORS 127.150 is amended to read:

127.150. Return of missing person; accounting by trustee. In the event the missing person returns, the court, upon the application of [such] the missing person or upon its own motion, shall require the trustee to render and file a verified account of the administration of the trust. The provisions of the law relating to final accounts of [administrators and executors] personal representatives shall apply with reference to the form and contents of [such] the final account.

Section 16. ORS 127.160 is amended to read:

127.160. Delivery of property in possession of trustee. Upon settlement of the accounts of the trustee, the court shall order the property of the missing person remaining in the hands of [such] the trustee to be delivered to the owner thereof.

Section 17. 127.170. Appointment of successor trustee.

In the event of the death, resignation, removal or disability of the trustee, the court shall have the power, upon petition, to appoint a successor trustee without notice or formal hearing.

Section 18. ORS 127.180 is amended to read:

127.180. Trustee's duties upon commencement of administration of estate of missing person as being that of a decedent. If, during the existence of a trust provided for in ORS 127.010 to 127.190, administration of the estate of [such] the missing person is instituted under the provisions of the law relative to the administration of the estates of deceased persons, the court shall require an accounting as provided in ORS 127.150 and shall order the property of the missing person remaining in the hands of the trustee to be delivered to the [administrator or executor of the estate] personal representative.

Section 19. ORS 127.190 is amended to read:

127.190. Exhaustion of property; settlement of estate. Whenever all the property of the missing person has been exhausted in the payment of debts, charges of administration, taxes and support of family dependents, the trustee shall file a final account and close the trust estate in the same manner and form, including notice, as provided by law for settlement of estates of [deceased persons] decedents.

PERSONS MISSING DURING WAR

Section 20. 127.310. Appointment of conservator to care for absentee's estate. Whenever a person, hereafter in ORS 127.310 to 127.350 referred to as an absentee, has been reported or listed as missing, or missing in action, or interned in a neutral country, or beleaguered, besieged or captured by an enemy, has an interest in any form of property in this state and is a legal resident of this state and has not provided an adequate power of attorney authorizing another to act in his behalf in regard to such property or interest, then the court having probate jurisdiction in the county of the absentee's legal domicile or of the county where the property is situated, upon petition alleging the foregoing facts and showing the necessity for providing care of the property of the absentee, made by any person who would have an interest in the property of the absentee were the absentee deceased, or on the court's own motion, after notice to or receipt of proper waivers from all the heirs or next of kin of the absentee as provided by law for the administration of an estate, and upon good cause being shown, may, after finding the facts to be as aforesaid, appoint a conservator to take care of the absentee's estate, under the supervision and subject to the orders of the court.

Section 21. ORS 127.320 is amended to read:

127.320. Bond and reports of conservator; powers.

The court has discretionary authority to appoint any suitable person as [such] a conservator and may require the conservator to post an adequate bond and make such reports as the court may deem necessary. The conservator shall have the same powers and authority as the guardian of the property of an infant or incompetent and shall be considered an officer of the court.

Section 22. 127.330. Support for dependents. The court is authorized to order the conservator to provide support for any person dependent upon the absentee for support or for the wife and minor children of the absentee, out of the assets of the absentee's estate.

Section 23. ORS 127.340 is amended to read:

127.340. Appointment of attorney; fees. In case of legal controversy involving the [absentee's] estate of the absentee or any part thereof, the court is authorized to appoint an attorney to appear and represent the interests of the absentee therein. The attorney [ad litem so appointed] shall stand in the relation of attorney for the absentee, and reasonable fees for service rendered may by the court be ordered paid from the estate by the conservator.

Section 24. ORS 127.350 is amended to read:

127.350. Termination of conservatorship; death of absentee. At any time, upon petition signed by the absentee, or on petition of an attorney in fact acting under an

adequate power of attorney granted by the absentee, the court shall direct the termination of the conservatorship and the transfer of all property held thereunder to the absentee or to the designated attorney in fact. [Likewise, if] At any time subsequent to the appointment of a conservator if it appears that the absentee has died and [an executor or administrator] a personal representative has been appointed for the estate, the court shall direct the termination of the conservatorship and the transfer of all property of the deceased absentee [held thereunder to such executor or administrator] to the personal representative.

References: Advisory Committee Minutes:
2/16, 17/67 p. 9
3/17, 18/67 pp. 6 to 10

ADVISORY COMMITTEE

Probate Law Revision

Thirty-sixth Meeting
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Dates) and: Times)	1:30 p.m., Friday, May 19, 1967 and 9:00 a.m., Saturday, May 20, 1967
Place:	Judge Dickson's courtroom 244 Multnomah County Courthouse Portland, Oregon

Agenda

1. Approval of minutes of April 1967 meeting.
2. Miscellaneous matters.
3. Intestate succession.
4. Advancements.
5. Adoption.
6. Illegitimacy
7. Felonious Death.
8. Wills.
9. Next meeting.

ADVISORY COMMITTEE
Probate Law Revision

Thirty-sixth Meeting, May 19 and 20, 1967
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The thirty-sixth meeting of the advisory committee (a joint meeting with the Committee on Probate Law and Procedure, Oregon State Bar) was convened at 1:30 p.m., Friday, May 19, 1967, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Frohnmayer, Husband, Jaureguy, Lisbakken and Mapp. Carson, Gooding and Riddlesbarger were absent.

The following members of the Bar committee were present: Braun, Gilley, Krause, Meyers, Kraemer, McKenna, Piazza, Thalhofer, Thomas, Richardson and Bettis. Biggs, Lovett, McKay, Mosser, Silven, Pendergrass, Copenhaver and Warden were absent.

Also present: James Sorte from the staff of Legislative Counsel.

Minutes of April Meeting

There being no objections, the minutes of the last meeting (April 21, 22, 1967) were approved as submitted.

Miscellaneous Matters

Chairman Dickson asked Zollinger to brief the committees on what had transpired since the March meeting of the committees. Zollinger explained to the committees that a meeting had been held concerning the prospect of Allison undertaking the drafting of the revised probate code and the prospect of Mapp attending the meeting in Colorado in June and July of 1967 of the American Bar Association Committee on a Uniform Probate Code.

Present at the meeting were Norman Stoll and William Love of the Law Improvement Committee, Chairman Dickson and Vice Chairman Zollinger of the Advisory Committee on Probate and Legislative Counsel, Robert W. Lundy. Zollinger said that the Advisory and Bar committee members

working on revising the Oregon Probate Code were indebted to Mr. Mapp for his generous offer to attend the sessions in Colorado without compensation for anything except actual out-of-pocket expenses. He said that the members of the Law Improvement Committee that attended the meeting were also very favorably impressed and had approved of the plans concerning both Mr. Allison and Mr. Mapp. Zollinger also reported to the committees that the Law Improvement Committee had indicated that the Probate Revision project is the most important project pending before the committee. Zollinger said that Allison was in a position to begin redrafting the code immediately, and that Judge Dickson is able to make space available in Multnomah County Courthouse. Sorte advised the committees that Lundy felt he would need authorization from the Legislative Counsel Committee before final approval of the plans concerning Allison and Mapp. Husband said he would discuss the matter with Lundy and have Lundy contact Allison and Mapp.

Procedure for Review of Drafts

Zollinger asked that the committees consider the method to be adopted for the review of the drafts that had been prepared and distributed to all members of the committees prior to the May 1967 meeting. He advised the committees that it had been suggested that the committees work through smaller groups such as subcommittees. He said that he did not approve of that procedure, and he would prefer having the consensus of opinion of the committees as presently constituted. He added that when there is a major policy decision the committees should voice their opinion as to policy and leave the particular wording to Allison. Frohnmayer said that he agreed with Zollinger. He also said that after the sessions in Colorado of the meeting on the Uniform Probate Code that the committees might like to reconsider any action they had taken. He was of the opinion that whereever possible, unless the policy considerations were otherwise, that the advisory and Bar committees should adopt as much of the language of the Uniform Probate Code as possible.

Dickson asked whether the drafts that had been distributed represented drafts of the entire proposed Oregon probate code. Sorte said that the drafts represented everything that the committees had considered except the area concerning inheritance tax. He explained that the drafts on tax had not been included with the other materials because at the last meeting (April 1967) the committees had suggested

major policy changes in the present code. One of the policy decisions was to favor an administrative determination of the inheritance tax. Under those circumstances the tax aspect would take an entire revision. As a consequence, the drafts on inheritance tax were not included with the other drafts. Sorte explained that one other matter that was not included with the materials was a draft on missing persons, chapter 127. That matter, he explained, had been referred to Mrs. Braun and Mr. Gilley for a report. Mrs. Braun had suggested that the estates of missing persons might be safeguarded under the existing provisions of the guardianship law. The committees had expressed approval of this plan, and had, at the April 1967 meeting, referred the matter to Mrs. Braun and Mr. Gilley for a report at the May 1967 meeting.

Zollinger said that the chapter on the powers of the probate court would need substantial revision, and that the present draft had been prepared by Legislative Counsel to form a basis for discussion. Other members of the committee were of the opinion that the chapter on definitions would also require some revision. It was agreed that the chapter on definitions would be amended periodically as the committees proceeded to go through the drafts.

Allison called attention to the fact that there had never been any final decision on the particular order of the chapters of the probate code. He reminded the committees that there had been three separate drafts of an outline of the probate code, but that no final action had been taken. Allison asked whether this was to be left to the discretion of the draftsman and was advised by Dickson that it would be placed on the agenda of the June 16,17, 1967 meeting.

Dickson asked for an expression of opinion as to whether the members would like to proceed in the order of the drafts as they had been received, or whether the order should be changed. The members favored proceeding in the order that the drafts were received.

Intestate Succession

Frohnmayer explained to the committees that the initial action on intestate succession had been taken in August and September of 1965. Following that action by the committees Legislative Counsel had suggested certain changes to what was originally called proposal number 2. He advised the committees that he had worked with Mr. Piazza and reviewed the suggestions of Legislative Counsel, and

that many of the suggestions were adopted and incorporated into the draft dated April 27, 1967.

Frohnmayer explained there was a suggestion that the first part of the draft, definitions, should be placed in one chapter with other definitions that would be used throughout the probate code. He said that he was not certain that he was in agreement. He said, for example, that the definitions of "claims" as used in the chapter dealing with intestate succession would not be the same as the definition of "claims" in the chapter on claims of creditors.

Dickson suggested that since there are different meanings for the word "claims", that perhaps it would be better to use the word "obligations" in the chapter on intestate succession. Frohnmayer and Jaureguy agreed with Dickson. Zollinger suggested that since the matter was not a policy decision that it be left to the discretion of the draftsman.

Definition of Net Estate

Frohnmayer said that a question that occurred to him was whether or not the definition of net estate should either include or exclude exempt property. He suggested that a reference should be made in the definition section and refer to the ORS sections dealing with exempt property. This, he said, would alert a young lawyer to the other provisions of the code.

Definition of Issue

Dickson asked whether the definition of issue would be broad enough to include adopted children. Frohnmayer answered that it had been suggested that the definition include adopted children, but that he was of the opinion that the sections dealing with adopted children were adequate to cover adopted children without adding anything to the word "issue" in the chapter on intestate succession.

Kraemer asked whether the same problem was applicable to illegitimate children, and Zollinger answered that the matter could be covered by a cross reference.

Frohnmayer suggested that the word "lawful" preceding "issue" was superfluous.

Definition of Personal Property

Zollinger asked whether the inclusion of "chattels

Real" in the definition of personal property should be changed to "leasehold estates." Frohnmayer suggested the wording "leasehold interests."

Zollinger expressed the opinion that he would favor a definition of property similar to the definition provided in the Uniform Commercial Code. Under that definition there is included intangibles, royalties, copyright interests, etc.

Gilley asked whether it was necessary to define property in the chapter on intestate succession.

Frohnmayer referred to the definition used in the Wisconsin probate and expressed approval of that definition.

Zollinger indicated that consideration of the definitions should be postponed until the committees had proceeded further with the drafts. Zollinger also expressed approval of the suggestion of Kraemer that the definition of personal property be that it was everything that was not real property. Zollinger also favored including in the definition of property "any legal or equitable interest."

Section 2 of Draft dated April 27, 1967

Section 2 was amended as follows: "Any part of the net estate of a decedent which is not effectively disposed of by [his] will, constitutes the net intestate estate and shall descend and be distributed as prescribed in the following sections."

Section 3

Section 3 was amended as follows: "If the decedent [dies intestate, leaving] leaves a [surviving] spouse and issue, the [surviving] spouse shall have [an undivided] a one half interest in the net intestate estate of the decedent." [, in addition to provision for support.]

Section 4

Section 4 was amended to read: "If the decedent [dies intestate leaving] leaves a [surviving] spouse and no issue, the [surviving] spouse shall have all of the net intestate estate of the decedent." [, in addition to provision for support.]

Section 5

Section 5 was amended to read: "The part of the net intestate estate not passing to a [surviving] spouse shall pass:

(1) To the issue of the [intestate] decedent equally if they are in the same degree of kinship, or if in unequal degree, [those of] to the issue of more remote degree [take] by representation;

(2) If no issue survives the [intestate] decedent, to the surviving parents of the [intestate] decedent; when both parents of the [intestate] survive, and they are married to each other, they shall take the real property as tenants by the entirety and the personal property as joint owners with the right of survivorship, [if they are married to each other;] otherwise they shall take as tenants in common;

(3) If no issue or parent survives the [intestate] decedent, to the issue of either parent by representations;

(4) If no issue, parent or issue of either parent survives the [intestate] decedent, to the surviving grandparents of the [intestate] decedent; [when grandparents of the intestate survive him] if they are married to each other, they shall take [the] real property as tenants by the entirety and the personal property as joint owners with the right of survivorship [,]; otherwise they shall take as tenants in common;

(5) If no issue, parent, issue of either parent or grandparent survives the decedent, equally to the issue of deceased grandparents in the nearest degree of kinship to the decedent to and including the fifth degree as provided in ORS _____, without representation;

There was considerable discussion of whether or not subsection 4 of section 5 accurately expressed the policy desired by the committees. There was discussion over whether or not half bloods were treated the same as whole bloods and whether or not they should be. No final decision was made.

(6) There were no changes in subsection (6).

Section 6

Frohnmayer explained that the definition of "representation" in the Wisconsin code also set forth a chart to trace degrees of kindred. He said that both he and Piazza favored such a provision in the Oregon code. He also indicated that they would set forth a chart with somewhat more elaboration than the present Wisconsin code.

Zollinger expressed reluctance to set forth a diagram or chart in the code. He explained that a chart would not be in harmony with the existing code, and expressed his reluctance to add a diagram chart. No definite action was taken but most of the members of the committees seemed to favor having a chart or diagram in the proposed code.

Section 6 was amended to read:

"Representation" [refers to a] means the method of determining distribution [in which] when the [takers] distributees are in unequal degrees of kinship [with respect] to the [intestate] decedent and is accomplished as follows: After first determining who are in the nearest degree of kinship of those entitled to share in the net estate, the net estate is divided into equal shares, the number of shares being the sum of the number of living persons [who are] in the nearest degree of kinship and the number of persons in the same degree of kinship who died before the [intestate] decedent, [but who] and left issue surviving the intestate. Each share of a deceased person in the nearest degree of kinship [shall in turn be] is divided in the same manner among his surviving children and the issue of his children who have died leaving issue [who survive the] surviving [intestate] decedent. This division [shall] continues until each portion falls to a living person. All distributees except those in the nearest degree of kinship take by representation."

There was discussion concerning whether or not there should be included in the definitions section a definition of "intestate", and whether that definition should provide for both intestate and partially intestate situations. No definite action was taken.

Section 7

Section 7 was amended to read:

"As used in section 5, the degree of kinship [computed according to the rules of the civil law] is determined by counting upward from the [intestate] decedent to the nearest common ancestor and then downward to the relative, the degree of kinship being the sum of the counts [:],as follows:" [Note: There would be a diagram or chart here illustrating the manner of determining the count].

Section 9

Section 9 was amended so that "intestate" was replaced by the word "decedent" in every place that the former word appeared.

Section 10

There were no changes in section 10.

Section 11

Section 11 was amended to read:

"A person related to the intestate through more than one line is entitled only to the share which is the largest."

Proposed Official Comments to Probate Code Revision Project

Frohnmayer read the official comments that he had prepared to explain the changes made by the committees in the chapter dealing with intestate succession. The members expressed their approval of the comments and it was the general concensus of opinion that the new code should have appropriate comments concerning each chapter.

Illegitimacy [Note: This is the draft dated May 7, 1967, and distributed to all members of the committees prior to the May 19,20, 1967 meeting.]

After reading the draft, and discussing the wording "For the purpose of inheritance to, through and from an illegitimate child:" that is the beginning of the draft on illegitimacy, the committees adjourned at 5:00 p.m. until the following morning.

The meeting was reconvened at 9:00 a.m., Saturday, May 20, 1967, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Frohnmayer, Husband, Lisbakken and Mapp. Carson, Gooding, Jaureguy and Riddlesbarger were absent.

The following members of the Bar committee were present: Braun, Gilley, Krause, Kraemer, McKenna, Piazza, Thomas and Bettis. Biggs, Lovett, Meyers, McKay, Mosser, Silven, Thalhofer, Pendergrass, Richardson, Copenhaver and Warden were absent. Also present was Sorte from Legislative Counsel Committee.

Illegitimacy (continued)

After discussing the possibility of a father of an illegitimate child marrying the mother after the death of the illegitimate child, for the sole purpose of inheritance, it was decided that the rights of the father and the illegitimate child are fixed at the time of death, so that there is no real chance of the father taking advantage of an event of that kind. Gilley moved that the subsection (2) of section 1 be amended as follows: "(2) The child shall also be treated as the legitimate child of the father if: [during the lifetime of the child] The motion failed.

Mapp called attention to the fact that the courts construe statutes dealing with illegitimacy strictly, and he raised the question of what the words "by", "through" and "from" mean when referring to inheritance of the illegitimate and the parents of the illegitimate. Mapp then called attention to the wording of the Model and Wisconsin codes.

Piazza called attention to the fact that the other codes seemed to go into a good deal more detail spelling out the rights of the parties in such a situation.

Allison advised the committees that under the existing Oregon law the rights of the illegitimate child are provided for, and that perhaps the existing provisions should not be changed.

Zollinger asked whether it would be better to have a general provision to the effect that the child shall be treated as the legitimate child for all purposes, or whether it would take more elaboration than that. He was also of the opinion that the Wisconsin code adequately spelled out the rights and duties of an illegitimate child

and the parents of the child.

Frohnmayer suggested that the matter be left as is until after Mapp attends the session in Colorado, and then the committees reconsider the draft and compare it to the draft of the Uniform Probate Code Committee. Dickson agreed that the matter should be left to Mapp and Allison.

Piazza called attention to the fact that there are several different provisions in the code dealing with illegitimacy, and that he believed all of them should be reviewed and compared to the section dealing with the right of an illegitimate to inherit.

Krause said that the provision allowing the father to express the fact of his paternity in writing was too loose. He cited as an example a postcard written by a purported father in which the purported father might allude to the fact that he was the father. Others were of the opinion that such a set of facts, without other proof, would not persuade the court.

Official Comment Concerning Illegitimate Children

Frohnmayer read his proposed official comment on the rights of a illegitimate child, and the committees expressed their approval with minor changes.

Adopted Children

Frohnmayer read his proposed official comment on the section dealing with the rights of adopted children. Zollinger suggested that there be further explanation for the distinction made in the section for adjudication in the case of the natural mother and that of the natural father. Frohnmayer said that he would revise the comment to explain that with the father there is more chance of fraud and therefore a distinction.

McKenna questioned the wording that the illegitimate child shall "be considered" the natural child. He said he would prefer the code as it is presently worded as the language is stronger as to the rights of the illegitimate child. Frohnmayer suggested the wording "child shall be treated as the natural child." Kraemer suggested that the statute provide that the illegitimate child is the natural child. The committees decided to postpone further discussion of the matter until Mapp returns from

the sessions in Colorado.

Advancements [Note: Appendix A of these minutes is a draft on advancements. The members of the Advisory and Bar Committees should replace tab number 4 of the book of drafts with the appendix]

Frohnmayer read the draft. He said that he and Piazza had discussed subsection (4) of the draft, and had decided that the value of an advancement should be the value of the property as of the date of the advancement or the date when possession and enjoyment of the property passes to the advancee, whichever occurs first. As the draft is, in its present form, the advancement would be valued as of the date of the advancement, and this would be true even if possession and enjoyment were deferred for a considerable period of time.

Braun asked how the statute would be applied in a situation where there was a gift but the expression of the grantor was not made for several years after the gift was made. Frohnmayer said that he would think that the gift would be given the value as of the date that the grantor expressed the fact that the gift was an advancement.

Zollinger was of the opinion that the grantor should be forced to declare a gift intended to be an advancement at the time it is made or not at all. Frohnmayer disagreed. He cited an example of a person giving one of several children, substantial sums, over a long period of time, and suddenly realizing how unfair this was to the other children. He said that such a person should be able to make the written declaration of advancement at any time.

Frohnmayer read and said that he approved of the approach of Wisconsin and Iowa, that is to wait until the advancee has the possession and enjoyment to place a value on the advancement. Otherwise, where a person retains a life estate, reserving a remainder, the life estate would have to be valued. Frohnmayer moved that the committees approve the policy approach of Wisconsin and Iowa. The motion was seconded by Zollinger and carried.

Zollinger raised the question of the distributive share of the children of a deceased advancee. He asked for an expression of opinion as to whether or not the children of the advancee should receive a smaller proportional share because of the advancement to their

parent. Allison said that he would not penalize the children of the advancee because of the action by the advancee. He said he would favor disregarding the advancement in such a situation. Dickson agreed. Thomas said that it bothered him because to disregard an advancement if the advancee predeceases the grantor is to put a premium on the advancee receiving money from the grantor and spending it. Frohnmayer favored Allison's suggestion.

Zollinger suggested deleting "gratuitious" preceding transfer. Mapp disagreed and said that the word was essential to the theory of an advancement.

Allison suggested defining "advancement" in the first section of the draft on advancements.

Husband was of the opinion that if the person making a transfer of property wants it to be treated as an advancement he can make a will and indicate that intention.

Frohnmayer moved that the matter be referred back to him for redrafting, and the motion passed.

Feloneous Death

Frohnmayer explained to the committees that although he had not been assigned the discussion of the matter of feloneous death, that he and Piazza had reviewed the draft and would proceed to discuss the matter. Frohnmayer noted that the matter of feloneous death had much broader ramifications than those involved in probate situations. He said that when the matter had been initially discussed in August and September of 1965 the committees had spent many hours discussing the problem of whether conviction was required before the provisions of the statute would become applicable. He said that there are situations where there is a criminal conviction of a felony death and yet the slayer sues an insurance company and convinces the jury that he did not feloneously slay the other party. He said that the prior discussions had convinced the members that they could not set any rule on this point.

Allison said that the present provision in the Oregon probate code already goes further than a feloneous death for just probate situations.

Dickson called attention to an Oregon case that held that you cannot deprive a person of property because that

person caused a feloneous death, however, you can deprive the killer of the right to succeed to property.

Frohnmayer agreed that the present Oregon case law prohibits taking property from the slayer. He indicated that the slayer would have the right to an undivided life interest in jointly owned property until his death at which time the heirs of the person slayed would succeed to the slayer's one half interest.

Thomas asked why the interest is only for the life-time of the slayer and Zollinger replied that the statute could not deprive the slayer of due process of law.

Feloneous Death, Section 4

Subsection (5) of section 4 was amended to read:

"(5) Property in which the slayer holds a reversion or vested remainder held by a third person for the life-time of the decedent continues in that person for a period of time equal to the normal life expectancy of a person of the sex and age of the decedent at the time of death."

Subsection (6) of section 4

There was added to subsection (6) of section 4 a subparagraph (c) to replace existing (c) and the present subparagraph (c) was changed to subparagraph (d). The new subparagraph (c) now reads:

"(c) To the appointees if the power has been exercised."

The new subparagraph (d) (formerly subparagraph (c) now reads:

"(d) In any case the property or any benefit there-in does not pass to the slayer."

Zollinger asked for an opinion of the committees as to whether or not the probate code should provide for the rights of parties after one party feloneously slays another party. He suggested the committees consider either placing this in the probate code, or, as an alternative, having a separate proposal.

Allison expressed the view that it would be better

to have the subject of feloneous death in the probate code rather than approach the legislature with a number of separate proposals.

The meeting adjourned for lunch at 12:15 p.m.

The meeting was reconvened at 1:45 p.m. The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Frohnmayer, Jaureguy, Lisbakken and Mapp. Carson, Gooding, Husband and Riddlesbarger were absent.

The following members of the Bar committee were present: Braun, Gilley, Kraemer, Piazza, Thomas and Bettis. Biggs, Krause, Lovett, Meyers, McKay, Mosser, McKenna, Silven, Thalhofer, Pendergrass, Richardson, Copenhaver and Warden were absent.

Also present was Sorte.

Wills

The subject of wills was placed on the agenda for the June 1967 meeting.

Powers and Duties of Court

There was some discussion of the chapter on the powers and duties of the court, but because the members felt it desirable to defer the matter until after reviewing changes made in the 1967 legislature, the matter was postponed until a later date.

Rights of Aliens to Inherit

The subject of the rights of aliens to inherit was passed because of previous committee action at the February, March and April, 1967 meetings of the committees.

Uniform Simultaneous Death

Because of action of the committees at the April 1967 meeting further consideration of the Uniform Simultaneous Death Act was temporarily passed.

Missing Persons (ORS Chapter 127)

Mrs. Braun and Mr. Gilley reported to the committees

that they had studied the matter of incorporating the chapter on missing persons into the guardianship chapter, and that they felt that this could be accomplished with relatively few changes. They proposed that there be a definition of missing persons, and that the section allowing the appointment of a general guardian provide that a guardian could be appointed when a person was missing as defined. They added that several other sections of the guardianship code would have to be amended, but that the changes would be relatively minor and would allow repeal of the present ORS chapter 127.

A motion was made, seconded and carried that the chapter on missing persons, (ORS 127) be incorporated into the existing guardianship law. The matter was referred to Mrs. Braun and Mr. Gilley for further study and a report at the June 1967 meeting.

The following matters were scheduled for the June 16,17, 1967 agenda:

1. Minutes of the May 1967 meeting.
2. Miscellaneous matters.
3. Wills (Discussion to be led by Mr. Riddlesbarger).
4. Election against Will and Dower and Curtesy (Discussion to be led by Mr. Allison).
5. Initiation of Probate (Discussion to be led by Mr. Gilley and Mr. Krause).
6. Family Support (Discussion to be led by Mr. Zollinger).
7. Title to Property (Discussion to be led by Mr. Frohnmayer).
8. Powers and Duties of Personal Representative (Discussion to be led by Mr. Butler).
9. Outline of Chapters of proposed Oregon probate code.
10. Conserving Property of Missing Persons (Chapter 127, Report by Mrs. Braun and Mr. Gilley).
11. Advancements (Mr. Frohnmayer).
12. Next meeting.

The meeting adjourned at 3:15 p.m.

APPENDIX A
(Minutes, Probate Advisory Committee Meeting, May 19, 20, 1967)

Proposed revised Oregon probate code
ADVANCEMENTS
1st Draft
January 11, 1967

This draft is based primarily on the draft prepared by Mr. Frohnmayer and distributed to the committees prior to the December 1965 meeting and discussion of the content thereof at the February 1966 meeting. The draft is an appendix to the February 1966 minutes.

Section 1. Advancements. (1) If a decedent dies intestate as to his entire estate, property transferred during his lifetime as an advancement to a person entitled to inherit a part of the estate shall be counted toward the intestate share of the advancee and, to the extent that it does not exceed the intestate share, shall be included in computing the estate to be distributed.

(2) A gratuitous inter vivos transfer of property is not an advancement unless the decedent expresses that intention in writing or the advancee acknowledges the advancement in writing.

(3) If an advancee dies before the decedent, leaving lineal descendants who inherit from the decedent, the advancement shall be considered as if it had been made to the descendant for purposes of that inheritance. If the descendant is entitled to a smaller share of the estate of the decedent than the advancee would have been entitled, the descendant shall be charged with the proportion of the advancement as the amount he would have inherited in the absence of the advancement bears to the amount the advancee would have inherited in the absence of the advancement.

(4) An advancement shall be valued as of the date of the advancement.

References: Advisory Committee Minutes:
9/18/65, p. 7; and Appendix
2/18, 19/66, pp. 22 to 24; and Appendix

ORS 111.110 to 111.170

Comment: Is the transfer of property only considered an advancement if it is gratuitous? If so, would this word be more properly placed in subsection (1) rather than (2)?

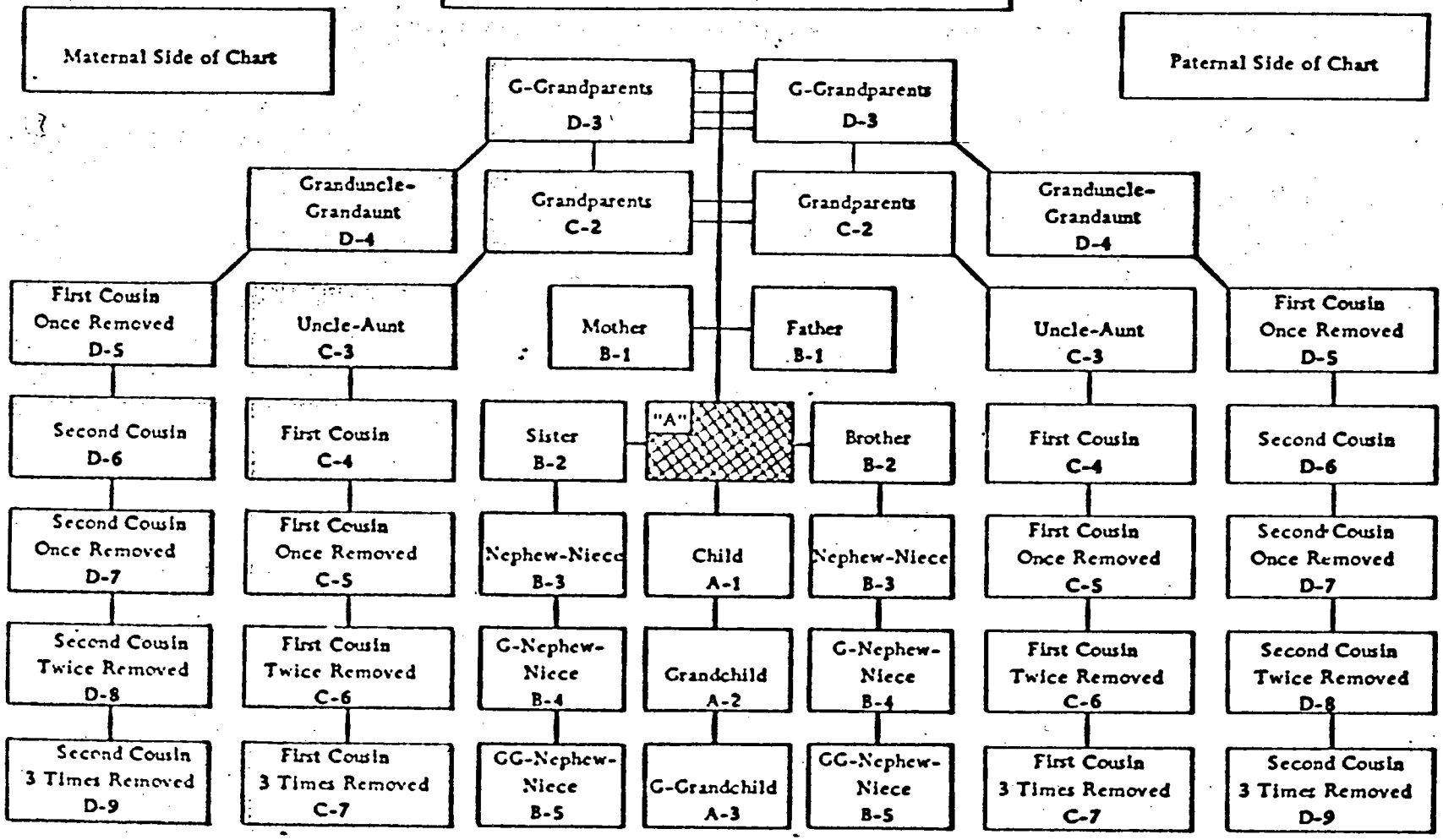
Could subsection (2) be stated in the affirmative rather than the negative, for example: "A gratuitous inter vivos transfer of property is an advancement only if decedent expressed that intention in writing or the advancee acknowledges the advancment in writing"?

Does the time of the instrument in which the decedent states his intention or the advancee acknowledges the advancement have any significance? In other words, could the deed be made on one day, and a year later in a separate memorandum the decedent state that it was his intention that the property transferred in the deed was an advancement?

Section 2. Repeal of existing statutes. ORS 111.110, 111.120, 111.130, 111.150, 111.160 and 111.170 are repealed.

Comment: This draft follows the draft prepared by legislative counsel which was in turn based on the draft discussed at the February 1966 meeting of the committee and printed as an appendix to the minutes thereof.

THE BAKER CHART
ANCESTORS AND NEXT OF KIN UNDER THE CIVIL LAW
(REVISED)



KEY TO CHART

Maternal Kin of "A". ☐

"A" designates lineal Descendants of "A".

Immediate Family of "A" ☐

B, C, D, etc. identifies nearest ancestors in common with "A". Members of "A's" immediate family cannot be said to be on either Paternal or Maternal side.

Paternal Kin of "A". ☐

1, 2, 3, etc. indicates Degree of Kinship to "A".

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PROPOSED OFFICIAL COMMENTS TO PROBATE CODE REVISION PROJECT

I.

INTESTATE SUCCESSION

1. For Summary of Chapter.

This chapter is a major revision of the existing Oregon law of intestate succession. In the drafting of these proposals, the committee was guided by the following objectives: First, to eliminate the complexities of the provisions for dower and curtesy; second, to treat similarly the provisions for the descent and distribution of real and personal property; third, to augment the share of the surviving spouse and minor children in the case of intestacy; fourth, to clarify language throughout where necessary to eliminate ambiguities and inconsistencies; and fifth, to eliminate some of the more archaic provisions of the law.

2. Comment to Section 1.

The use of statutory definitions in legislative acts promotes clearness in the meaning of the text of laws dealing with technical matters. The new Oregon probate code would follow the pattern of Iowa, Washington, Wisconsin and the Model and Uniform probate codes in placing a comprehensive definition section at the beginning of the code.

3. Comment to Section 2.

The revised draft deals throughout with the concept of the net estate. Section 2 defines the net intestate estate and specifies that any part or all of an estate as to which there is no will, or a will not making an effective disposition, will be dealt with under the provisions of the intestate succession chapter. This chapter is designed primarily for the small estate with normal family relationships; persons in the middle and upper wealth brackets are increasingly aware of the need for wills and estate planning. In most small estates the decedent wishes his spouse to have the bulk of the estate. Under the following provisions several significant changes are generally evident:

(a) All property is treated identically as part of the net estate. There is no priority, as between types of property for the payment of debts or claims and, unlike the present Oregon code, no difference in the shares of real and personal property receivable by the intestate heirs.

(b) Any system of intestate succession is to a certain extent arbitrary. The shares in any system of descent may alter radically upon the contingency of some person in a closer degree of kindred having predeceased the intestate.

The revised law attempts to approximate as closely as possible the desires of the average intestate. Any intestate succession statute can be defended on the grounds that the owner of wealth may make a different disposition if he wishes merely by executing a will, but the fact remains that many people do not make such wills and that human inertia is such that the situation is not likely to change greatly. Hence the intestate succession law--the "will" made for people by the law--must attempt to anticipate the wishes of people who die having made no testamentary disposition. No statute can anticipate all of the varing desires, facts and circumstances which surround testamentary dispositions without becoming unduly complex. The same statute must serve for the young man with a wife and minor children and for the older retired man whose children are grown and self-supporting, for a man with small resources and for the man with a fortune, for the man who has married several times and for the person who has never married. Any statute can be criticized because it does not satisfactorily meet some unusual situation. Generally, however, wealthy individuals have greater reason to execute wills, and the statute should, therefore, be designed with the moderate and small estate in mind. The existing statutes were drawn a century ago when the family was more independent and when attitudes toward ownership by a widow were different from modern views. Hence modern wills give a better indication to the proper pattern of descent than do present statutes.

(c) Existing Oregon law treats real property differently than personal property. These distinctions are products of our inherited system of descent and distribution, drawn from the English law of prior centuries and abandoned in England by statute in 1925. The result of these inherited and amended provisions is that inheritance rights are dependent upon the kind of property owned by the decedent. There is no longer any sound policy reason for retaining these distinctions, and the modern trend, embodied in this chapter, is toward a single system of inheritance (intestate succession) with abolition of common law dower and curtesy. The "net estate" concept is used to refer to the amount which should descend or be distributed. Support rights are rights or interests in addition to those which descend or are distributed as part of the net estate.

4. Comment to Section 3.

This section increases the amount passing to the widow where there is surviving issue. It attempts to provide adequately for the person closest to decedent and most likely to be dependent upon his estate for continued financial security. Particularly where the estate is small it is desirable to increase the share of the surviving spouse.

5. Comment to Section 4.

Section 4 preserves existing Oregon statutory law regarding the share of the surviving spouse when decedent leaves no issue. See ORS 111.020(2) and ORS 111.030(4).

6. Comment to Section 5.

This section involves several changes in Oregon law which modernize it to be more consonant with current thought on the distributional schemes most likely to approximate the wishes of the average intestate. Section 5 describes the scheme of distribution both in the case where decedent has left a surviving spouse and issue and in the situation where there is no surviving spouse but where issue or other kindred of the decedent survive. Subsection 1 retains the priority given in existing Oregon law to the issue of the intestate. It also codifies, in the definition of "representation" in section 6, existing Oregon law as to the meaning and operation of the right of representation. All of the shares are calculated with reference to the net estate of the decedent. Under existing Oregon law the rights of lineal descendants where decedent leaves a spouse are subject to a right of dower or curtesy with respect to the real property and in cases of intestacy to inheritance of one-half the personal property. Under the proposed law where there is a surviving spouse, the rights of issue (lineal descendants) are subject only to the one-half undivided interest in the net estate of the surviving spouse.

Subsection 2 preserves existing Oregon law, see ORS 111.020(2) and (3). This section in addition specifies the form of ownership of the property both when the surviving parents are married to each other and when they are not married.

Subsection 3 is consistent with existing Oregon law, ORS 111.020(3) in that it provides for the brothers and sisters of the intestate. It differs from existing Oregon law, however, in giving priority to all of the issue of the parents of the intestate, even when no brothers or sisters are living. Under existing Oregon law the issue of deceased brothers or sisters of decedent may take only by right of representation. In the event that all brothers and sisters should have predeceased the decedent, their descendants, if any, do not presently take by right of representation but only as next of kin. See I Jaureguy and Love, Oregon Probate Law and Practice section 12 at page 16-17 (1958). In the proposed section all issue of the parents of the decedent, including nephews and grandnephews, who are in the fourth and fifth degrees of kindred respectively would take to the exclusion of grandparents, aunts and uncles and first cousins of the deceased even though the latter are, respectively, in the second, third and fourth degrees of kindred

from the deceased. In providing for the right of representation, as to the issue of the parents of decedent, the proposed section represents a change from the existing statute, which is limited to the brothers and sisters of the intestate and to the issue of any deceased brother or sister by right of representation. By specifying "issue" of the parent, rather than brothers and sisters of the deceased, the statute's wording is clear that any lineal descendants of the intestate's parents, rather than merely his brothers and sisters, are entitled to take under this section either directly or by right of representation. This is contrary to existing Oregon case law, Bones v. Lollis, 192 Or. 376, 234 P2d 788; Andrews v. First Nat. Bank of Eugene, 192 Or. 230, 234 P2d 791; Op. Atty. Gen. 1934-36, P. 602. Those authorities have held that if decedent left nieces and nephews and also grandnieces and grandnephews the latter would take nothing even though their parents predeceased the intestate. Under the proposed statute the latter would be able to take by right of representation.

Subsection 4 is new but only declaratory of existing Oregon law since a grandparent is the nearest in degree if a decedent left no surviving spouse, parents, issue, brothers or sisters or issue of brothers and sisters. The subsection also specifies parallel to that for parents, the form of property ownership of the grandparents.

Subsection 5 limits inheritance to relatives claiming through the intestate's grandparents and within the fifth degree of kindred or less. More remote relatives are excluded. In recent years there has been a trend toward limiting inheritance by remote relatives under the intestacy laws. New York, by chapter 712 affective September 1, 1963, has adopted new rules of descent and distribution which eliminate collaterals in lines more remote than that of the grandparent. Likewise the proposed probate code of Wisconsin, section 852.01(2) limits inheritance by remote relatives unless within the fourth degree of kinship or less. Limitations on inheritance by collateral kindred were proposed in the Model Probate Code in 1946 and adopted in a slightly different form in Pennsylvania in 1947 and in Indiana in 1953. See report no. 1.1B of the New York Commission on Estates.

These limitations on inheritance were proposed for the following reasons:

(a) In modern times, with increased mobility and loss of close contact due to urbanization, the "family" is more restricted in size. Ties with remote relatives are weakened. Very few people can even name their second cousins. Normally a decedent does not want his property to pass to these remote relatives; if he does, he can easily make a will picking out

those he wishes to favor.

(b) Conversely the remote relative has no claim on a decedent's property. He is not likely to be dependent or to have rendered any of the services which might lead to an expectation of inheritance. Frequently he learns of his relationship to decedent only after the latter's death. For this reason he has been sometimes referred to as "the laughing heir". The inheritance is a mere windfall.

(c) With mobility of persons it is increasingly difficult to trace remote relatives. This increases the cost of settling estates, including those in which decedent left a will and made no provision for his relatives for the very reason that they were remote. Even with a will, these remote heirs must be notified as a matter of due process. Remote relatives often are foreign citizens, complicating the problems of notifying them and transferring property to them.

(d) Remote relatives having standing to contest wills may promote vexatious litigation for its nuisance value in the hopes of getting a settlement, even they have no possible moral claim to a share in the estate. A statute limiting inheritance by remote relatives thus in some measure will cut down on will contests.

(e) Although it is often said that escheat is not favored, a person's obligations to the community in which he lives may be far stronger than those to remote relatives of whom he has long ago lost track. It must always be remembered that the decedent can prevent escheat by making a will leaving the property as he pleases to remote relatives or to friends or to charity.

(f) Two other archaic doctrines are eliminated by the present provision. First, such remants of the doctrine of Ancestral Estates as exist in present ORS 111.020(5) and discussed in Cordon v. Gregg, 164 Or. 306, 97 P2d 732, 101 P2d 414(1940), discussed in I Jaureguy and Love, Oregon Probate Law and Practice, section 15, pages 19 through 22, criticized and noted, 20 Or. L. Rev. 164 (1940). The proposed section also makes no such distinction as exists in present ORS 111.020(4) between next of kin and equal degree claiming through different ancestors. Hence the nearer ancestor rule as it exists in present Oregon law is abolished. Since inheritance by more remote collateral relatives is in any event limited by the proposed statute, there is no occasion for the nearer ancestor rule to arise.

Subsection 6 provides for escheat if the decedent leaves no surviving relatives within the preceding subsection. It is similar to the provision of ORS 111.020(6) and 111.030(5) except for the limitations on inheritance by more remote collateral relatives.

7. Comment to Section 6.

This section defines "representation" in greater detail than does present ORS 111.010(4). This definition is consistent with the present interpretation of Oregon law. See I Jaureguy and Love, Oregon Probate Law Practice, sections 9 and 10 (1958). This definition makes it clear that the pattern of stirpital distribution is to be determined at the level of the nearest living lineal descendant of the intestate, rather than at the level of the decedent's children, regardless of whether or not they predeceased decedent. The proposed definition is taken from Model Probate Code, section 22(c) and prevents the anomalous result of such cases as Maud v. Catherwood, 67 Cal. App. 2d 636, 155 P2d 111 (1945), noted 33 Calif. L. Rev. at 324 (1945). Since the operation of the right or representation may differ depending upon the stirpital level chosen as the root generation, it is desirable to specify the level in the definition. The present definition has been adopted by the tentative drafts of the Uniform Probate Code.

8. Comment to Section 7.

Section 7 represents the codification of existing Oregon law. The phrase "degree of kindred" is presently defined and interpreted in ORS 111.040. Supplemental wording defining the precise civil law method of computation is taken from the Model Probate Code of 1946, section 22(b) (5) at page 61. Washington has adopted a similar definition, Washington Probate Code, section 11.02.005(5).

9. Comment to Section 9.

Section 9 is consistent with the rule of construction in existing Oregon law laid down by section 111.010(5).

10. Comment to Section 10.

Section 10 is consistent with present Oregon law in ORS 111.040.

11. Comment to Section 11.

Section 11 is new.

PROPOSED OFFICIAL COMMENTS TO PROBATE CODE REVISION
PROJECT PROPOSAL #4

III.

INHERITANCE BY, THROUGH AND FROM AN ILLEGITIMATE CHILD

This section makes specific the inheritance rights of illegitimate children. The problem of illegitimate children is growing in incidence. It is important to modernize our statutes by, through and from illegitimate persons. Although illegitimacy is still against public policy, any change in the inheritance laws will not promote illegitimacy but merely protect the innocent child. In many jurisdictions the ancient stigma attaching to illegitimacy bars inheritance from collateral relatives, either through the mother or through the father. In light of the changing social attitude toward the illegitimate child, the right of the illegitimate child to inherit from collateral relatives ought to be expanded. Accordingly, this section allows inheritance through the mother in any case and through the father in a situation where the father has been established as provided in subsection 2.

PROPOSED OFFICIAL COMMENTS TO PROBATE CODE REVISION
PROJECT PROPOSAL #3

II.

INHERITANCE BY, THROUGH AND FROM AN ADOPTED CHILD

This section governs the effect of adoption on inheritance. It deals with the status of an adopted person for purposes of inheritance by such person from his adoptive relatives, by adoptive relatives from the adopted person (such as his children) and broadens the coverage to secure the rights of those claiming through the adopted child. This section generally terminates the relationship between an adopted person and his natural parents. The statute preserves the relationship only in the limited situation where a natural parent marries or remarries and the child is adopted by the stepfather or stepmother. This latter exception is consistent with the result reached by the Oregon Supreme Court in the case of Hood v. Hatfield, 235 Or. 38, 383 P2d 1021 (1963), noted 43 Or. L. Rev. 88 (1963) and it explicitly codifies the result of that case.

OFFICIAL COMMENTS TO COMMITTEE PROPOSAL ON ADVANCEMENTS

1. Comment to Section 1.

(a) This section changes present Oregon law in ORS 111.110 by expanding the doctrine of advancements to any person taking by intestate succession as opposed to the present limitation to the issue of the intestate.

(b) Since the intestate's share of real and personal property will be the same for all takers under the descent and distribution provisions, there is no need to distinguish between the real and personal property as is done in present ORS 111.150.

(c) Unlike the Iowa Code, Washington Code and Model Probate Code, this draft does not specify that the person to whom the advancement was made must have been entitled to inherit a part of the estate had the intestate died at the time of making the advancement. It would expand the doctrine of advancements to apply to persons who would not have been heirs had not the intestate died at the time of the advancement but who subsequently became heirs prior to the death of the intestate.

(d) This section specifies that the doctrine of advancements applies only to intestacy and only to persons sharing in the estate of one who has died intestate as to his entire estate. This limitation would not, however, seem to affect the holding of Clark v. Clark, 125 Or. 333, 342, 267 P. 534, 537, that a will might direct that a previous gift be considered an advancement in the determination of the shares into which an estate is to be divided.

2. Comment to Section 2.

This draft follows the approach of proposed Wisconsin probate code, section 852.11(1). The Iowa, Washington and Model probate codes provide that the presumption of a gift is rebuttable. However, the Wisconsin code is in accord with the more limited application of the statute of frauds already existing in Oregon law, ORS 111.120. Since the Wisconsin code represents the latest thinking on the matter and since the present draft does not change existing Oregon law, it would seem to be the preferred approach. The early case of Seed v. Jennings, 47 Or. 464, 83 P. 872 (1905) is in conflict with both the old Oregon statute and this new provision. That case suggested the common law presumption that the voluntary conveyance of property by a parent to a child is presumed to be an advancement, unless it is proved to be a gift. This dictum was contrary to the statute in force at the time and would, in any event, be overruled by the proposed version which reverses the presumption and makes it rebuttable only by evidence in writing.

3. Comment to Section 3.

This section is a substitute for ORS 111.170 and is consistent therewith. It is virtually identical to the Model Probate Code, section 29(c), Iowa Code, section 226, Washington Code, section 11.04.041. The person to whom an advancement is made is charged for it whether he takes per capita or by representation. See generally, Model Probate Code's comment at page 67. For a contrary approach see first tentative draft of revised part 2 Model Probate Code (July 10, 1966), section 211(c) which provides that if the advancee dies before the intestate, the advancement shall not be taken into account in determining descent and distribution of the net intestate estate.

4. Comment to Section 4.

This section adopts subsection (d) of section 310 of a preliminary draft of the Uniform Probate Code. The first tentative draft of the revised part 2 of the Model-Uniform Probate Code (July 10, 1966), section 211(b), however, states a different rule. It provides "The advancement shall be considered as of its value at the time when the advancee came into possession or enjoyment or at the time of the death of the intestate whichever first occurs." The latter approach is also that of the Washington, Iowa and Model probate codes. Section 4 above changes present Oregon law (ORS 111.160) which provides for valuation by the donor or donee in any one of three different writings or its estimated value when granted. The former method presents the possibility of inconsistent valuations arising from each of the authorized writings. In 1 Jaureguy and Love, Oregon Probate Law and Practice, sections 41-46, this problem is noted. The section here obviates the problem and provides only for an objective determination of the value of the advancement at one point in time.

ADVISORY COMMITTEE

Probate Law Revision

Thirty-seventh Meeting
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Dates)	1:30 p.m., Friday, June 16, 1967
and:	and
Times)	9:00 a.m., Saturday, June 17, 1967
Place:	Judge Dickson's courtroom 244 Multnomah County Courthouse Portland, Oregon

Suggested Agenda

1. Minutes of the May meeting.

2. Miscellaneous matters.

3. Wills (Discussion to be led by Mr. Riddlesbarger).

4. Election against Will and Dower and Curtesy (Discussion to be led by Mr. Allison).

5. Initiation of Probate (Discussion to be led by Mr. Gilley and Mr. Krause).

6. Family support (Discussion to be led by Mr. Zollinger).

7. Title to Property (Discussion to be led by Mr. Frohnmayer).

8. Powers and Duties of Personal Representative (Discussion to be led by Mr. Butler).

9. Outline of Chapters of proposed Oregon probate code.

10. Conserving Property of Missing Persons (Chapter 127, Report by Mrs. Braun and Mr. Gilley).

11. Advancements (Discussion to be led by Mr. Frohnmayer).

12. Next Meeting.

ADVISORY COMMITTEE
Probate Law Revision

Thirty-seventh Meeting, June 16 and 17, 1967
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The thirty-seventh meeting of the advisory committee (a joint meeting with the Committee on Probate Law and Procedure, Oregon State Bar) was convened at 1:30 p.m., Friday, June 16, 1967, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Jaureguy, Lisbakken and Riddlesbarger. Carson, Frohnmayer, Gooding, Husband and Mapp were absent.

The following members of the Bar committee were present: Braun, Gilley, Kraemer, Lovett, Meyers and Richardson. Bettis, Biggs, Copenhaver, Krause, McKay, McKenna, Mosser, Pendergrass, Piazza, Silven, Thalhofer, Thomas and Warden were absent.

Also present was Robert W. Lundy, Legislative Counsel.

Miscellaneous Matters

Lundy reported that the presiding officers of the Oregon legislature, acting in the current absence of a Legislative Counsel Committee, had approved reimbursement from Legislative Counsel Committee funds for expenses incurred by Mapp in attending the work session of the Reporters on the proposed Uniform Probate Code, from June 12 to July 15, 1967, at the University of Colorado Law School in Boulder, Colorado. Dickson noted that he had received a post card from Mapp,in which the latter indicated he had become an active participant in the work session, rather than merely an observer. Mapp's Colorado address is: Thomas W. Mapp, Uniform Probate Code Project, Kittredge Halls, Boulder, Colorado 80302.

Lundy reported that the legislative presiding officers also had approved the engagement of Allison's services to prepare a final draft of a revised Oregon probate code to be proposed by the advisory committee and submitted to the Law Improvement Committee. Lundy indicated that compensation for Allison's services and incidental secretarial and other

expenses would be paid from Legislative Counsel Committee funds allocated to the Law Improvement Committee and law revision program. Allison commented that he had been provided with office space (Room 251) in the courthouse across the hall from Dickson's courtroom, and had obtained the part-time services of a secretary and other facilities to assist him in his work.

Allison outlined the procedure he planned to follow in his drafting work on the proposed revised probate code. He indicated that, following consideration by the committees of the drafts contained in the blue notebooks distributed to members before the May 1967 meeting, he would proceed to revise those drafts in accordance with action thereon by the committees and make such changes in form and wording as were necessary to achieve clarity in meaning and other aims of good draftsmanship. He stated that he would then send the revised drafts, together with any necessary explanation of changes or questions, to those members of the committees who originally had worked on the areas covered by the drafts, with the request that those members review the revised drafts and offer suggestions and comments. Following this review by the particular members concerned, Allison indicated, he would again revise the drafts, if necessary, and lay them aside for incorporation in a final draft of the proposed revised code and subsequent consideration by the committees as a part of a whole.

Allison indicated that responses relating to his revised drafts by members of the committees who reviewed those drafts, as well as other correspondence to him by members, should be addressed to him at 251 Multnomah County Courthouse, Portland, Oregon 97204, in care of Department No. 7, Circuit Court, Fourth Judicial District.

Zollinger remarked that one of the most important tasks of the committees was to promote acceptance of the proposed revised probate code, and that a significant aspect of this task was the preparation and publication of good editorial comment on the parts and sections that ultimately make up the code. He suggested that the draftsman should assume some responsibility for such editorial comment, both in initial preparation thereof and in reviewing, evaluating and suggesting necessary revision of comment prepared by particular members of the committees on particular areas of the code. Dickson remarked that editorial comment should be available to the committees when they considered a final draft of the code. In response to an inquiry by Gilley, Dickson expressed the view, with which there appeared to be general agreement, that the editorial comment published should not reflect the differing

views of committee members on particular points, and that a united front should be presented on matters approved by a majority of the advisory committee. Riddlesbarger suggested that the editorial comment published in the study draft of the proposed Wisconsin probate code constituted a good model to follow in preparing editorial comment for the proposed Oregon code.

Dickson observed that when committee members accepted speaking engagements on the proposed revised code, a presentation limited to a half hour, for example, was inadequate for the purpose, and that more time should be sought. He suggested that the seminar approach, with several committee members involved, might be desirable.

Disposition of Human Bodies

Dickson referred to the provisions of ORS chapter 97 relating to the disposition of human bodies, and suggested that some clarification and improvement of these provisions might be considered as a part of the probate revision project. Allison indicated that he would note the matter for future consideration by the committees.

Wills

Riddlesbarger pointed out that the Legislative Counsel's office had prepared a first draft, dated January 30, 1967, relating to the subject of wills, and that this draft was contained in the blue notebooks distributed to members before the May 1967 meeting, following tab 10. He indicated that he had prepared a revision of that first draft, and proceeded to distribute copies of the revision to committee members present. [Note: A copy of Riddlesbarger's revision constitutes Appendix A to these minutes.] Riddlesbarger explained that, in the sections of the revision, words in parentheses were words of the first draft to be omitted, while words underscored were new words to be inserted.

Section 1. Who may make a will. Riddlesbarger suggested that consideration might be given to deletion of "or who has been lawfully married" from section 1 of the revision, noting that the comparable section of the proposed Wisconsin Probate Code (section 853.01) did not contain such a provision, but indicated that he did not recommend such deletion. In response to a question by Jaureguy, Lovett commented that the minimum age for marriage in Oregon was 18 for males and 15 for females, with consent, and that the minimum age in some other states was less than in this state.

Riddlesbarger explained his preference for "make a will" to "dispose of his property by will," commenting that the property disposition concept could be incorporated in the definition of the term "will" as a testamentary instrument disposing of one's property, or that merely appoints an executor, or that merely revokes or revives another will. Zollinger indicated that he favored retention of "dispose of his property by will" in section 1, and then adding to the section a second sentence defining the term "will," rather than having the definition in another section at the beginning of the proposed revised code. He expressed the view that the definition of "will" in section 3, 1963 Iowa Probate Code, was a satisfactory one. After further discussion, Riddlesbarger suggested, and it apparently was agreed, that section 1 should state that a person may by will dispose of his property, appoint (or nominate) an executor or revoke or revive another will, followed by a definition of "will" as including a codicil.

Section 2. Execution of a will. Riddlesbarger pointed out that section 2 of the revision would require a testator to publish the will in the presence of each of the witnesses. He expressed the view, with which Dickson agreed, that the witnesses should be made aware of what they were signing.

Zollinger suggested that "declare that the instrument is his will" be used in (1)(a) and (2)(a) of section 2, instead of "publish the will." He also suggested that "thereon" be substituted for "to the will" in the second sentence of (1)(d) of section 2.

The question of whether, in order to satisfy the requirement of publishing or declaring the will, the testator himself must state that the instrument is his will was discussed briefly. Riddlesbarger asked whether the testator might act through an agent in this regard; for example, a statement by the testator's attorney. Butler remaraked that such a statement by the testator's attorney in the presence of the testator, and the testator's failure to contradict such statement, might meet the requirement of declaring the will.

Braun and Richardson raised the question of instruments not wills but testamentary in nature and, in order to cover certain contingencies, executed with the same formalities as wills, and noted that such instruments could not be declared wills as required by section 2. Zollinger commented, and Dickson and Butler agreed, that such instruments should not be treated as wills, and that the testamentary purposes of such instruments could be accomplished by true wills in the event of any uncertainty.

Gilley and Richardson, referring to (2)(d) of section 2, expressed concern as to what acts would unmistakably indicate that the will had been signed by the testator or his proxy. After further discussion, Gilley moved, seconded by Braun, that (2)(d) of section 2 be deleted. Motion carried.

Section 3. Witness as beneficiary. Riddlesbarger explained the substitution of "gives" for "bequeathed or devised" in the last sentence of section 3 of the revision. Allison suggested it might be desirable to retain "bequeathed or devised." He also remarked that the last sentence might be relocated at the beginning of the section.

The definition of an interested witness in subsection (3) of section 853.07, proposed Wisconsin Probate Code, was discussed. Gilley moved, seconded by Zollinger, that the substance of the Wisconsin defintion be included in section 3. Motion carried.

Section 4. Validity of a will. The comment under section 4 of the first draft was discussed briefly. No change was made in section 4 of the revision.

Section 5. Testamentary additions to trusts. Riddlesbarger pointed out that subsections (7), (8) and (9) of section 5 of the first draft were not contained in section 5 of the revision. He suggested that subsection (7) was covered by section 21 of the revision, and that subsections (8) and (9) were not appropriate since section 5 differed from the Uniform Act in some respects. Zollinger expressed the view that subsection (8) appeared to be of some value in calling for consideration of court decisions on similar statutes in other states. After further discussion, it was agreed that subsection (8) should be added to section 5 of the revision as subsection (7) thereof, but that subsections (7) and (9) should not be added to section 5 of the revision.

Referring to section 21 of the revision (a savings clause as to wills made prior to the effective date of the proposed revised code), Lundy observed that the proposed revised code probably would contain a number of savings clauses, and that all provisions of the code should be considered in determining the need for savings clauses applicable thereto.

Section 6. Manner of revocation or alteration exclusive. No change was made in section 6 of the revision.

Section 7. Express revocation or alteration. Riddlesbarger commented that he had questioned the provision of

section 7 of the revision requiring two witnesses to the injury or destruction of a will by a person other than the testator, noting that the comparable section of the proposed Wisconsin Probate Code (section 853.11) did not contain such a provision, but that he did not recommend deletion of the provision from section 7.

Riddlesbarger pointed out that the proposed Wisconsin section (section 853.11(1)) contemplated partial revocation of a will. The matter of partial revocation was discussed, and the concensus was that section 7 should not authorize partial revocation of a will.

Section 8. Revocation by marriage. Gilley referred to subsection (2) of section 8 of the revision, and questioned the requirement therein that the antenuptial agreement or marriage settlement make "provision" for the surviving spouse. Richardson expressed the view that the agreement or settlement should make such "provision," and stated that if a testator wanted to make no provision for his surviving spouse, he should specify this by his will.

Braun indicated that she was inclined to favor deletion of all of section 8, but most other committee members appeared to oppose such deletion.

Zollinger referred to subsection (2) of section 853.11, proposed Wisconsin Probate Code, and suggested that the Wisconsin provision appeared to constitute a clear and appropriate statement of the committees' purpose in regard to revocation of a will by marriage of the testator. After further discussion, Zollinger moved, seconded by Gilley, that the Wisconsin provision be substituted for section 8 of the revision. Objection was raised to that part of the Wisconsin provision relating to a contract between the testator and his spouse entered into after marriage. Butler moved, seconded by Gilley, to amend the main motion to delete "or after" from the phrase "contract before or after marriage" in the Wisconsin provision. Motion to amend carried. Main motion, as amended, carried.

Section 9. Revocation by divorce or annulment. Richardson questioned deletion from section 9 of the revision of the words in parentheses (i.e., "and the effect of the will is the same as though the former spouse did not survive the testator"). It was agreed that the words in question should not be deleted.

Section 10. Revocation does not revive prior will. No change was made in section 10 of the revision.

Section 11. Devise of life estate. Allison suggested that "or bequest" not be deleted from section 11 of the revision, if the application of the section was to be extended to personal property. Zollinger commented that there was no purpose in making section 11 apply to personal property. Allison responded that in such event "or legatee" should also be deleted from section 11. Zollinger indicated that "devise" would be defined to include "bequest" and vice versa.

Section 12. Devise passes all interest of testator. No change was made in section 12 of the revision.

Section 13. Property acquired after making will. Riddlesbarger noted that the section of the proposed Wisconsin Probate Code (section 853.29) similar to section 13 of the revision provided: "A will is presumed to pass all property which the testator owns at his death and which he has power to transmit by will, including property acquired after the execution of the will." He also pointed out that the comment under the proposed Wisconsin section described three types of statute on the subject of after-acquired property that had been passed in this country.

Dickson suggested, and Zollinger concurred, that section 13 be revised to read: "An interest in property acquired by a testator after he makes his will passes as provided in the will." Dickson commented that, under his suggested wording, if there were no provision in the will, the after-acquired property would pass by intestacy. Lisbakken questioned whether the will would have to specify after-acquired property in order for such property to pass "as provided by the will," and indicated her preference for the wording of the proposed Wisconsin section. After further discussion, Dickson's suggested revision of section 13 was approved by a majority of the committee members.

Section 14. Encumbrance or disposition of property after making will. In response to a question by Riddlesbarger, Lundy commented that the source of section 14 of the revision appeared to be subsection (3) of ORS 114.230, and not ORS 114.150. Lundy noted that the second sentence of ORS 114.150 related to the subject of discharge of encumbrances, which was dealt with in a separate draft in the blue notebooks.

Section 14 A. Bond or agreement to convey property devised as a revocation. Riddlesbarger pointed out that section 14 A of the revision was based upon ORS 114.140, that the substance of the section had previously been approved by the committees, but that for some reason the section had

not been included in the first draft.

Sections 14 B and 14 C. Riddlesbarger explained that sections 14 B, relating to non-ademption of specific gifts in certain cases, and 14 C, relating to renunciation of gift under will, were verbatim copies of sections of the proposed Wisconsin Probate Code (sections 853.35 and 853.21, respectively). He noted that the subject matter of the two sections had not previously been considered by the committees, and recommended that the sections be considered for inclusion in the proposed revised code.

The meeting was recessed at 5:05 p.m.

The meeting was reconvened at 9 a.m., Saturday, June 17, 1967, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Carson, Jaureguy, Lisbakken and Riddlesbarger. The following members of the Bar committee were present: Biggs, Braun, Gilley, Kraemer, Krause, Lovett, McKay, Meyers, Richardson, Thalhofer and Thomas. Also present was Lundy.

Wills (continued)

Sections 14, 14 A, 14 B and 14 C (continued). Riddlesbarger noted that the background of sections 14 and 14 A of the revision, including previous committee consideration and action in regard thereto, was unclear, and that the matter had been left to Allison and Lundy to investigate and report thereon at the next meeting of the committees. He commented that sections 14 B and 14 C of the revision were before the committees for the first time at this meeting, and that in view of this circumstance Allison had suggested postponement of consideration of those two sections until the next meeting. Riddlesbarger pointed out that section 14 C would involve inheritance tax consequences and as such should be considered by the inheritance tax subcommittee consisting of Carson, Braun and Lisbakken.

Dickson requested that a report by Allison and Lundy on sections 14 and 14 A and committee consideration of sections 14 B and 14 C be placed first on the agenda for the meeting of the committees in July 1967.

Section 15. When estate passes to issue of devisee or legatee; anti-lapse. Allison suggested, and it was agreed, that the first sentence of section 15 of the revision be altered to read that "the descendants take by representation

Section 21. Act not to affect wills made prior to Act. Riddlesbarger pointed out that the matter of savings clauses to be included in the proposed revised code had been discussed at the Friday session of the meeting, and that section 21 of the revision constituted one such savings clause. He commented that the subject of savings clauses would be considered by the committees at a future time.

Drafting Procedure by Allison

For the benefit of committee members not present at the Friday session of the meeting, Allison repeated the explanation given at that session of the procedures he planned to follow in his drafting work on the proposed revised code. [Note: See page 2 of these minutes.]

Election Against Will; Dower and Curtesy

Allison noted that a first draft, dated April 28, 1967, on the subject of election against will and abolition of dower and curtesy was contained in the blue notebooks distributed to members before the May 1967 meeting, following tab 11. He explained that he had prepared a second draft on the subject, together with some editorial comments thereon, and proceeded to distribute copies of the second draft and editorial comments to committee members present. [Note: A copy of Allison's second draft and editorial comments thereon constitute Appendix B to these minutes.]

Section 1. In response to a question by Richardson, Allison outlined the previous action by the committees resulting in the intestate share of the surviving spouse being an undivided one-half interest, if there was issue of the intestate, and the election against will being an undivided one-fourth interest.

Butler noted that the wording of subsection (1) of ORS 113.050, as amended by section 1 of the second draft, was that the surviving spouse had an election "to take under the will," and questioned whether the wording was appropriate in those instances in which the will made no provision for the surviving spouse. The appropriateness of the wording was discussed and several suggestions for different wording made. Allison pointed out that section 236, 1963 Iowa Probate Code, used the wording "elect to take against the will." Riddlesbarger referred to the wording "elect to take the share provided by this section" used in section 861.05, proposed Wisconsin Probate Code. Dickson suggested that the matter of devising appropriate wording be left to Allison as draftsman.

the property"; and that the second sentence of the section be deleted. He pointed out that "representation" was defined in a section of the draft on intestate succession previously considered and acted upon by the committees.

Section 16. Children born or adopted after execution of will (pretermitted children). Zollinger suggested that the word "maximum" in the last sentence of subsection (4) of section 16 of the revision be deleted.

Riddlesbarger commented that section 16 did not contain a provision on the remedy available to pretermitted children, and that this matter had previously been referred to the subcommittee on the probate court and jurisdiction thereof for consideration in connection with the general subject of remedies in probate.

Probate Courts and Jurisdiction

Dickson requested that the matter of probate courts and jurisdiction thereof be placed on the agenda for the next meeting of the committees in July, and indicated that at that meeting he would appoint a subcommittee to study the matter further. He asked Lundy to report at the July meeting on legislation on the subject enacted at the 1967 regular session of the Oregon legislature.

Wills (continued)

Section 17. Delivery of will by custodian; liability. No change was made in section 17 of the revision.

Section 18. Disposition of wills deposited with county clerk. No change was made in section 18 of the revision.

Sections 19 and 20. Riddlesbarger noted that the revision retained section 19 of the first draft, but not section 20 thereof. In response to a question by Riddlesbarger, Lundy pointed out that sections 19 and 20 amended existing ORS sections to make them consistent with provisions of the proposed revised code, and remarked that inclusion of these existing sections in the code itself was not contemplated. He commented, and Allison agreed, that the code revision bill probably would include a large number of such amendments to existing ORS sections, and that these amendments would be located at the end of the bill. Lundy explained that the amendment of ORS 107.110 by section 20 was necessitated by the proposed repeal of ORS 114.130, referred to in ORS 107.110, and enactment of a similar new section by the first draft.

Riddlesbarger asked whether the committees wished to consider the sections of the proposed Wisconsin Probate Code, particularly sections 861.05 and 861.07, on the subject of the elective share of a surviving spouse. He pointed out that section 861.05, for example, provided for reduction of the elective share by certain property given the surviving spouse under the will. Richardson expressed the view, with which Jaureguy agreed, that election against will should take into account property passing to the surviving spouse outside of the will; for example, insurance proceeds, inter vivos trust income and jointly owned property. Allison commented that the approach taken by the proposed Wisconsin sections went considerably beyond the present Oregon concept of election against will. He suggested, and Butler agreed, that adoption of the Wisconsin approach would constitute a controversial change in Oregon law that the legislature might not be willing to accept, whereas less difficulty in this regard probably would be had with the simple substitution of election against will as to real property for dower and curtesy.

After further discussion on the Wisconsin approach to the matter of the elective share of a surviving spouse, Braun moved, seconded by Richardson, that the committees consider further the adoption of the Wisconsin approach. Motion carried. Dickson appointed a subcommittee, consisting of Riddlesbarger, as chairman, Braun and Richardson, to prepare a proposal adopting the Wisconsin approach and submit it for consideration by the committees at the next meeting in July.

Sections 2 to 12. Allison explained briefly sections 2 to 12 of the second draft, pointing out that most of these sections were amendments to existing ORS sections deleting references therein to dower and curtesy.

Statute of limitations. Allison called attention to the fact that the second draft did not repeal or amend ORS 113.090, which prescribed a 10-year limitation, after the death of a decedent, on actions or suits brought to recover or reduce to possession dower or curtesy by the surviving spouse of the decedent. He expressed the view that it would be desirable to retain the ORS section, even though it would be applicable only for a maximum period of 10 years after the effective date of the proposed revised probate code.

Dickson suggested, and Zollinger agreed, that it might be desirable to remove ORS 113.090 from the probate code and

relocate the section in the general ORS chapter on statutes of limitations (i.e., ORS chapter 12). Lundy commented that ORS 113.090 could be so relocated and renumbered under the editorial authority of the Legislative Counsel's office in publishing ORS, but that any change in the substance of the section would have to be accomplished by legislation. Lundy noted that not all of the present Oregon statutes of limitations were located in ORS chapter 12.

Initiation of Probate or Administration

The committees began a consideration of the first draft, dated March 27, 1967, on the subject of initiation of probate or administration, which was contained in the blue notebooks distributed to members before the May 1967 meeting, following tab 12.

Section 1. Venue. Gilley referred to section 1 of the first draft, noted that it was a substitute for ORS 115.140 and explained the section briefly. Zollinger commented that it should be made clear that section 1 applied to venue only, and not to jurisdiction. Allison remarked that jurisdiction in probate generally was geared to the domicile of the decedent, the place where he died or the place where his property was located.

Several members suggested that a provision that any circuit court in the state had jurisdiction in probate appear in a separate section preceding section 1 or be incorporated in section 1. Gilley commented, and Thomas agreed, that improper venue could be objected to and changed, but that if no such objection was made, jurisdiction would not be affected. Gilley suggested including in section 1 a specific provision that if the proceeding was commenced in a county of improper venue, such would not affect jurisdiction of the court, but that the proceeding would be subject to change of venue. He pointed out that jurisdiction was dealt with in the first draft, dated May 3, 1967, pertaining to powers of court, which was contained in the blue notebooks, following tab 2. Thalhofer referred to subsections (1) and (2) of ORS 109.310, relating to jurisdiction and venue in adoption proceedings, and suggested, and Gilley and Zollinger agreed, that those subsections might furnish an appropriate model for revision of section 1.

Allison remarked that he did not favor venue in the county of the place of abode of the decedent, and Dickson agreed. In response to a question by Thomas, Zollinger suggested the possibility of a definition of "place of abode." In response to a question by Biggs, Riddlesbarger remarked

that under certain circumstances the place of abode of a decedent might be the hospital in which he died. Dickson expressed the view that the key criterion in determining venue should be the location of property of the decedent, and not the domicile or place of abode of the decedent. Allison proposed that subsection (1) of section 1 be revised to include the county in which the decedent left assets as proper venue, and perhaps also the county in which the decedent died. Gilley indicated that he favored venue only in the county of the domicile of the decedent, and Riddlesbarger agreed. Zollinger remarked that it would be easier to determine the location of property of the decedent than to determine his domicile.

Richardson commented that creditors of decedents would be likely to oppose provision for proper venue in several counties, and that such creditors would favor proper venue only where the activities of a decedent were centered. Dickson suggested that the interests of creditors could be served by requiring the personal representative's notice to be published in several counties; for example, in every county in which the decedent had assets.

Gilley noted that the section of the proposed Wisconsin Probate Code (section 856.01) on venue limited venue in the case of a domiciliary decedent to the county of his domicile, and provided for stay of proceedings in all but the county where proper venue was finally determined and for change of venue. He also pointed out that the matter of probate jurisdiction was governed by a statute section separate from the one on venue in Wisconsin.

Zollinger moved, seconded by Dickson, that it be recorded as the concensus of the committee members present that section 1 provide that proper venue, in the case of both domiciliary and nondomiciliary decedents, be in the county in which the decedent was domiciled, or had his place of abode, or where he died or where his assets were situated, and that a provision similar to the last sentence of subsection (2) of ORS 109.310 be added to section 1. Motion carried. Gilley and Riddlesbarger indicated that they were still opposed to multiple venue, Riddlesbarger remarking that such venue put a premium on who first was able to commence the proceeding.

Section 2. Proceedings commenced in more than one county. Section 2 of the first draft was referred to several times during the course of the discussion on section 1. Dickson suggested that change of venue under section 2 be made discretionary in the court upon a showing that venue should be

elsewhere, and that although proper venue might be in the first county, the court could transfer the proceeding to another county of proper venue. Zollinger moved, seconded by Dickson,that Dickson's suggestion be approved. Motion carried.

Section 3. Pleadings and mode of procedure. Gilley noted that section 3 of the first draft was substantially the same as ORS 115.010, with the principal exception being the authorization in section 3 for an agent or attorney of a person making a petition, report or account to verify it. After extended discussion on verification by an agent, Gilley moved, and it was seconded, that the words "agent or" be deleted from the fourth sentence of section 3. Motion carried.

Lundy suggested, and Allison agreed, that section 3 might more appropriately be located in that part of the proposed revised code relating to powers of court in probate.

Dickson suggested that subsection (2) of section 3 might more appropriately precede subsection (1). It was also suggested that the word "verified" in subsection (2) be deleted, since the requirement of verification appeared in the fourth sentence of section 3.

Section 4. Appointment of special administrator. Allison suggested that the word "final" in the references to the final account of a special administrator in subsection (3) of section 4 of the first draft should be deleted.

Richardson proposed that the wording of paragraph (b) of subsection (1) of section 4 be revised to read "loss, injury or deterioration," in order to achieve consistency with similar wording elsewhere in section 4. Zollinger expressed the view that "deterioration" need only appear in the first sentence of subsection (1) of section 4. After further discussion, Richardson's proposal apparently was approved.

The meeting was recessed at 12:05 p.m.

The meeting was reconvened at 1:30 p.m. The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Carson, Jaureguy, Lisbakken and Riddlesbarger. The following members of the Bar committee were present: Biggs, Braun, Gilley, Krause, Lovett, Meyers, Thalhofer and Thomas (arrived 2:25 p.m.). Also present was Lundy.

Initiation of Probate or Administration (continued)

Section 3. Pleadings and mode of procedure (continued). Gilley, at Carson's suggestion, proposed that the committees reconsider their action on section 3 of the first draft at the Saturday morning session of the meeting in regard to verification of papers by agents. Carson noted that authorization for verification by agents had been deleted by such previous action of the committees, and argued that such authorization should be retained in the case of agents for corporations. After further discussion, Gilley moved, and it was seconded, that the wording of the fourth sentence of section 3 be revised to authorize verification by agents of corporations. Motion carried.

Section 5. Petition for appointment of personal representative. Gilley referred to section 5 of the first draft, and suggested that "account" be inserted between "Security" and "number" in subsection (1), and that the reference to court jurisdiction in subsection (3) be deleted. He expressed the view, and it was agreed, that subsection (4) was unnecessary and should be deleted. Dickson noted that references to the petitioner in subsection (2) should be changed to references to the person nominated to be the personal representative.

Zollinger referred to subsection (5) of section 5, and commented that the ages of all heirs, devisees and legatees were not necessary; only the ages of such of them as were minors. After further discussion, it was agreed that subsection (5) should require the ages and birth dates of minors, but not the ages of others.

Zollinger questioned the need of the requirement in subsection (6) of section 5 that the petition include an estimated value of the property belonging to the decedent. The use of such estimated value in determining the amount of the filing fee and the amount of the personal representative's bond was discussed. It was pointed out that such estimated value was insufficient information for such determination, and that sufficient information for those purposes would become available and could be supplied after the filing of the petition. Braun remarked that undesirable situations could result from undue publicity given to estimated values of estates included in petitions. It was suggested, and agreed, that subsection (6) be revised to read: "Any facts that would be of assistance to the court in fixing the amount of the bond of the personal representative."

Section 6. Qualification of personal representative. Butler referred to subsection (6) of section 6 of the first draft, and stated that it was his recollection that the last previous action by the committees on the matter of nonresident personal representatives was to allow a nonresident to serve as an executor, but not as an administrator, if he appointed a resident agent to accept service of summons and process. Lundy commented that his recollection on the subject was the same as Butler's. It was agreed that subsection (6) should be revised to allow a nonresident to serve as an executor but not as an administrator.

Gilley remarked that the committees by previous action had decided to include judges of the county, district, circuit and Supreme courts in the classes of persons not qualified to serve as personal representatives, and noted that for some reason section 6 did not contain such a provision. Riddlesbarger asked whether pro tem judges should be specifically included in the categories of judges to be disqualified. Butler asked whether judges of the Tax Court should also be so included.

Lundy noted that some county judges not only had no probate functions, but had no judicial functions at all, and asked whether, in view of this fact, county judges with no judicial functions should be disqualified to serve as personal representatives. Zollinger commented that under the proposed revised code county judges would have no probate functions, and suggested, and it apparently was agreed, that county judges should be deleted from the disqualified categories of judges. Thalhofer pointed out that no judges were specifically disqualified to be guardians under ORS 126.161.

In response to a question by Biggs, Gilley remarked that a recalled judge was no longer a judge and thus would not fall within the categories of judges not qualified to be personal representatives. Biggs expressed the view that a recalled judge should be so disqualified, especially if the ground for recall was misconduct, the same as a suspended or disbarred attorney.

After further discussion, it apparently was agreed that a provision should be added to section 6 to the effect that judges of the district, circuit, Tax and Supreme courts were not qualified to be personal representatives.

Zollinger suggested that "readmitted" be substituted for "reinstated" in subsection (5) of section 6.

Section 7. Preference in appointing personal representative. Gilley commented that section 7 of the first draft did not appear to completely reflect the previous committee action on the subject matter at the January 1966 meeting. [Note: See Minutes, Probate Advisory Committee, 1/14,15/66, pages 21 to 24. The wording of the section approved at the January 1966 meeting was:

> "The court shall appoint as personal representative a qualified person or persons whom the court finds to be suitable, giving preference to the following persons in the following order or their respective nominees:
>
> "(1) The executor named in the will;
> "(2) The surviving spouse of the decedent;
> "(3) The nearest of kin of the decedent or the respective nominees of any of them."]

Zollinger expressed the view that the nominee of the executor should not be given preference in the appointment of a personal representative over the surviving spouse or the surviving spouse's nominee. After further discussion, it apparently was agreed that section 7 should be revised to coincide with the wording approved at the January 1966 meeting, but with no specific preference to the nominee of an executor.

Section 8. Testimony of attesting witnesses to will. Gilley suggested deletion of "may" after "witness" in the last sentence of subsection (2) of section 8 of the first draft, and deletion of "facts" after "in the same manner as" in subsection (3).

Zollinger referred to subsection (4) of section 8, and questioned the necessity of requiring, in the absence of evidence of attesting witnesses, evidence of the genuineness of the testator's signature if the genuineness of the witnesses' signatures could be proved. Biggs suggested, and it apparently was agreed, that subsection (4) should be revised to require evidence of genuineness of the signature of the testator or at least one of the witnesses.

Krause commented that, in the absence of evidence of attesting witnesses, something more than evidence of genuineness of signatures should be required. Gilley suggested that the attestation clause of a will should recite the fact of publication of the will. Carson pointed out that what

was involved was probate in common form, and remarked that the requirements for such should not be too strict. Dickson noted that the evidence of witnesses could be preserved, under subsection (1) of section 8, by affidavits made at the time of execution of the will, and that this practice could be used to resolve the problem of unavailability of witnesses at the time of probate in common form, although such affidavits could not be used, as indicated in subsection (3), in probate in solemn form.

Dickson suggested, and it was agreed, that subsection (4) of section 8 should precede subsection (3).

Determining validity of will in testator's lifetime. Riddlesbarger reminded the committee members of the suggestion made by Professor Hans A. Linde, School of Law, University of Oregon, that some consideration might be given to authorization for a procedure to determine the validity of a will during the testator's lifetime. Butler remarked that the availability of such a procedure might impose a significant burden on the courts. Thomas suggested that the problems sought to be resolved by Linde's suggestion might be alleviated to some extent by the use of depositions. Braun commented that problems of testamentary capacity might be resolved by medical or psychiatric examinations of testators. It was agreed that further consideration of Linde's suggestion be deferred and that Riddlesbarger might contact Linde on the matter.

Section 9. Hearing when no will. Zollinger noted that section 9 of the first draft appeared to have no precisely similar counterpart in existing Oregon statutory law. He commented that section 9 referred to the petition of the personal representative, and that the petition would not necessarily be filed by the personal representative. Allison expressed the view that the apparent purpose of section 9 was to fill a gap in the procedure prescribed by existing statutory law.

Section 10. Necessity and amount of bond; bond notwithstanding will. Gilley suggested that "or special administrator" be inserted after "personal representative" in the first sentence of section 10 of the first draft. Allison noted that section 4 of the first draft specifically required a special administrator to file a bond. Riddlesbarger noted that section 21 of the first draft, dated April 27, 1967, on definition of terms defined "personal representative," and Gilley suggested, and Dickson agreed, that perhaps that definition should exclude special administrators.

In response to a question by Gilley, Lovett expressed the opinion that the banking law contained provisions pertaining to the necessity of bonds of trust companies acting as personal representatives and the reduction of bonds of personal representatives by deposits with banks and trust companies. [Note: See ORS 709.240 to 709.260.] Lundy noted that ORS 126.171, relating to the bond of a guardian, contained the phrase "except as otherwise provided by law" in order to recognize the existence of other provisions of law pertaining to bonds of guardians, including such provisions in the banking law. Carson suggested that such a phrase might be added to section 10 in order to resolve the matters of the provisions in the banking law and the provision on special administrators.

Gilley suggested, and it was agreed, that "and approved by the endoresement thereon of the Judge" be deleted from the first sentence of section 10.

Gilley commented that subsection (1) of section 10 should be revised to read: "The apparent value of the estate." Zollinger proposed that the wording of subsection (1) be: "The nature and apparent value of the assets of the estate."

Several members expressed the view that bond should not be required of a personal representative if the will waived that requirement. Gilley commented, and Dickson agreed, that such a waiver should not be conclusive, and that the court should be able to require bond notwithstanding the waiver in appropriate circumstances. [Note: Previous action by the Committees on the subject of waiver of bond of a personal representative by will is recorded in Minutes, Probate Advisory Committee, 3/18,19/66, pages 33 and 34, and Appendix; and Minutes, Probate Advisory Committee, 4/15,16/66, page 19. The action so recorded indicates that there should be some provision stating, in substance, that when a will declares that no bond is required of the personal representative, he may act without filing a bond; but notwithstanding waiver of the bond by will, the court may, at any time in its discretion, on its own motion or on petition of an interested person, require the personal representative to give bond, and the court shall require a nonresident executor to give bond. The first draft does not appear to contain such a provision.]

Section 11. Increasing, decreasing or requiring new bond. Gilley suggested that "approved and" be deleted from the second sentence of section 11 of the first draft.

Section 12. Letters testamentary or of administration. Gilley remarked that "acceptance of the appointment" should be substituted for "acceptance of the trust" in the first sentence of subsection (1) of section 12 of the first draft, and that "or is the petitioner for letters of administration" should be deleted from subsection (2).

In response to a question by Dickson, Zollinger noted that subsection (2) of section 12 was duplicated to some extent by the provisions of ORS 709.330 on the sale and transfer of assets and liabilities by a trust company and the effect thereof on fiduciary relations.

Section 12a. Forms of letters testamentary and of administration. Zollinger and Dickson noted that it was not contemplated that letters be issued to special administrators. Meyers commented that special administrators could act under authority of court orders.

No change was made in section 12a of the first draft.

Section 13. Publication of notice by personal representative. Dickson commented that, in view of the previous action by the committees on section 1 of the first draft, relating to venue, section 13 of the first draft should require publication of the personal representative's notice of appointment in counties in addition to the one in which the proceeding was pending. Zollinger suggested that publication be required in the county in which the decedent was domiciled, as stated in the petition for appointment of the personal representative, in addition to the county in which the proceeding was pending, if they were different counties. Allison remarked that publication might be required in the county in which the proceeding was pending and in such other counties as the court might prescribe. Dickson expressed the view that protection of creditors was not the only reason supporting the desirability of publication in more than one county. After further discussion, in the course of which several members expressed opposition to the requirement of publication in more than one county, Carson moved, and it was seconded, that no change be made in subsection (1) of section 13.

The requirement of paragraph (b) of subsection (2) of section 13 that the notice include the names and addresses of the personal representative and his attorneys was discussed at some length. Riddlesbarger and Gilley argued that those names and addresses need not be included in the notice, and that the only address that should be required was the one at

which claims were to be presented to the personal representative. Dickson and Carson agreed that the attorney of a personal representative need not be identified in the notice. Allison and Jaureguy expressed the view that the names and addressed of both the personal representative and his attorney was often useful information. Dickson commented that the inclusion of such information in the notice would not be prohibited, but would not be required. It apparently was agreed that paragraph (b) should be deleted, and that paragraph (d) should refer to presentation of claims to the personal representative at the address designated in the notice for such presentation.

Section 14. Notice to heirs, devisees and legatees. Carson indicated that he did not favor the requirements of subsection (1) of section 14 of the first draft, relating to mailing notice to heirs, devisees and legatees of a decedent. He commented that such requirements appeared contrary to the general aim of the committees to achieve simplification of probate procedure. Krause noted that existing law (i.e., ORS 115.220) required mailing of copies of a will admitted to probate to devisees and legatees named therein, and commented that one of the purposes of subsection (1) of section 14 was to justify elimination of mailing copies of wills.

Butler, Riddlesbarger and Biggs stated that they shared Carson's view on the undesirability of the requirements of subsection (1) of section 14. Riddlesbarger and Biggs commented that it was often very difficult to locate the heirs of a decedent, and that required mailing of notice to such heirs would impose a substantial burden on the personal representative. Biggs proposed that the mailed notice required by subsection (1) be limited to notice to devisees and legatees named in a will. Zollinger expressed the view that the surviving spouse and at least the adult lineal heirs of the testator not provided for by the will should be mailed notice. Braun and Carson commented that if the aim was to notify all persons interested, beneficiaries under prior wills might be as interested as heirs.

Dickson remarked that one purpose of mailed notice was to satisfy requirements of due process, and that, for example, if a suriviving spouse or heir were not notified of the probate proceeding, his rights might not be foreclosed by the termination of the time period for contesting the will. Jaureguy commented that whatever might be the requirements of due process, it should be the policy of the state to afford some kind of notice to persons entitled to contest a will.

Braun moved, and it was seconded, that subsection (1) of section 14 be deleted. Motion carried.

Removal of personal representative. Gilley noted that the provision relating to removal of a personal representative, which appeared in the first draft as subsection (4) of section 14, should be a separate section.

Biggs observed that the removal proceeding under the section was to be initiated by petition, and expressed the view that the court should be able to initiate the proceeding on its own motion. Gilley suggested that "or upon its own motion" be inserted after "Upon the petition being filed" in the second sentence of the section. After discussion on whether issuance of a court order directing the personal representative to appear and show cause should be mandatory or discretionary with the court, it apparently was decided to retain "shall" in the second sentence and not substitute "may" therefor.

Section 15. Appointment of successor personal representative. Thalhofer suggested that "is disqualified" be substituted for "ceases to qualify" in subsection (1) of section 15 of the first draft. Lundy pointed out that the terminology used in section 6 of the first draft was "is not qualified," rather than "is disqualified." Zollinger commented that the wording of subsection (1) of section 15 might be changed to "ceases to be qualified."

Section 16. Notice by new personal representative. Gilley suggested that "need not give notice" be substituted for "does not have to give notice" in the first sentence of section 16 of the first draft, and that "notice shall state" be substituted for "notice shall provide" in the third sentence.

The requirement of notice by a new personal representative was discussed at some length. Dickson asked if the time period for filing claims would begin again upon the publication of notice by the new personal representative, or if the period begun by publication of notice by the previous personal representative would still apply. Gilley pointed out that previous action by the committees at the March 1966 meeting answered this question by indicating that if appointment of the successor personal representative occurred before expiration of the four-month claim presentation period, the court should be authorized to extend the period for not more than four months after appointment of the successor and that the notice published by the successor should state the period of extension. [Note:

See Minutes, Probate Advisory Committee, 3/18,19/66, page 30.] In response to a question by Dickson, Zollinger commented that a reason for the notice by the new personal representative was to inform creditors of the change in personal representatives so that such creditors could present their claims to the proper personal representative. Gilley moved, and it was seconded, that the committees approve the substance of section 16, with the addition thereto of an appropriate provision reflecting the previous committee action at the March 1966 meeting on extension of the claim presentation time period. Motion carried.

Section 17. Proceedings when will found after administration granted. The matter of whether the circumstance described in section 17 of the first draft would call for notice by a new personal representative was discussed.

Dickson suggested that section 17 be relocated before sections 15 and 16 of the first draft.

Butler questioned the reference to letters testamentary in section 17, and remarked that if the will found and proven did not name an executor, the new letters would be letters of administration with the will annexed. Zollinger noted that the form of letters testamentary set forth in section 12a of the first draft contemplated use thereof in the case of an administrator with the will annexed.

Lundy pointed out that section 17 was based upon ORS 115.340, and that ORS 115.200 described the reverse situation in which, if a will was proven and letters issued thereon and the will was then set aside, delcared void or inoperative, those letters would be revoked and letters of administration issued. He observed that the committees had previously approved a section similar to ORS 115.200, but that such section, for some reason, did not appear in the first draft. [Note: See Minutes, Probate Advisory Committee, 3/18,19/66, page 19; and Minutes, Probate Advisory Committee, 2/18,19/66, pages 10 and 11.]

Section 18. Designation of attorney to be filed. It apparently was agreed that "represent him" should be substituted for "assist him" in section 18 of the first draft.

Section 19. Duty of court to supervise. It was suggested that "and require" be substituted for "to insure" in section 19 of the first draft.

Section 20. Contest of will. It was agreed that the period for contesting a will should be reduced from six months to four months.

Section 21. No change was made in section 21 of the first draft.

The meeting was adjourned at 4:55 p.m.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, June 16 & 17, 1967)

To: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: W. P. Riddlesbarger

Subject: Proposed Revision of Chapter on Wills

Mr. Sorte has furnished each member of the committees with a compilation of a chapter on wills prepared in accordance with the previous action of the committees. The following represents the writer's suggested revisions of the proposals and his comments thereon.

It was believed that official comments respecting the various sections should not be undertaken until final agreement is reached as to the contents of the chapter.

Section 1. Who may make a will. Any person who is 18 years of age or older or who has been lawfully married, and who is of sound mind, may (dispose of his property by) make a will.

Comment: There would be some reason to delete the words "or who have been lawfully married." Persons of an age younger than 18 years might be deemed too immature to be allowed to make a will. But the reasons for reducing the minimum age to 18 years apply equally to a person who has been lawfully married but younger than those years. Those reasons are set forth in full in the comments following section 835.01, page 40 of the proposed Wisconsin Probate Code. I have not recommended deletion, however, because I am not aware of any problems necessitating a change of the present law.

I recommend that the words "may dispose of his property by will" be deleted and the words "may make a will" substituted. The reason is that a will may be made for purposes other than the disposal of property. That idea was included originally because the right to dispose of one's

property by will is statutory. Perhaps the definition of the term "will" could include the thought.

Section 2. Execution of a will. A will shall be in writing and shall be executed (by the signatures of the testator and of at least two attesting witnesses as follows:) with the following formalities:

(1) The testator, in the presence of each of the witnesses shall:

(a) Publish the will; and

(b) Sign the will; or

(c) Acknowledge the signature previously made on the will by him or by his proxy; or

(d) (At the direction of the testator and in his presence have) Direct one of the witnesses or (another) some other person to sign thereon the name of the testator. Any (witness) person who so signs the name of the testator shall sign his own name (as a witness) to the will and write on the will that he signed the name of the testator at the direction of the testator.

(2) (The witnesses shall each sign the will in the presence of the testator.) At least two witnesses shall each:

(a) Hear the testator publish the will; and

(b) See the testator sign the will; or

(c) Hear the testator acknowledge the signature on the will; or

(d) Observe acts which unmistakably indicate that the will has been signed by the testator or by his proxy; and

(e) Sign the will in the presence of the testator and at his request.

Comment:

1. The words "by the signatures of the testator and of at least two attesting witnesses as follows" have been deleted because they duplicate the subsequent provisions respecting signing.

2. Subparagraph (b) has been changed because if witnesses need not be in the presence of each other, the acts of the testator in the presence of the witnesses may be different.

3. The language of subparagraph (c) of the proposal is not clear as to whether the proxy is or may be a witness to the will of another person.

4. I recommend that publication be required despite the fact that the committees did not so provide. Although ORS 114.030 contains no language to support the requirement, the Supreme Court has recently held that a codicil was improperly executed because the witnesses did not know the nature of the document they were called upon to witness. See Erickson v. Davidson, 216 Or. 547, citing Richardson v. Orth, 40 Or. 252. The court made no mention of Loper v. Werts, 19 Or. 122; In re Skinners Will, 40 Or. 571; In re Estate of Neil; 111 Or. 282; In re Estate of Heaverne, 118 Or. 308; In re Estate of Shaff, 125 Or. 288, and In re Christofferson Estate, 183 Or. 75, in each of which it was held not to be necessary that the testator publish the will or that the witnesses have any idea as to the purport or contents of the instrument to which they subscribed their names. My proposal eliminates any uncertainty that might exist. A better reason, however, is found in the functioning of the attesting witnesses. An attesting witness is one who signs his name to an instrument for the purpose of proving and identifying it or who signs with the intention of being considered a witness to the act in question. The act in question may be publication of the will or its execution by the testator or both. Publication signifies the act of declaring or making known to the witness that the testator understands and intends that the instrument signed by him to

be his last will and testament. The purpose of publication is to make it manifest that the testator knows what he is executing and to secure him against fraud or imposition. The act should impress upon the witnesses the fact that since the document is a will they are expected to remember what occurred at its execution and be ready to vouch for its validity. If the requirement were to be that the witnesses attest only to the signing of the will by the testator, the foregoing purposes of publication would not be served. Moreover, the testator may have signed several documents on the same occasion or on other occasions during that day. In such event, unless the witnesses are aware of the nature of the document signed in their presence their testimony would be meaningless insofar as the execution of the will is concerned. Publication does not require that the contents of the will be revealed. The right of privacy, therefore, is not invaded.

Section 3. Witness as beneficiary. A will attested by an interested witness is not thereby invalidated. If an interested witness attests a will and the will is not attested also by two or more disinterested witnesses, the interested witness may take under the will only so much of the provision made for him therein as in the aggregate equals in value, on the date of death of the testator, the part of the estate of the testator that would have passed to him had the testator died intestate. A witness is interested only if the will gives to him some (a) personal and beneficial interest in the estate. (of the testator is bequeathed or devised to him by the will.)

Comment: The only changes have been made by rephrasing the wording of the section.

Wisconsin defines what is not to be construed as a personal or beneficial interest in the estate as follows:

"(a) A provision for the spouse of the witness;

"(b) a provision for employment of the witness as executor or trustee or in some other capacity after death of the testator and a provision for compensation at a rate or in an amount not greater than that usual for the services to be performed;

"(c) a provision which would have conferred no benefit on the witness if the testator had died immediately following execution of the will."

I have mixed feelings as to whether any of those requirements should be included in the Oregon law. Because those feelings are not strong either way, I have not proposed any change in the section.

Perhaps some ambiguity exists as to whether a proxy who signs the name of the testator to the will may be "interested." My reasoning is that unless he is also a "witness" he would not be "interested."

Section 4. Validity of a will. A will is lawfully executed if it is in writing, signed by the testator and otherwise executed in accordance with the law of:

(1) This state at the time of execution or at the time of death of the testator;

(2) The domicile of the testator at the time of execution or at the time of his death; or

(3) The place of execution at the time of execution.

Comment: No changes have been made.

Section 5. Testamentary additions to trusts. (1) A devise (or bequest) may be made by a will to the trustee or trustees of a trust, regardless of the existence, size or character of the corpus of the trust, if:

(a) The trust is established or will be established by the testator, or by the testator and some other person or

persons, or by some other person or persons;

(b) The trust is identified in the testator's will; and

(c) The terms of the trust are set forth in a written instrument, other than a will, executed before or concurrently with the execution of the testator's will, or in the valid last will of a person who has predeceased the testator.

(2) The trust may be a funded or unfunded life insurance trust, although the trustor has reserved any or all of the rights of ownership of the insurance contracts.

(3) The devise (or bequest) shall not be invalid because the trust:

(a) Is amendable or revocable, or both; or

(b) Was amended after the execution of the testator's will or after the death of the testator.

(4) Unless the testator's will provides otherwise, the property so devised: (or bequeathed)

(a) Shall not be deemed to be held under a testamentary trust of the testator but shall become a part of the trust to which it is given; and

(b) Shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator, regardless of whether made before or after the execution of the testator's

will so provides, including any amendments to the trust made after death of the testator.

(5) A revocation or termination of the trust before the death of the testator shall cause the devise (or bequest) to lapse.

(6) This section shall not be construed as providing an exclusive method for making devises (or bequests) to the trustee or trustees of a trust established otherwise than by the will of the testator making the devise.

Comments: (a) The words "or bequeath" and "or bequest" have been deleted because the definitions make the use of the words unnecessary. (b) Subsection 7 can be deleted and the words "or any devise" added following the word "wills" in the proposed section 21. (c) Subsections 8 and 9 of the proposal appear to be unnecessary.

Section 6. Manner of revocation or alteration exclusive. A will may be revoked or altered only as provided in sections 6 to 10 of this Act.

Comment: No changes recommended.

Section 7. Express revocation or alteration.

(1) A will may be revoked or altered by another will.

(2) A will may be revoked by being burned, torn, canceled, obliterated or destroyed, with the intent and purpose of the testator of revoking the will, by the testator or by another person at the direction of the testator and in the presence of the testator. Such injury or destruction by a person other than the testator at the direction and in the presence of the testator shall be proved by at least two witnesses.

Comment: No changes recommended.

Section 8. Revocation by marriage. A will is revoked by the marriage of the testator after the execution of the will, unless:

(1) The spouse of the testator does not survive the testator;

(2) Provision is made for the surviving spouse by a written antenuptial agreement or marriage settlement; or

(3) The will evidences the intent of the testator that the will not be revoked by the marriage.

Comment: No changes recommended.

Section 9. Revocation by divorce or annulment. Unless a will evidences a different intent of the testator, the divorce or annulment of the marriage of the testator after the execution of the will revokes all provisions in the will in favor of the former spouse of the testator and any provision therein naming the former spouse as executor. (and the effect of the will is the same as though the former spouse did not survive the testator.)

Comment: The words "and the effect of the will is the same as though the former spouse did not survive the testator" have been deleted because they seem to be unnecessary.

Section 10. Revocation does not revive prior will. If, after making a will, the testator makes a subsequent will, the revocation of the subsequent will does not revive the earlier will.

Comment: The word "does" is inserted in the title of the section.

No change is recommended, although consideration was given to preserving some of the provisions of ORS 114.120 respecting revival.

Section 11. Devise of life estate. A devise (or bequest) of property to any person for the term of the life of the person, and after his death, to his children or heirs, vests an estate or interest for life only in the devisee or legatee, and remainder in the children or heirs.

Comment: No change recommended.

Section 12. Devise passes all interest of testator. A devise (or bequest) of property passes all of the interest of the testator therein at the time of his death, unless the will evidences the intent of the testator to dispose of a lesser (estate or) interest.

Comment: The section adopted by the committees was as follows: "A devise of property shall pass the interest of the testator therein at his death unless the will discloses an intention to dispose of a lesser estate or interest." The changes made appear to be for housekeeping purposes only, except that further committee action deleted the words "estate or" from each of Sections 12, 13 and 14.

Section 13. Property acquired after making will. An estate or interest in property acquired by a testator after he makes his will passes as provided by the will, unless the will evidences the intent of the testator to dispose of a lesser (estate or) interest.

Comment: The words "estate or" were removed from the

section pursuant to the aforementioned action of the committees, the record of which appears on Page 11 of the minutes of the meeting held 12/17,18/65.

It whould be pointed out that the proposal to delete sections 13 and 14 was approved by a bare majority of the Advisory Committee and carried the Bar Committee. I voted against the deletion and have not changed my position.

Section 14. Encumbrance or disposition of property after making will. An encumbrance or disposition of property by a testator after he makes his will shall not affect the operation of the will upon a remaining (estate or) interest therein which is subject to the disposal of the testator at the time of his death.

Comment: No changes are recommended.

Section 14 A. Bond or agreement to convey property devised as a revocation. An executory contract of sale made for a valuable consideration by a testator to convey any property devised in any will previously made, is not deemed a revocation of such previous devise, either in law or equity; but such property shall pass by the devise, subject to the same remedies on such agreement, for specific performance or otherwise, against devisees as might be had against the heirs of the testator or his next of kin, if the same had descended to them.

Comment: The committees approved the writer's proposal No. 12 in principle, but referred to Lundy the task of re-drafting the section with the aim of simplifying the wording but retaining the present meaning. See Page 6 of the minutes of the meeting held 12/17,18/65. I have attempted to perform that task.

Section 14 B. Non-ademption of specific gifts in certain cases.

(1) Scope of section. It is the intent of this section to abolish the common law doctrine of ademption by extinction in the situations governed by this section; this section is inapplicable if the intent that the gift fail under the particular circumstances appear in the will, or if the testator during his lifetime gives property to the specific beneficiary with the intent of satisfying the specific gift. Whenever the subject of the specific gift is property only part of which is destroyed, damaged, sold or condemned, the specific gift of any remaining interest in the property owned by the testator at the time of his death is not affected by this section; but this section applies to the part which would have been adeemed under the common law by the destruction, damage, sale or condemnation.

(2) Proceeds of insurance on property. If insured property which is the subject of a specific gift is destroyed or damaged, the specific beneficiary has the right to:

(a) Any insurance proceeds paid to the personal representative after death of the testator with the incidents of the specific gift; and

(b) A general pecuniary legacy equivalent to any insurance proceeds paid to the testator within one year of his death.

But the amount hereunder is reduced by any amount expended or incurred by the testator in restoration or repair of the property.

(3) Proceeds of sale. If property which is the subject of a specific gift is sold by the testator within two years of his death, the specific beneficiary has the right to:

(a) Any balance of the purchase price unpaid at the time of death (including any security interest in the property and interest accruing before death), if part of the estate, with the incidents of the specific gift; and

(b) A general pecuniary legacy equivalent to the amount of the purchase price paid to the testor within one year of his death.

Acceptance of a promissory note of the purchaser or a third party is not considered payment, but payment on the note is payment on the purchase price; and for purposes of this section property is considered sold as of the date when a valid contract of sale is made. Sale by an agent of the testator or by a trustee under a revocable living trust created by the testator, the principal of which is to be paid to the personal representative or estate of the testator on his death, is a sale by the testator for purposes of this section.

(4) Condemnation award. If property which is the subject of a specific gift is taken by condemnation prior to

the testator's death, the specific beneficiary has the right to:

(a) Any amount of the condemnation award unpaid at the time of death, with the incidents of the specific gift; and

(b) A general pecuniary legacy equivalent to the amount of an award paid to the testator within one year of his death.

In the event of an appeal in a condemnation proceedings, the award is for purposes of this section limited to the amount established on such appeal. Acceptance of an agreed price or a jurisdictional offer is a sale within the meaning of subsection (3) of this section.

(5) Sale by guardian or conservator of incompetent. If property which is the subject of a specific gift is sold by a guardian or conservator of the testator or a condemnation award or insurance proceeds are paid to a guardian or conservator, the specific beneficiary has the right to a general pecuniary legacy equivalent to the proceeds of the sale or insurance proceeds (reduced by any amount expended or incurred in restoration or repaid of the property). This provision does not apply if testator subsequent to the sale or award or receipt of insurance proceeds is adjudicated competent and survives such adjudication for a period of one year; but in such event sale by a guardian or conservator within two

years of testator's death is a sale by the testator within the meaning of subsection (3) of this section.

(6) Securities. If securities are specifically willed to a beneficiary, and subsequent to execution of the will other securities in the same or another entity are distributed to the testator by reason of his ownership of the specifically bequeathed securities and as a result of a partial liquidation, stock dividend, stock split, merger, consolidation, reorganization, recapitalization, redemption, exchange, or any other similar transaction, and if such other securities are part of testator's estate at death, the specific gift is deemed to include such additional or substituted securities. "Securities" has the same meaning as in _____.

(7) Reduction of recovery by reason of expenses and taxes. Throughout this section the amount the specific beneficiary receives is reduced by any expenses of the sale or of collection of proceeds of insurance, sale, or condemnation award and by any amount by which the income tax of the decedent or his estate is increased by reason of items covered by this section. Expenses include legal fees paid or incurred.

Comment: The foregoing is copied verbatim from the proposed probate code of Wisconsin. It is recommended because it seems to treat the situations covered in a fair and equitable manner. No authority was found either in the statutes or the case law of Oregon. A justification for the section is found on Page 69 of the proposed probate code of Wisconsin.

Section 14 C. Renunciation of gift under will. Any

person to whom property is given by the terms of a will may renounce all of such property, or unless the will expressly provides otherwise any part of such property, by filing a signed declaration of such renunciation with the county court and serving a copy on the personal representative within 180 days from admission of the will to probate; but the court may extend the time for cause shown. No interest in the property or part thereof so renounced is deemed to have vested in such person; but the renounced property or part passes as if such person had predeceased the testator unless the will provides otherwise. However, a renunciation is invalid to the extent that the person renouncing has prior to filing the renunciation effectively assigned or contracted to assign the renounced property, if prior to entry of the final judgment, or earlier distribution by the personal representative in reliance on the renunciation, the assignee files with the county court a copy of the assignment or contract and serves a copy on the personal representative.

Comment: This section is copied verbatim from the proposed probate code of Wisconsin. It is recommended primarily to resolve the question, at least in Oregon, as to whether or not the renunciation would constitute a gift for gift tax purposes. It would, of course, settle the question as to the right of a devisee or legatee to renounce a provision made for his benefit.

Section 15. When estate passes to issue of devisee or legatee; anti-lapse. When property is devised (or bequeathed) to any person who is related by blood or adoption to the

testator and who dies before the testator leaving lineal descendants, the descendants take the property the devisee (or legatee) would have taken if he had survived the testator. If the descendants are all in the same degree of kinship to the predeceased devisee, (or legatee) they take equally, or if of unequal degree, they take by representation.

Comment: The only change was to delete the words "or legatee."

Section 16. Children born or adopted after execution of will (pretermitted children). (1) If a testator, during his lifetime or after his death, has a child born after the execution of his will or adopts a child, whether in this state or elsewhere, after that execution, and dies leaving the after-born or after-adopted child unprovided for by any settlement and neither provided for nor in any way mentioned in the will, a share of the estate of the testator disposed of by the will passes to the after-born or after-adopted child as provided in this section.

(2) If the testator has one or more children living when he executes his will and:

(a) No provision is made in the will for any such living child, an after-born or after-adopted child shall not take a share of the estate.

(b) Provision is made in the will for one or more of such living children, an after-born or after-adopted child shall take a share of the estate as follows:

(A) The share of the estate that the after-born or after-adopted child takes is limited to the part passing to the living children under the will.

(B) The after-born or after-adopted child shall take the share of the estate, as limited by subparagraph (A) of this paragraph, he would have taken had the testator included all after-born and after-adopted children with the living children for whom provision is made in the will, and had the testator given an equal part of the estate to each living, after-born and after-adopted child by the will.

(C) To the extent feasible, the interest of an after-born or after-adopted child in the estate shall be of the same character, whether equitable or legal, as the interest the testator gave to the living children by the will.

(3) If the testator has no child living when he executes his will, an after-born or after-adopted child shall take a share of the estate as though the testator had died intestate as to the estate.

(4) An after-born or after-adopted child may recover the share of the estate that passes to him as provided in this section either from the other children under paragraph (b) of subsection (2) of this section or from the testamentary beneficiaries under subsection (3) of this section, ratably, out of the shares of the estate passing to those persons under the will. In abating the interests of those beneficiaries,

the character of the testamentary plan adopted by the testator shall be preserved to the maximum extent possible.

Comment: No change was made in the section as adopted. It should be pointed out, however, that the matter of the remedy of the pretermitted child was not adopted. Instead, any further action in that regard was to await the report of a committee appointed to consider the matter of the jurisdiction of the probate court.

Section 17. Delivery of will by custodian; liability. (1) A person having custody of a will, other than an executor named therein, shall deliver the will, within 30 days after the date of receiving information that the testator is dead, to a court having jurisdiction of the estate of the testator or to an executor named in the will.

(2) If it appears to a court having jurisdiction of the estate of a decedent that a person has custody of a will made by the decedent, the court may issue an order requiring that person to deliver the will to the court.

(3) A person having custody of a will who fails to deliver the will as provided in this section is liable to any person injured by that failure for damages sustained thereby.

Comment: No changes recommended.

Section 18. Disposition of wills deposited with county clerk. The county clerk of each county shall make all reasonable effort to deliver each will deposited in his office as provided in ORS 114.410 before the effective date of this Act and on deposit in his office on that date to the testator or

person to whom the will is to be delivered after the death of the testator. Any such will not so delivered before January 1, 2010, may be destroyed by the county clerk.

Comment: No changes recommended.

Section 19. ORS 41.520 is amended to read:

41.520. Evidence to prove a will. Evidence of a last will and testament (, except when made pursuant to ORS 114.050, shall not be received, other than) shall be the written instrument itself, or secondary evidence of (its contents) the contents of the will, in the cases prescribed by law.

Comment: No changes made. The question is whether the section should be in the probate code or in the chapter on evidence. It should be in the latter or in a separate chapter on procedure in probate courts.

Section 21. Act not to affect wills made prior to Act. This Act does not apply to wills or any devise made prior to the effective date of this Act as provided by ORS chapter 114.

Comment: The only change is to include the words "or any devise."

Section 22. Repeal of existing statutes. ORS 114.010, 114.020, 114.030, 114.040, 114.050, 114.060, 114.070, 114.110, 114.120, 114.130, 114.140, 114.150, 114.210, 114.220, 114.230, 114.240, 114.250, 114.260, 114.270, 114.310, 114.320, 114.330, 114.340, 114.410, 114.420, 114.430, 114.440, 115.110, 115.130 and 115.990 are repealed.

Comment: No change recommended.

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, June 16 & 17, 1967)

Prepared by
Mr. Allison

Proposed revised Oregon probate code
ELECTION OF WIDOW - DOWER, CURTESY
2nd Draft
June 12, 1967

This draft is proposal #6.

Section 1. 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 dies seised 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] the estate of the decedent. 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 2. 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 3. 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 4. 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 5. ORS 91.030 is amended to read:

91.030. A [tenancy by curtesy,] 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 6. 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 real property.]

[(3)] (2) 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] the 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.] (3) 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)] (2) of this section.

Section 7. 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 been released or extinquished 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 8. 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 9. 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 10. ORS 107.100 is amended to read:

107.100. (1) Whenever a marriage is declared void or dissolved, the court has power further to decree as follows:

(Paragraphs (a) to (g), inclusive, omitted here)

[(h) for the extinguishment and barring of dower and curtesy.]

(Remainder of ORS 107.100 omitted here)

Section 11. 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.

Section 12. This Act takes effect on January 1, 1970.

References: Advisory Committee Minutes:
6/19/65, pp. 5 and 6
9/18/65, pp. 6 and 7

EDITORIAL COMMENTS

Subject: Proposed Revised Oregon Probate Code Provisions on Election of Widow and Abolition of Dower and Curtesy

I have found it necessary to rewrite the first draft on this subject, dated April 28, 1967, for the principal reason that the original of this draft was embodied in Senate Bill 315, introduced in the 1965 Legislative Session, as a Senate Judiciary Committee Bill, at the request of the Law Improvement Committee. Since this must be considered for understanding in legislative bill form, it had to be rewritten to show not only the additional language included in the proposed amendments, but also the deletions from the present sections.

This bill was presented to the Legislature to include, of necessity, not only the provisions for abolition of dower and curtesy, but also to include the amended provisions for intestate succession, which would give the surviving spouse a fee interest in real property in lieu of a present dower or curtesy interest.

There was also introduced in the Legislature a companion bill, Senate Bill 328, which also was recommended by this committee to the Law Improvement Committee and by it introduced in the Legislature. This bill attempted to set up provisions which would attempt to give some protection to a spouse where

a title was vested in the other spouse, akin to our present inchoate dower or curtesy interest. Although neither bill passed, it was the indication that the Senate Judiciary Committee was favorably disposed to the bill abolishing dower or curtesy, but was not interested in Senate Bill 328 to attempt to preserve inchoate interests prior to death.

I quote portions of the able comments made to the legislature in support of Senate Bill 315 as follows:

> "The common law right of dower and curtesy has been modified or abolished in many states. In Oregon, a parallel right of the surviving spouse to take against the will of the decedent a one-fourth interest in his personalty has been created. This bill abandons the distinction between real and personal property, so far as concerns the rights of a surviving spouse and provides that, with respect to both, the surviving spouse may take a one-fourth interest.
>
> "Under present Oregon Law, upon the death of the owner of a tract of timberland, his surviving spouse will be entitled to one-half of the earnings, but if the decedent owns all of the stock of a corporation, which owns the timberlands, the surviving spouse may claim one-fourth of the stock, absolutely. You will note, of course, that the right to the use of timberland has little value. The value of a dower or curtesy interest in lands bears no relation to the value of the lands but concerns only their productiveness and the life expectancy of the owner.
>
> "Section 1 of the bill amends ORS 113.050 which now provides that a surviving spouse may elect against the will of a decedent to take an undivided one-fourth interest of the personal property of his estate. As amended, it provides that the surviving spouse may also elect to take by descent an undivided one-fourth interest in all the property of which the decedent dies seised and, with respect to real property, makes no distinction between resident and nonresident decedents.
>
> "Section 2 of the bill abolishes dower and curtesy except with respect to the surviving spouse of a person who died prior to the effective date of the Act; it preserves rights and remedies with respect to vested estates of dower and curtesy.
>
> "Section 3 of the bill amends ORS 5.040 relating

to jurisdiction of probate courts in the admeasurement of dower or curtesy. For this purpose, jurisdiction is limited to the interest of the surviving spouse of a person who died before the effective date of the Act.

"Section 4 of the bill deletes references to tenancies by curtesy in ORS 91.020 and section 5 makes a similar deletion in ORS 91.030.

"Section 6 amends ORS 105.340, relating to sales in partition, to delete reference to inchoate rights of dower.

"Section 10 repeals 41 sections of the Code relating to estates of dower and curtesy. Under sections 3 and 4 of the bill, these provisions will continue in effect with respect to the rights of dower and curtesy of the surviving spouses of land-owners who died before the effective date of the Act.

"The bill does not in any respect modify the law with respect to dower or curtesy consummate. Inchoate interests are mere expectancies or possibilities and legislation affecting or abolishing them does not impair any property right or the obligation of any contract. This is well established in other jurisdictions and it is the holding of our own Supreme Court in United States National Bank vs. Daniels (1947), 180 Or. 356,177 p. (2d) 246.

"The Advisory Committee on Probate Law notes a trend toward the abolition of common law estates of dower and curtesy and considers that it is in keeping with the trend away from an agrarian economy. There is nothing radical about the change which this bill proposes. It simply makes a more appropriate provision for the benefit of the surviving spouse of a decedent than has heretofore been made under existing law."

The reference to the Advisory Committee minutes is certainly anything but helpful in considering the serious questions which I shall now introduce for discussion and decision by this meeting.

I note that in my copy of Bill No. 1, submitted to the Law Improvement Committee as revised January 14, 1965, I have in section 1 and in section 2 of the proposed draft, the words "one-fourth interest" have been corrected to read "one-half interest". Although I can find no language in the minutes which authorize this change, it is obvious why the change was made in my draft. The original bill, Senate

Bill 315, provided that the widow be given an undivided one-quarter interest in the real property in lieu of the dower interest. Of course, long subsequent to this time, the committee has changed this undivided one-quarter interest in the real property to an undivided one-half interest in the real property. Thus, if the widow is to take by descent, she would take an undivided one-half interest and not an undivided one-quarter interest as now provided in this bill.

It is my suggestion, however, that the undivided one-quarter interest in real and personal property as provided in the draft be retained. We are now providing, in effect, that the devolution of real property to the widow will correspond to the present devolution of personal property. Thus, it would seem appropriate that the present undivided one-quarter of the personal property, upon election against will, should be retained also as to both the real and personal property.

With respect to other changes in the present draft from the first draft submitted to you, I quote the following from Mr. Lundy's comments on the original rough draft of this proposal:

> "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."

Section 2 of the proposal reads in part as follows: "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." In my opinion, to carry out the full intent of this language, the proposed bill should eliminate all reference to both inchoate and consummate dower and curtesy. This has indicated to me a change in section 3 of the first draft.

I have also included amendments to ORS 107.100 and 105.050, which were not included in the original proposal No. 6.

I have also eliminated section 9 of the proposed Act since this section is included in and amended by the draft of Clifford E. Zollinger on support of spouse and children.

I have eliminated the amendment of ORS 111.030, section 10 of this proposal, because that is repealed by the present draft on advancements.

I have eliminated section 11 because this provision would be repealed by the proposed section on wills.

One other comment is necessary. This bill does not repeal ORS 113.090, which provides that no action or suit shall be brought after 10 years after the death of a decedent to recover or reduce to possession curtesy or dower by the surviving spouse of such decedent. This limitation statute has been most useful to title companies in passing outstanding dower or curtesy interests where it can be established that the owner of the property has been dead 10 or more years. Since this is a limitation statute, it would be applicable to dower and curtesy rights for a period of ten years following the effective date of the Act. Although retaining this limitation statute in the code would not be consistent with the remainder of this bill, I suggested to Mr. Lundy that I could see no great harm in retaining this section for the notice of all concerned.

In Mr. Lundy's original comments on the proposed draft he called attention to the fact that the draft did not include amendments of a number of sections which, because of the substantial bulk they would add to the draft, were not included. Certain of these sections have been included in the present draft, but I call attention to the fact that, in addition to the above, amendments should be included to ORS 68.420, 94.105 and 105.330. The amendment of these sections, which would consist merely of the elimination of the

references to dower and curtesy interests, would be included in any legislation submitted finally.

I have not included in the draft Mr. Lundy's able comments or others in the file, but this materal will be included as part of the final draft.

STANTON W. ALLISON

OBJECTIVES OF MICHIGAN PROBATE

CODE REVISION

Adopted 1/21/67

I.

TO SIMPLIFY THE PROCESS OF TESTAMENTARY SUCCESSION TO THE END OF REDUCING THE DIFFERENCES IN CERTAINTY, CONVENIENCE, PRIVACY AND DELAY THAT PRESENTLY EXIST BETWEEN DISPOSITIONS BY WILL, ON THE ONE HAND, AND TRANSFERS AT DEATH BY REVOCABLE TRUST, ON THE OTHER.

a. By simplifying the procedures relating to probate of wills, so that wills can be validated via an administrative process without notice, leaving questions that might be raised by contest or by request for a binding adjudication of validity, for decision in a separate proceeding. Such an approach would eliminate the delay involved in obtaining letters testamentary, reduce or eliminate the need for special administrators, and reduce the ability of persons who might oppose the will to impede and delay normal administration as a means of inducing settlement. It would tend to equalize the position of one who would attack a will, with that of one who might attack a revocable trust.

b. By providing that wills which are filed with the probate court incident to probate proceedings should be treated as private documents to be exhibited to those who can show probable interest, but not to the public.

c. By providing statutory duties, powers and protective devices to executors so that, where there are no limitations on his power by will and no other reason to resort to probate court for instructions or the resolution of controversies, the personal representative will have the option of settling and closing the estate without further recourse to probate court. At the same time, the rules should provide ample protection for interested parties by (1) requiring the personal representative to give certain notices and information to interested parties as a prerequisite to gaining the benefit of statutes of limitation; (2) providing a complete opportunity for any interested party to subject the personal representative to the authority of the probate court when any occasion demands it; (3) providing for the possibility that the court may order that a particular administration be accomplished under the continuing supervision of the probate court if some necessity for so doing is shown.

d. By eliminating the disparity that presently exists

between wills and will substitutes in respect to the elective share of spouses by (1) requiring an electing spouse to take economic benefits received from the decedent by will substitutes into account for purposes of determining what his or her protected share in the probate estate should be; (2) by extending the spouse's right of election to will-like transfers to third persons while making it clear that such transfers are valid except to the extent necessary to make up the share of the spouse; (3) providing for disinheritance of the spouse by consent by barring him or her from electing against a will to which he or she has given written approval during the decedent's lifetime.

e. By minimizing the continuing supervision by probate court of testamentary trusts and by empowering the probate court to handle litigation involving any kind of trust that persons properly might submit to a Michigan court, (i.e., including inter vivos family trusts, or other trust arrangements of a dispositive nature).

f. By aligning Michigan rules concerning interpretation of wills and its rules relating to ancillary administrations to uniform models so that the likelihood of conflicts of law problems in cases of decedents who have moved from state to state, or who own property in several states, may be reduced.

II.

TO UPGRADE THE WORK AND IMAGE OF THE PROBATE COURT BY REDUCING OR ELIMINATING THE NECESSITY FOR A JUDGE'S INVOLVEMENT IN ROUTINE MATTERS RELATING TO ADMINISTRATION OF DECEDENTS' ESTATES, BY INCREASING THE POWER AND FINALITY WITH WHICH THE PROBATE JUDGE MAY DEAL WITH CONTESTED MATTERS, AND BY BROADENING THE SUBJECT MATTER JURISDICTION OF THE PROBATE COURT SO THAT IT PROPERLY MAY DEAL WITH ALL KINDS OF PROBLEMS INVOLVING FIDUCIARIES, WHO ARE, OR MAY BE, PROPERLY BEFORE A PROBATE COURT.

a. By eliminating the supervisory role of the probate court over most matters relating to estates; making controversies relating to estates more like other litigated matters in that the court will act in a judicial way in response to pleadings raising issues for decision, and process subjecting interested parties to the power of the court.

b. By separating routine administrative matters such as the non-contentious authentication and validation of wills, appointment of personal representatives in non-contested cases and the checking and receiving of reports required to be filed by personal representatives, from the responsibilities of probate judges by designating the position of probate registrar and permitting delegation of such matters to the registrar.

c. By making adjudications in matters litigated before the probate judge final, subject only to appeal to the Court of appeals. Ideally, the probate court should be considered as co-equal with the circuit court. If it can be considered a part of the latter court, other things would fall in place. If it is to remain a separate court, then the jurisdiction of the circuit court over probate matters would need to be terminated.

d. By giving the probate court jurisdiction, as now possessed by circuit courts, over inter vivos trusts.

III.

TO UPDATE AND SIMPLIFY THE LAW OF INTESTATE SUCCESSION AND THE RULES RELATING TO THE SETTLEMENT OF SMALL ESTATES SO THAT THE IMPACT OF RULES OF PROPERTY SUCCESSION ON PERSONS OF MODEST MEANS WILL BE AS BENEVOLENT AS POSSIBLE.

a. By increasing the amount of property which a surviving spouse and dependents may claim ahead of creditors and devisees to some fixed amount and by providing affidavit procedures and summary administration procedures so that estates of such size usually will not need to be administered.

b. By providing that all intestate property pass to the surviving spouse up to a limit calculated to cover most modest estates. If the amount involved is over a set amount, the excess would be divided by the surviving spouse and descendants.

c. By eliminating the distinction between real and personal property for purposes of intestate succession.

d. By eliminating the possibility of inheritance by very remote relatives by providing for escheat where the decedent is not survived by any dependents, whether relatives or not, nor any relatives who are closer in relationship than descendants of great-grandparents. In other words, descendants of grandparents would be the outer limit on blood relatives who might inherit.

e. By providing a period of survivorship, such as 30 days, as a condition to the right of any heir (save to exempt or family allowance property) to take property by intestate succession.

f. By providing an optional system of independent administration for personal representatives of intestate persons so that such representatives will have the power to settle and close the estate of an intestate without the necessity of recourse to the probate court after receiving letters of

administration. Such a system would include appropriate safeguards which would assure any interested person of reasonable protection. This would provide the same flexibility of administration for intestate estates as is proposed for testate estates.

IV.

TO CORRECT VARIOUS INEQUITIES OF EXISTING PROBATE LAWS AND TO ELIMINATE VARIOUS PROVISIONS OF THE PRESENT CODE WHICH HAVE GENERATED CONSIDERABLE CRITICISM AND WHICH CAN BE ELIMINATED WITHOUT FUNDAMENTAL DAMAGE TO THE SECURITY OF THE SUCCESSION PROCESS OR THE INTERESTS OF THOSE INVOLVED IN ITS SMOOTH OPERATION.

a. By providing that any suitable person who consents to suit in Michigan courts may be a fiduciary of a Michigan probate estate.

b. By eliminating the appointment of appraisers by probate judges and making the selection of appraisers the sole responsibility of the personal representative.

c. By eliminating statutory fees for personal representatives and substituting a non-specific provision entitling personal representatives to reasonable compensation. This would permit the subject of fees for fiduciaries to be made the subject of court rule, if any schedule ... other than those settled by competitive pressures is desirable.

d. By eliminating the risk of personal liability of personal representatives for conduct which is reasonable. This would mean a change in the law concerning the personal liability of an executor or administrator for torts of his employees and in the rules making a fiduciary absolutely liable for a reasonable, but erroneous determination of the identity of the persons entitled to the estate .

e. By including comprehensive provisions dealing with the rights of adopted persons so as to remove questions relating to intestate succession and the interpretation of gifts and bequests to groups identified as "children," "issue," "heirs" and "descendants."

f. By aligning to modern, uniform norms, the basic Michigan assumptions concerning such subjects as revival of revoked wills, proof of destroyed wills, implied exercise of powers of appointment, and ademption of specific gifts of corporate securities as affected by a change of ownership of such items between the date of execution of the will and the date of death.

V.

TO REVISE THE LAW OF GUARDIANSHIP TO MAKE IT MORE RESPONSIVE TO THE NEEDS OF THE TIMES AND TO REDUCE THE AMOUNT OF REQUIRED SUPERVISION OF THE AFFAIRS OF GUARDIANS AND OTHER CONSERVATORS BY THE PROBATE COURT.

a. By separating the subjects of guardians of the person of incompetents from the subject of care of property of persons who are disabled to the point of being unable properly to manage their property and business affairs. Such a separation would move the question of mental competency away from the question of ability to conserve or to manage property leaving the competency question as relevant only to situations where some restraint of personal liberty is appropriate.

b. By reducing the need for guardians or conservators for minors or their property by designating certain relations with whom a minor may be residing as having certain statutory rights in respect to authorizing medical treatment or other intrusions on the person or liberty of a minor, and in respect to small property interests of minors.

c. By giving property conservators appointed by the probate court the option and power to manage the affairs of the owner with minimum contact with the probate court.

Preliminary Remarks by Richard V. Wellman at Meeting of Probate Council and Probate Code Revision Committee, Michigan State Bar Association Building, Lansing

January 21, 1967

The subject of probate reform is frequently associated with Dacey's book. This is unfortunate, for it obscures the fact that an American Bar Association subcommittee was moving toward probate reform as early as 1962, and that this Council took steps at least six months before Dacey's book first appeared, toward revision of Michigan's Probate Code.

To me, these moves by responsible agencies of the bar demonstrate two points: first, that lawyers are sensitive to legal technicalities that are upsetting to the public; and, second, that there are problems with probate law in terms of its impact on the practicing lawyer, and the way he would like to handle estates, that warrant serious study and revision. Whether bar groups could have expected much success with legislatures in respect to changes in this area without Dacey's help is problematical. But, with the amount of public attention that is presently focused on probate, we have a unique opportunity to move things toward a better way. I, for one, am awfully glad that we got a bit of a head start on the job.

From a purely professional viewpoint, the reasons why practicing lawyers are concerned with the present shape of our probate laws are not hard to find. Our probate code of 1939 was not very old when the marital deduction came into federal tax law in 1948 to give real impetus to the estate planning business. Since then, it has become increasingly true that the practicing lawyer has been pushed by good judgment and client demand, ever more deeply into the science of seeking out safe, efficient and simple devices for carrying out the tremendously diverse objectives of owners in respect to preserving and transmitting their savings. In the process, we have become keenly aware of the values that are flowing from generation to generation via insurance, pension and profit-sharing arrangements, joint tenancies, living trusts and other devices. This realization has sharpened our perception of the truly unique role that the will plays in estate planning, but it has also made us more aware of the embarrassing encumbrances that accompany use of the will as an estate planning tool. Many of us think of the will as the lawyer's specialty, and we hate to see it slip into the category of something no person of considerable means uses when he is completely well advised about its features and comparative shortcomings.

The problems that relate to the utility of wills are rooted in probate procedures. Turning to this area, we should see that we live with three inherited assumptions which, in combination, account for most of our difficulties. These are (1) the idea that a will has no validity until it is judicially authenticated after death; (2) that all personal and intangible property of a decedent vests, as a matter of title, in the person appointed by the probate court as the executor or administrator of the decedent's estate; and (3) an extenstion of the first two--that the probate court, being indispensable in the settling of a decedent's estate, is somehow responsible for supervising the process of collection and distribution of assets, and must stay involved in the process until the estate is judicially closed.

The product of these notions, especially the last one, is an inflexibility of procedures governing the settlement of estates that makes the administrative process more a hinderance than a helpful safeguard. For example, there is no essential difference in the procedures applicable to a well drawn will which governs a completely planned estate, and to an estate governed by a do-it-yourself job, or an intestacy. The same routines apply whether the successors of a particular estate are harmonious and cooperative, or at each other's throats. Probate procedures take no particular account of whether the assets of an estate are simple or complex, although the differences in the headaches that go with running a closely held business, and those attending ownership of a well selected portfolio of securities seem obvious from every other point of view.

Of course, inflexible rules become obsolete more quickly. For example, there probably was a day when it made sense to make the sale of land shortly after its owner's death a sticky piece of business. But, when that ancient point of view works to impede the free mangement of a portfolio of rapidly fluctuating securities, or to obstruct the sale of speculative land during a period following an owner's death we realize how far out of tune our rules have become.

But, inflexibility and outmoded assumptions are not the whole of the story. Another major drawback of present assumptions relates to fixing responsibility. The notion that the probate court supervises estates leads the public to blame the courts when things go sour in a particular estate, but we all know that today's courts, particularly those in populous areas, are in no position to serve as true supervisors of all that goes on in estate administration. They must react to pleadings and facts brought to their attention. Executors, on the other hand, are handcuffed by the need to get court orders on routine matters and are

thus rather effectively impeded from exercising responsibility which really should be theirs. Attorneys can and do help this curious situation, but here, too, we must realize that they work for the executor and must await his authorization. The result is a tragic form of the old shell game; you never know exactly which hat covers the blame when things go wrong.

The drafting subcommittee which you have appointed has given preliminary approval to a set of principles which we believe may help us achieve a new code and a new approach to some of these problems. The ideas set forth in these principles are in line with the present direction of the national effort to achieve a uniform probate code. Again, speaking in general terms, I would say that the principal feature of the new approach we are considering is flexibility. I can best emphasize this by saying that nothing presently being considered would force a particular probate court or probate lawyer to make drastic changes in the way estates are presently handled, provided present procedures seem preferable as applied to a given case when compared with alternatives. The changes involved are in the order of options. If they make sense, I would expect that they would begin to be used by careful lawyers in selected situations. This may not be the sort of dramatic change in law that will be exciting news for various ladies' sewing circles, but, in my judgment, it is the sort of change which will serve best to meet the needs of the public.

LIVING TRUSTS: AVENUE FOR ABUSE?

Probate practices must meet 20th century need

by William J. Hickey
Probate Judge, Norfolk County, Massachusetts

The twentieth century has posed a serious challenge to the nation's probate courts.

Where land and transfer of ownership was once a major asset of the probate system, realty today plays a minor part in most estates.

Probate practices, save for descent and purchase of realty, no longer serve for administering estates of bank accounts, securities, problems of mental capacity, investment practices and estate and inheritance taxes.

The family's financial future today is not a task for an amateur or a "do-it-yourself" man.

Nor can any pattern of multitudinous forms assure a plan's capacity for meeting the family's particular needs at lowest costs in expenses, taxes, and avoidance of potentially dangerous and troublesome mistakes.

Probate today is under attack throughout the nation. The national press has entered the fray: emotions and prejudices are heightened; facts are obscured.

The probate system--as it exists to day--is being attacked because of:

Lengthy delays in making funds available to heirs;

Political patronage;

Unreasonable expenses for court-appointed appraisers and guardians ad litem;

Publicity attending financial status of decedents and their beneficiaries.

Basis in Fact

Judges and attorneys must recognize that these attacks may have a basis in fact.

We must rectify and modernize our probate courts.

There is an absence of uniformity in procedure and jurisdiction of probate courts throughout the nation. Consequently, I shall deal primarily, but not exclusively, with the Massachusetts probate court system--one of the oldest in the United States.

AVENUE FOR ABUSE?
Hickey

Back in History

The Massachusetts Legislature, in 1784, established the state probate courts, providing for judges and registers of probate in each county and defining their powers.

In 1862--eight years later--these courts were made Courts of Record, and, in 1891, became courts of general and Superior jurisdiction.

On many occasions and at various times both the organization and personnel of these courts have been studied by prominent citizens.

In 1956, then Gov. Christian A. Herter (later Secretary of State under President Eisenhower) appointed the Herter Judicial Survey Commission, composed of an eminent cross-section, geographically and professionally of the community.

This Commission declared:

> . . . most people in the Commonwealth, at one time or another, find themselves, or their relatives and friends involved in proceedings in the probate court. These courts enjoy an enviable reputation throughout the country for their organization and substantiveness and are up to date in their work. . . .

In Massachusetts the name "Probate" is an anomaly since the jurisdiction of the Courts encompass, not only probate matters, but also the human and financial problems of every segment of society.

A partial list of subjects within the sphere of authority of Massachusetts Probate Courts is: the probates of wills and granting of administration of estates; appointments of guardians and conservators; petitions for adoption of children and change of name; libels for divorce, or for affirming or annulling marriages; petitions of married women relative to their separate estates; petitions relative to the care, custody, education and maintenance of minors; and equity matters arising under trusts created by will or other written instruments.

Effective March 1, 1964, the Probate Courts were granted original and concurrent jurisdiction in equity with the Supreme Judicial and Superior Courts "of all cases and matters of equity cognizable under the general principles of equity jurisprudence and with reference thereto shall be Courts of general equity jurisdiction."

Streamlined System

Changes in recent years resulted in streamlining the entire Massachusetts probate system. Here are a few of the changes:

1. Legislative statute for the appointment of a chief justice with authority to assign judges to alleviate the caseload throughout the Commonwealth.

2. Supreme Judicial Court rule requiring court-appointed appraisers and guardians to file a detailed statement of services rendered, disbursements, and charges may be published and are on file for public scrutiny.

3. Legislative statute authorizing testator to order that no guardians ad litem be appointed to represent minors or unborn persons.

4. No judge of probate nor any register, assistant register, or persons employed in any registry of probate shall be interested in, or benefited by, the fees of emoluments which may arise in amy matter pending before any Probate Court.

Considering the Massachusetts changes and, after a study of probate nationally, I feel the following recommendations should greatly improve administration in all probate courts throughout the U. S. and improve the "image" of the probate system everywhere:

1. Abolish court appointed appraisers. Since the fiduciary must marshall the assets, he should be responsible for the establishment of valuations. The opinions of non-expert court appraisers is not given any weight by the State Inheritance or Federal Tax Bureaus. Therefore, their existence serves no useful purpose. (It should be noted that so-called court appointed appraisers are not required in the administering of an Inter Vivos Trust.)

2. Shorten the period of creditors to bring suit and thus allow estates to be probated more swiftly.

3. Extend the widow's allowance to include all dependents of the decedent and increase amounts available so as not to inconvenience those who relied upon the decedent for financial support.

4. Require estate and inheritance tax returns to be filed and reviewed more quickly; authorize the fiduciary to make distribution six months after filing returns without personal liability for any additional assessment.

5. Require the fiduciary to make final distribution within 15 months from the date of death, or forfeit the right to payment of services and be subject to removal. This filing period to be extended only upon approval of the Court and upon affidavit for good cause.

6. Require attaching creditors to file an affidavit stating the exact nature of a claim and facts substantiating the amount of attachment.

7. Require all fees to fiduciaries and attorneys to be approved by the Probate Court prior to payment.

8. Make the financial status of all decedents and their wills and trusts private records, open only to heirs-at-law and other interested persons--comparable to the tax records of the Federal and State Governments.

9. Appoint rather than elect Justices and probate officials.

10. Expand a small estate statute, in those communities that have it, to include somewhat larger estates, broader in scope.

11. Require the trustees of inter vivos trusts to file accounts in the Probate Court upon the death of the donor.

Living Trust Query

Living trusts are being created for other than tax purposes, in most larger estates, to avoid delay of probating, the expense of probate and the publication.

When an estate is probated there should be a judicial review of the fiduciaries' financial transactions, their fees and their general competency. Presently, the accounts of many fiduciaries, under inter vivos trusts, are being filed in court although there is no requirement to do so. In a judicial review, Probate Courts also have authority to determine the meaning of inter vivos trusts, the removal and appointment of trustees.

It should be considered whether, after the death of the donor of an inter vivos trust, the fiduciary be required to file an annual accounting.

This would give protection to the heirs and at the same time retain the unique tax advantages of the inter vivos trust, without additional charges.

Stricter Requirements

It is now more and more prevalent for older persons who are somewhat incapacitated to create joint accounts, or trustees accounts, or inter vivos trusts, for the purpose of allowing a confidant to manage the business affairs and pay the bills. In many cases there is no testamentary intent. Upon death, these funds are not reported and the question of mental capacity cannot be determined since there is no knowledge of any assets.

It is therefore suggested that, since these funds must be reported to the estate and inheritance tax authorities, such information be required by the Probate Courts so that some degree of supervision be exercised over the disposition of non-probate assets.

We must bring our Probate Courts in tune with the needs of the twentieth century. However, there is an immortal maxim that any plan created by the mind of man is no better than the mind or minds that administer the system.

ADVISORY COMMITTEE
Probate Law Revision

Thirty-eighth Meeting
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Dates) and: Times) 1:30 p.m., Friday, July 14, 1967 and 9:00 a.m., Saturday, July 15, 1967
Place: Suite 2201, Lloyd Center
(This Board Room is at the head of the spiral stairway on the Central Plaza, or take elevator to the medical section.)
Portland, Oregon

Suggested Agenda

1. Approval of minutes of May and June meetings.

2. Miscellaneous matters.

3. Probate courts and jurisdiction.

   a. Report by Legislative Counsel on 1967 legislation.

   b. Discussion to be led by (if present) Judge Thalhofer, Judge Warden, Mr. Copenhaver, Mr. Gooding and Mr. McKay.

4. Wills (draft by Riddlesbarger considered at June meeting).

   a. Sections 14 and 14A (background report by Mr. Allison and Mr. Lundy).

   b. Sections 14B and 14C (discussion to be led by Mr. Riddlesbarger).

5. Elective share of surviving spouse.

   Consideration of section 1 of draft by Allison considered at June meeting and elective share provisions of proposed Wisconsin Probate Code (draft by Mr. Riddlesbarger, Mrs. Braun and Mr. Richardson, and discussion to be led by them).

6. Family support (discussion to be led by Mr. Zollinger).

7. Outline of chapters of proposed revised Oregon probate code (discussion to be led by Miss Lisbakken).

8. Title to property (discussion to be led by Mr. Frohnmayer).

9. Advancements (discussion to be led by Mr. Frohnmayer).

10. Conserving property of missing persons (ORS chapter 127) (report by Mrs. Braun and Mr. Gilley).

11. Next meeting.

Please note change of meeting place for July meeting.

ADVISORY COMMITTEE
Probate Law Revision

Thirty-eighth Meeting, July 14 and 15, 1967
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The thirty-eighth meeting of the advisory committee (a joint meeting with the Committee on Probate Law and Procedure, Oregon State Bar) was convened at 1:45 p.m., Friday, July 14, 1967, in Suite 2201, Lloyd Center, Portland, by Chairman Dickson.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Frohnmayer, Husband, Jaureguy, Lisbakken and Riddlesbarger. Butler, Carson, Gooding and Mapp were absent.

The following members of the Bar committee were present: Bettis (arrived 3:30 p.m.), Gilley, Kraemer, Krause, McKay, Piazza and Thomas. Biggs, Braun, Copenhaver, Lovett, Meyers, Mosser, McKenna, Silven, Thalhofer, Pendergrass, Richardson and Warden were absent.

Also present was Robert W. Lundy, Legislative Counsel.

Approval of Minutes of May and June Meetings

The reading of the minutes of the two previous meetings (May 19 and 20; June 16 and 17, 1967) was dispensed with and the minutes were approved as submitted.

Probate Courts and Jurisdiction

Report by Lundy. Lundy distributed a copy of a report he had prepared dated July 12, 1967, on the subject of probate courts and jurisdiction. He explained that the report had been prepared in response to a request made at the June 1967 meeting concerning action taken by the 1967 regular session of the Oregon legislature on transfer of probate jurisdiction. He noted that probate jurisdiction had been transferred to the circuit court in the following four counties: Columbia and Tillamook from the county court; Linn and Umatilla from the district court. He indicated that in all four instances the transfers were made in conjunction with the addition of a circuit court judge.

Lundy also reported that the legislature had transferred juvenile jurisdiction to the circuit court in a number of counties, and, as a result of this action, there were only eight counties in Oregon where juvenile jurisdiction remained in the county court.

Lundy's report also set forth previous action by the committees relating to the subject of probate courts and jurisdiction and quoted excerpts from earlier minutes relating to the following four basic points previously decided:

(1) Vest original probate jurisdiction in all counties in the circuit courts only.

(2) Define probate jurisdiction in broad terms.

(3) Look to present methods of providing temporary circuit court judges to assist in handling the additional workload possibly resulting from transfer of probate jurisdiction.

(4) Authorize appointment of attorneys as probate commissioners to handl ex parte probate matters.

Report of subcommittee. McKay reported that he had met with Thalhofer and Copenhaver to discuss appointment of attorneys to act as probate commissioners to handle ex parte probate matters in counties in which there was no resident circuit court judge and no district court. The committees were of the opinion it would be more desirable to authorize the county clerks to sign ex parte matters than to appoint attorneys as probate commissioners and outlined the following reasons for the departure from the decision previously decided upon by the committees:

(1) The location of the county clerk was a matter of general knowledge, whereas the judge would have to be contacted in many cases to learn the name and address of the commissioner he had appointed.

(2) In several eastern Oregon counties there was just one attorney or firm and to appoint him might prohibit him or his firm from practicing in the probate court.

(3) The county clerk was the clerk of the court, and as such, was under the jurisdiction of the probate judge.

(4) The county clerk received a salary which would eliminate the need for such additional payment that would be necessary for probate commissioners.

McKay noted that the 1963 Iowa Probate Code, sections 22 and 23, adopted this approach and suggested that the draft be adopted to apply to the county clerk in the eight eastern Oregon counties which would be affected. Dickson urged that the provision be made permissive in all counties and pointed out that it would be both convenient to attorneys and time saving to the probate judge if the county clerk were permitted to handle ex parte orders.

The committees discussed the types of orders which the county clerk should be permitted to sign and agreed that he should not be permitted to determine or approve:

(1) A matter contested in any way.

(2) An order requiring appraisal of an estate.

(3) The amount of support money.

(4) The final account.

(5) Heirship.

(6) Attorney fees.

Determination of guardianship matters was discussed and it was agreed that the county clerk should be authorized to sign ex parte orders in guardianship matters as well as probate matters.

McKay commented that section 23 of the 1963 Iowa Probate Code allowed anyone who disagreed with any order to oppose it within six months. Riddlesbarger asked if ex parte probate orders by the clerk of court should be made permissive or mandatory. He suggested that some judges might refuse to relegate this responsibility to the clerk. McKay read section 23 of the 1963 Iowa Probate Code and the committees agreed that language would be appropriate.

McKay moved, seconded by Riddlesbarger, that a draft be prepared to provide for the transfer of all probate jurisdiction to the circuit court and to authorize and empower the county clerks in the respective counties to sign all but a few vital ex parte orders on a permissive basis. Motion carried. Dickson requested that the subcommittee, consisting of McKay, Thalhofer, Warden, Copenhaver and Gooding, prepare the draft, submit it to Allison prior to the September meeting, and the subject be placed on the September agenda as the first order of business.

Section 2. Execution of a Will. (Note: See Minutes, Advisory Committee, 6/16,17/67, Appendix A, page 2; and memorandum from Allison dated July 11, 1967.)

Allison called attention to his memorandum dated July 11, 1967, and requested reconsideration of the action taken at the June 1967 meeting requiring that the testator, in the presence of each of the witnesses, "declare that the instrument is his will." He was of the opinion that to add to the technical requirements for execution of a will would provide additional grounds for attacking a will of a competent testator. Allison recited the cases he had read on this subject and advocated rejection of the provision which, he, indicated, was contrary to the existing case law of Oregon prior to the Sloan decision in Erickson v. Davidson, 216 Or. 547. Allison moved, seconded by Thomas, that the committees adopt sections 237 and 238 of the proposed Uniform Probate Code.

Riddlesbarger called attention to his comments on section 2 of the wills draft (Note: See Minutes, Probate Advisory Committee, 6/16,17/67, Appendix A, page 3) and noted he had recommended that publication be required. He stated that a witness signed his name to an instrument for the purpose of identifying and proving it, and that if the witness did not attest to something, there was no good reason for the requirement that a will be witnessed. Krause expressed agreement with Riddlesbarger and commented that a witness should, as a minimum requirement, be aware that he was signing as a witness to a will. Frohnmayer observed that the execution of a will should be made as simple as possible and agreed with Allison that stumbling blocks should not be added which would defeat the intent of the testator. He also expressed the view that witnesses should not be required to sign in the presence of each other. Husband remarked that he favored having the two witnesses present at the same time. Jaureguy commented that while it was a good idea, the law should not require such a procedure. He said that he could not agree that a will should be denied probate because the witnesses did not sign in the presence of each other.

Gilley suggested providing that the will be admitted to probate in every instance unless there was testimony of an eye witness to the effect that the will was not published. Allison remarked that many wills, not drawn by lawyers, do not have an attestation clause.

Zollinger agreed with Riddlesbarger that unless a

witness attested a will, his signature was not very meaningful. He noted that in Iowa, where the law was the same as Oregon's present law, the requirement had been added that the testator publish his will and said that he would favor the requirement that the witness be aware of the fact that he was attesting a will.

After further discussion, Allison withdrew his motion and Zollinger moved, seconded by Riddlesbarger, that the action taken at the June 1967 meeting be reconsidered and that section 2, subsection (1), be amended to read:

"(1) The testator, in the presence of each of the witnesses shall:

"(a) Sign the will; or

"(b) Acknowledge the signature previously made on the will by him or by his proxy; or

"(c) Direct one of the witnesses or some other person to sign thereon the name of the testator. Any person who so signs the name of the testator shall sign his own name to the will and write on the will that he signed the name of the testator at the direction of the testator.

"(2) At least two witnesses shall each:

"(a) See the testator sign the will; or

"(b) Hear the testator acknowledge the signature on the will; or

"(c) Understanding that the instrument is the will of the testator, sign his name thereto in the presence of the testator and at his request."

Allison suggested that subparagraphs (b) and (c) of subsection (1) be transposed and was told this was a drafting matter to be left to his discretion.

Thomas expressed doubt that "understanding" was the proper term as used in subparagraph (c) above. Zollinger suggested "being aware" and Riddlesbarger called attention to the deleted language in subparagraph (d): "Observe acts which unmistakably indicate that the will has been signed by the testator . . ." Dickson directed that the exact terminology be left to the draftsmen. In reply to a question by Husband, the committee favored omitting the

provision that would require the witnesses to sign in the presence of each other. A vote was then taken on Zollinger's motion and the motion carried.

Section 14. Encumbrance or disposition of property after making will; and Section 14 A. Bond or agreement to convey property devised as a revocation. (Note: See Minutes, Probate Advisory Committee, 6/16,17/67, Appendix A, page 10; Lundy's report dated 7/13/67.)

Lundy distributed a report dated July 13, 1967, which he had prepared to answer questions raised at the June 1967 meeting on sections 14 and 14 A of Riddlesbarger's revised draft on wills. He explained that a question had arisen as to the derivation of section 14 and was of the opinion that it came from subsection (3), ORS 114.230. Section 14 A, he said, was derived from ORS 114.140. Concerning the status of ORS 114.150 Lundy noted that it covered a subject involved in what was called "Bill No. 7" in 1965. He called attention to the material following tab 19 in the blue notebooks which set forth the substance of Bill No. 7 plus the committees' action on certain sections in ORS chapter 116.

Allison indicated that section 377 of Jaureguy and Love made clear that section 14 A was necessary not only to indicate a change in the common law rule as to revocation, but also to provide that the person who received a specific devise of property would also receive the benefit of any contract on that property. Lundy expressed agreement that section 14 A was necessary and had been inadvertently omitted from the first draft. He added that section 14 A should probably follow section 10 of the draft rather than section 14 if the committees agreed with his conclusion that section 14 was not a revocation provision.

Riddlesbarger moved, seconded by Zollinger, that section 14 A be adopted and approved in principle, leaving to Legislative Counsel the task of drafting the section in proper language. The motion carried.

Riddlesbarger then moved, seconded by Zollinger, that section 14 be approved. The motion carried.

Section 14 B. Non-ademption of specific gifts in certain cases. Riddlesbarger explained that section 14 B was copied from the 1966 proposed Wisconsin Probate Code and expressed approval of the intent of this section and suggested that the action would clarify the concept of

ademption by extinction. Allison took the opposing view and recommended deletion of the section because it would apply only to specific gifts, and a court would have to determine whether the legacy was specific or demonstrative before the section would be applicable. Zollinger agreed with Riddlesbarger and cited an occasion in his own practice where the proposed section, had it been in effect, would have settled the case in what he deemed to be a fair and just manner. After further discussion, Riddlesbarger moved, seconded by Zollinger, that section 14 B be approved in principle. Motion carried. Dickson asked the committee members to study the section so that they would be in a position to discuss it at greater length the following morning.

Section 14 C. Renunciation of gift under will. Riddlesbarger explained that section 14 C was recommended primarily to resolve the question of whether or not a renunciation would constitute a gift for gift tax purposes. Dickson asked Lundy to call Carson after the meeting to alert him to this problem and indicated that the section would be discussed the following morning when Carson was present.

Elective Share of Surviving Spouse

Dickson read a letter written by Richardson to Riddlesbarger in which Richardson stated that neither he nor Braun would be able to attend the July meeting. In his letter Richardson outlined general agreement with the procedure in the 1966 proposed Wisconsin Probate Code for election against a will. Riddlesbarger requested that this subject be postponed and Dickson directed that it be placed on the August agenda as item number 1.

Riddlesbarger called attention to the report Riddlesbarger and Allison had prepared on the rights of a surviving spouse to elect against a will.

Family Support

(Note: See report by Zollinger dated June 5, 1967, entitled "Support of Spouse and Children.")

Zollinger called attention to a draft, tab 15, in the blue notebooks, dated January 25, 1967, prepared by Legislative Counsel which was derived from a draft by Gilley and Krause and approved by the committees. He favored the changes in the draft set forth in his report dated June 5, 1967.

Section 1. Occupancy of family abode by spouse and children. Zollinger noted that Legislative Counsel had raised the question of whether section 1 was limited to fee

simple estates or whether the purpose was to include leasehold estates. Zollinger was of the opinion the section should provide for leasehold property and this was added to his draft. In reply to a question by Dickson, Zollinger commented that he felt it appropriate to give an incompetent child the right to occupy the place of abode as provided in the section.

Frohnmayer suggested subsection (2), line 2, read "fire and other hazards" and the members agreed to this change. Frohnmayer suggested reviewing the terminology by changing "abode" to "family residence." Zollinger contended that "principal place of abode" was a more meaningful term and others agreed.

Section 2. Support of spouse and children; petition, answer and order. Allison called attention to the question by Legislative Counsel on page 5 of Zollinger's June 5 report which asked what persons were included in the notice to "interested parties." Allison indicated he would prefer not to require a formal citation and hearing procedure. Frohnmayer agreed that it was not necessary to issue a citation and was of the opinion that any kind of actual notice to the personal representative would be adequate. Gilley questioned the advisability of requiring appointment of a guardian ad litem for minor children to protect their interests, and, after discussion, indicated he would prefer to leave this matter to the discretion of the court. Frohnmayer said that he favored Gilley's suggestion and proposed that the personal representative receive notice and the citation be issued only to those persons whom the court determined should receive notice. His opinion was that no problem existed in this connection in the vast majority of cases, and he opposed further complicating the procedure in estates where no problem had been experienced.

After further discussion, Gilley moved that subparagraph (b) of subsection (1) read "Unless the court by order waives citation, citation to the personal representative . . .(no further change)."

Zollinger moved to amend Gilley's motion by revising subsection (1) to read:

"(a) (No change.)

"(b) Unless the petitioner is the personal representative, service of the petition and notice of hearing thereon.

"(c) Unless the court by order shall otherwise direct, citation to persons whose distributive share of the estate

may be diminished by the granting of the petition.

"(d) Hearing."

Husband seconded Zollinger's motion and the motion carried unanimously.

The meeting was recessed at 5:15 p.m.

The meeting was reconvened at 9:10 a.m., Saturday, July 15, 1967, by Vice Chairman Zollinger in Suite 2201, Lloyd Center, Portland.

The following members of the advisory committee were present: Dickson (arrived 9:40 a.m.), Zollinger, Allison, Carson, Frohnmayer, Husband, Jaureguy, Lisbakken and Riddlesbarger.

The following members of the Bar committee were present: Bettis (arrived 10 a.m.), Gilley, McKenna, Piazza and Thomas. Also present was Lundy.

Support of Spouse and Children (Continued)

Section 3. Nature of support; limitations; change by court. Zollinger pointed out that subsection (4) had been inserted because of a suggestion by Legislative Counsel that there should be an expression of the manner in which distributive shares were to be charged if at all, because of any support order at the time of final distribution.

Allison noted that Legislative Counsel had suggested use of the term "set apart" rather than "transfer of" in section 3. Jaureguy commented that "transfer" was ambiguous because it could mean transfer of possession or transfer of title. Zollinger suggested this could be corrected by inserting "title to" after "Transfer of" in subparagraphs (a) and (b) of subsection (1). Allison contended "set apart" was the better phraseology because it had been used in the code for many years. Zollinger asked for a show of hands on the use of the two terms and the majority of the committees favored "set apart."

After further discussion, Frohnmayer moved that the committees reconsider their decision. Zollinger again asked for a show of hands and the committees reversed their position and approved "Transfer of title to" in subparagraphs (a) and (b) of subsection (1).

Frohnmayer suggested substitution of "may" for "will"

in the first line of subsection (3) and Riddlesbarger proposed "is or may be" in place of "will." Frohnmayer indicated that under the wording of the draft, the court would actually have to make the determination as to the estate's insolvency and could then only allow one-half of the value of the estate. Jaureguy added that the support order was made before there was an accurate determination of the indebtedness of the estate.

Zollinger suggested the following language in subsection (3): "If it appears to the court that after such provision for support is made the estate will be insolvent, the provision for support . . . (no further change)." The committees agreed this language would be satisfactory.

In reply to a question by Riddlesbarger, Zollinger said that section 3 did not provide differentiation between payment for temporary or permanent support. Riddlesbarger was of the opinion that the court would have no guide to determine whether or not a previous award should be taken into account. Zollinger explained that the determination was discretionary in the court. Riddlesbarger questioned the clarity of the provision and suggested insertion of a requirement that the court take into consideration amounts previously paid in subsection (2). Gilley was of the opinion that subsection (4) of section 2 was self limiting and did not need revision.

Allison indicated that Dickson had previously stated his opinion that the provisions for support of spouse and children should be broad enough to serve as a substitute for a small estates Act. Dickson commented that adequate safeguards could be made for the protection of creditors while setting the remainder of the estate aside for the widow and children. Zollinger expressed disapproval of using this statute as a device to escape a small estates Act. He said that the provision by which the court could transfer title from the heirs to the widow for her support and the support of the children should be measured by their need and not by convenience in transferring title.

Zollinger moved, seconded by Gilley, that the committees approve the chapter on support of spouse and children with the amendments made during the course of the discussion. Motion carried.

Editorial comment. (Page 6.) Zollinger asked the committees to examine the editorial comment included in his report. Allison suggested deletion of "owned by him at his death" on line 9, page 7, and also noted that the words "or incompetent" should be deleted on line 6, page 7.

Allison referred to the sentence beginning on line 8, page 7, "Although section 1 applies only to the principal place of abode of the decedent, sections 2 and 3 permit the court to transfer to them or any of them another more suitable residence or to provide funds for the purchase or rental of other living quarters." After a discussion, Zollinger expressed the view that this provision belonged in the chapter on election of surviving spouse and other members agreed.

Wills

Section 14 C Renunciation of gift under will. Riddlesbarger apprised the committees of his research on the subject of renunciation. He was of the opinion that the committees should decide whether the new probate code should include a statute clarifying the right of a beneficiary to renounce a gift, and if the renunciation would constitute a gift for gift tax purposes.

Zollinger said that he saw no compelling reason to enact legislation on renunciation except where it affected tax liabilities. Zollinger was not convinced, that a renunciation should be a nontaxable transfer; however, if the committees decided it should be considered a taxable transfer, the provision should appear in the tax statutes. Zollinger remarked that a person should not be forced to accept responsibility attached to the ownership of property he received through descent. Riddlesbarger moved that section 14 C be deleted, because the section was already the law in Oregon. Frohnmayer favored including renunciation provisions in the law and suggested that the renunciation be required to take place within six months. Zollinger was of the opinion that renunciation was not an appropriate part of the chapter on wills and should be the subject of a special subcommittee report which would include renunciation of distributive shares as well as gifts in both testate and intestate estates. Dickson said that since the subject had tax implications, it would be referred to the subcommittee consisting of Carson, Lisbakken and Braun. Frohnmayer suggested the subcommittee consider a possible distinction between testamentary gifts and intestate succession in addition to the tax and time elements.

Section 14 B. Non-ademption of specific gifts in certain cases. Subsection (1). Scope of Section. Riddlesbarger pointed out that section 14 B had been taken verbatim from the 1966 proposed Wisconsin Probate Code and suggested the content of subsection (1) might more properly be included under "comments" than in the statute. He recommended adoption

of the balance of the section. Zollinger was of the opinion the section should be left intact in order to codity the law, repeal the common law and overrule the case law where appropriate. Allison asked if "specific gift" should be defined or the purposes of subsection (1) and Zollinger replied that the term had a clear meaning without further clarification. Zollinger moved, seconded by Riddlesbarger, that the substance of subsection (1) be approved. Motion carried.

Section 14 B, subsection (2). Proceeds of insurance on property. Both Krause and Piazza expressed disapproval of the provision permitting funds paid to the decedent one year prior to his death to be paid to the specific beneficiary. They said that such a provision could contravene the intent of the testator. Frohnmayer commented that the shorter the time period the more likely it would be that the money would still be in the estate. He suggested that a 30-day time period would leave no question at all that the money should go to the one to whom the property had been given under the terms of the will. Gilley commented that the proper criterion for determining the time period was to give the testator time to change his will. He moved, seconded by Krause, that subparagraph (b) of subsection (2) be revised from "one year" to "90 days." Motion failed.

After further discussion, Frohnmayer moved, and the motion was seconded, that subparagraph (b) of subsection (2) be amended to read " . . . paid to the testator within 180 days before his death." Motion carried. Riddlesbarger moved, seconded by Zollinger, that the substance of subsection (2) be approved as amended. Motion carried.

Section 14 B, subsection (3). Proceeds of sale. Krause suggested that "within two years of his death" be deleted in the first sentence of subsection (3). Zollinger so moved, the motion was seconded and carried.

Zollinger next moved that "180 days before" in subparagraph (b) be substituted for "one year of." He said he could see no reason for a distinction between the treatment accorded insurance proceeds and proceeds of a sale. The motion was seconded by Frohnmayer and carried.

Zollinger moved, seconded by Frohnmayer, the approval of subsection (3) as amended. Motion carried.

Allison commented that "and for purposes of this section property is considered sold as of the date when a valid contract of sale is made" could be eliminated in subparagraph (b).

Gilley moved, seconded by Krause, that the action of the committees approving subsection (3) be reconsidered. Motion carried. Gilley then moved, seconded by Krause, that subparagraph (b) be eliminated. Speaking in support of his motion Gilley stated, and Krause agreed, that proceeds of sale were inherently different than proceeds of insurance following a fire or casualty because a sale was a deliberate act of the testator and he probably did not intend that anything paid to him prior to his death would pass to the beneficiary. Zollinger disagreed, and noted that if he had intended a result different than that set forth in subparagraph (b), he would have expressed it by a testamentary act. Riddlesbarger pointed out that in this case his will said the property was to go to the beneficiary and the whole principle of the proposed code was that ademption by extinction would not operate in certain situations. Vote was then taken on Gilley's motion to delete subparagraph (b). Motion failed.

Section 14 B, subsection (4). Condemnation award. Dickson noted that the 1967 session of the legislature made provisions for condemnation awards and had added an additional measure of damages for moving, relocation, etc., following condemnation of property. Zollinger asked if the proposed statute should include a limitation on the award for the condemned property as distinguished from an award for moving expenses. Frohnmayer recommended that no limitation be imposed.

Riddlesbarger questioned the meaning of "jurisdictional offer" in the last sentence of subsection (4). Lundy suggested it might be the statutory terminology used in the Wisconsin condemnation law. Carson said that it should be a "judicial" offer. Bettis proposed the term be revised to "settlement offer." Krause thought "acceptance of an agreed price" was sufficient. Allison objected to the phraseology which referred back to "subsection (3) of this section." After further discussion, Riddlesbarger moved, seconded by Krause, that subsection (4) be approved with the following revisions: Change "gift" to "devise" in line 2; delete "one year or" in subparagraph (b) and insert "180 days before"; leave to Legislative Counsel the task of clarifying "jurisdictional offer." Motion carried.

Lundy asked if it was the committee's intent that whatever compensation was received in a condemnation proceeding within six months before the death of the owner be subject to this section and received an affirmative reply.

Section 14 B, subsection (5). Sale by guardian or conservator of incompetent. Riddlesbarger moved, seconded by Frohnmayer, that subsection (5) be adopted with the following

amendments: Change "gift" to "devise" on line 2, correct the typographical error in line 8 by changing "repaid" to "repair;" on line 11 delete "one year; but" and insert "six months."; delete the rest of the subsection. Motion carried.

Section 14 B, subsection (6). Securities. Riddlesbarger pointed out that "securities" are defined in the Securities Act. Lundy asked if the Oregon definition was the same as the definition intended in the Wisconsin Act. Riddlesbarger moved, seconded by Zollinger, that subsection (6) be approved with the definition of "securities" to be inserted by Legislative Counsel, and with "gift" changed to "devise" in line 9. Motion carried.

Section 14 B, subsection (7). Reduction of recovery by reason of expenses and taxes. Riddlesbarger noted that previous sections had covered subjects similar to those included in subsection (7). He moved, seconded by Zollinger, that subsection (7) be approved with the understanding that Legislative Counsel would add provisions from other sections, if necessary, and make whatever housekeeping revisions he deemed advisable. Motion carried.

Section 14 A. Bond or agreement to convey property devised as a revocation. Riddlesbarger asked Legislative Counsel to review section 14 A in the light of the committee's decisions made at this meeting.

The committee recessed for lunch at 11:45 a.m. and reconvened at 1:30 p.m. with the following members of the advisory committee present: Dickson, Allison, Carson, Frohnmayer, Husband, Jaureguy, Lisbakken and Riddlesbarger. Members of the Bar committee present were: Bettis, Gilley, Krause, Piazza and Thomas (arrived 2:05 p.m.). Lundy was also present.

Arrangement of Proposed Revised Oregon Probate Code

Lisbakken reviewed the reports made by the various subcommittees outlining the arrangment of the material to be included in the proposed revised Oregon probate code and recommended adoption of the report dated May 12, 1966, prepared by Dickson, Lisbakken and Richardson. Dickson explained that this subcommittee had attempted to arrange the code in a logical order beginning with the definitions and flowing through the entire program of administration in the order an estate was processed through a probate court. Lundy explained some of the technical difficulties inherent in arranging this bulk of material and also called attention to the fact that the chapters on gift and inheritance taxes were located in the middle of the available chapter numbers dividing the code

at a somewhat illogical point. He further explained that the arrangment of the bill as passed by the legislature would be followed closely when incorporating it into ORS.

After further discussion, Riddlesbarger moved, seconded by Frohnmayer, that the concensus of the committee be that the outline dated May 12, 1966, be followed to the extent feasible. Motion carried.

Title to Property (Note: This is Appendix A to these minutes).

Frohnmayer distributed copies of a memorandum he and Piazza had prepared dated July 13, 1967, and read it to the committees. With respect to section 1 under "Title and Possession of Decedent's Property" Allison asked why "administrative expenses" had not been included with the claims for which the estate was liable. Frohnmayer replied that "claims" was defined to include administrative expenses as well as taxes. Allison pointed out that the section on claims of creditors would need a different definition of "claims." Frohnmayer commented that it should be noted that this particular section should not be included in the sections included under the broad claims definition. Dickson pointed out that since the committees had provided for support of incompetent children,they should also be added to the section. Frohnmayer agreed with Dickson.

Allison was of the opinion that one of the most useful provisions in the present code was the right to sell property for the benefit of the estate. He suggested this provision be kept in mind when provisions were drafted concerning property subject to sale for payment of expenses.

Frohnmayer called attention to subsection (3) on page 5 of his memorandum and read the draft prepared by Jack McMurchie under tab 16 in the blue notebook, "Allocation of Income." (See also Minutes, Probate Advisory Committee, 2/17,18/67, pages 1, 2 and 3, and Appendix A). Lundy noted that tab 15 was also part of the same subject.

After further discussion, Frohnmayer agreed to meet with McMurchie, Butler, Richardson, Zollinger and Allison prior to the September meeting to correlate the material on this subject and to determine the action of the committees with respect to the drafts which had been prepared. Dickson directed that this subject be placed on the September agenda as item #2.

Advancements (Note: This is Appendix B to these minutes).

Frohnmayer distributed a second draft on advancements dated July 5, 1967, which he and Piazza had prepared in

response to a request by the committees at the May 1967 meeting. Allison suggested section (1) b. be revised to "the heir states in writing" and Frohnmayer agreed. Jaureguy questioned when an advancee could state a gift was an advancement. Frohnmayer said that he did not consider the time factor to be of significance so long as there was a writing.

Frohnmayer said that Allison had written him suggesting that a definition of "advance" be included in this chapter, but that he and Piazza were of the opinion "advance" was defined in section 1. Allison proposed the following definition which he had copied from a California case: "Advancement: An irrevocable gift in praesenti of property to an heir by an ancestor to enable the donee to anticipate his inheritance to the extent of the gift." Frohnmayer was of the opinion the proposed definition was no improvement over section 1.

Frohnmayer suggested insertion of "or his issue" after "heir" in the second line of section 3. Allison pointed out that the heir was referred to as "advancee" earlier in the chapter, and the members agreed that "advancee" would be a better term than "heir." Carson pointed out that the chapter was not consistent in the use of "lineal descendant" and "issue." The committees agreed "issue" would be the better word to use throughout the new Oregon probate code. Allison noted that ORS 111.140 should be repealed and Frohnmayer concurred. After further discussion, the committees agreed to make the following revisions:

"(1) b. the heir states in writing . . .

"(2) If an advancee dies before the decedent leaving issue who inherit from the decedent . . . the issue of the advancee, whether or not the issue take by representation.

"(3) If the value of the advancement exceeds the share of the advancee, the advancee shall be excluded . . .

"(4) The advancement . . . when the advancee comes into its possession or enjoyment . . .

"(5) ORS 111.110, 111.120, 111.130, 111.140, 111.150 . . ."

Dickson commented that he was in agreement with the 1966 provisions of the Wisconsin Probate Code except for the provisions vesting title to property in the personal representative. He suggested Frohnmayer correspond with the draftsmen of the Wisconsin Code to determine their reasons for giving the personal representative title, possession and income derived from property of the estate. Frohnmayer agreed to do so and Dickson directed that the matter again be discussed

at the September meeting.

Conserving Property of Missing Persons

(Note: See report of May 30, 1967, by Mrs. Braun and Mr. Gilley entitled "Missing Persons - ORS chapter 127.")

Allsion asked if this draft was intended to replace ORS chapter 127 and received an affirmative reply from Gilley.

Section 1. Gilley explained that the definition of "missing person" in subsection (8) of section 1 was intended to cover two situations; i.e., (1) for a person whose whereabouts was unknown, and; (2) for a person who was known to be unable to return, for example in the case of a person who was a prisoner of war jailed in Mexico.

Frohnmayer called attention to the occasional situation where a person refused to manage his own affairs and his family might suffer by his lack of attention. He suggested that such a person be included in the definition of "missing persons." Others pointed out that ample remedies were available to families or creditors in situations of that kind. It was generally agreed that such a provision should not be included.

Thomas called attention to the phrase "whose whereabouts is unknown" and asked, "Unknown to whom?" Riddlesbarger pointed out that his status would be determined by allegation and by the efforts made to locate him. Lundy expressed the view that he would not be a missing person until the matter had been adjudicated and, like the allegations contained in a petition for incompetency, there would have to be proof of that fact. The committees decided that the court should make the determination and the definition should not be narrowed by adding "known to the petitioner."

Section 4. Gilley explained that the provision in subsection (e) of section 4 dealing with the Social Security Administration was inserted because that agency would forward mail but would not divulge forwarding addresses. In reply to a question by Allison, Gilley explained that it was his understanding that the committees had previously decided to require publication in every case with respect to a missing person. When the court required other persons to be served with a citation, he advised that the general publication sections would cover the manner in which they should be served. He suggested that the missing person should be served by publication in every case. Piazza suggested the missing person be served personally, and in addition, that he be mailed a citation at his last known address. He proposed

that the same provisions of service be followed as provided in the guardianship code for service of a summons and suggested the following wording for subsection (e):

"(e) If the proposed ward is a missing person, on the missing person and such other persons as the court may direct. In addition to service a copy of the citation shall be mailed to such missing person at his last known address and by registered mail with postage prepaid letter to be forwarded through the United States Social Security Administration to his last address available to that agency."

Gilley recommended that there be publication in all cases because publication might reach someone who should be aware of the appointment of a guardian for the missing person. A motion to require publication in all cases involving missing persons failed.

Section 6. Gilley called attention to subparagraph (e) of subsection (2). Allison suggested the same language be used to provide notice in the case of a sale as was used in section 4 for notice on appointment of a guardian. Piazza proposed the section read:

"(e) If the ward is a missing person, on the missing person and on such other persons as the court may direct." Gilley approved the revision.

Section 8. Gilley pointed out the amendment in section 8 and Piazza asked if the provision was in conflect with the ademption situation covered by the committee earlier in the day. Dickson said that it was in harmony with the ademption provisions. Gilley explained that the merits of the section had not been considered by the subcommittee. He also noted that the guardianship code was applicable in most instances to missing persons without further amendment.

Allison read ORS 127.060 to the committees and questioned whether this provision should also be included in the guardianship code inasmuch as ORS Chapter 127 would be repealed. Lundy suggested ORS 126.255 might answer the question asked by Allison.

The meeting was adjourned at 4:20 p.m.

August and September Meetings

The following matter was scheduled for the August 1967 meeting:

Transfer of probate jurisdiction and provision for county clerks to sign certain ex parte matters.

The following matters were scheduled for consideration at the September 1967 meeting:

1. Elective share of surviving spouse

Consideration of section 1 of draft by Allison considered at June meeting and elective share provisions of proposed Wisconsin Probate Code (draft by Mr. Riddlesbarger, Mrs. Braun and Mr. Richardson, and discussion to be led by them).

2. Title to property

Allocation of income. Discussion to be led by Frohnmayer.

3. Advancements

Discussion to be led by Frohnmayer.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, July 14 & 15, 1967)

Proposed revised Oregon probate code
Memorandum on Title to Property
1st Draft
July 13, 1967

Prepared by:

Otto J. Frohnmayer
A. E. Piazza

We have been requested to lead the discussion on "title to property" at the meeting of the committees to be held on July 14 and 15, 1967. The following are some observations and suggestions which might facilitate the discussions of the committees.

Where Should Title Be Vested In Real And Personal Property During Probate?

(1) Present Oregon law. The writers have not researched this problem in Oregon, but off the top of their collective heads, one with and one without, we believe that there is a distinction in Oregon between title to real property and title to personal property as follows:

a. Upon death title to real property instantly passes to the heirs in case of intestacy and in case of testacy to those who are willed the realty.

b. Title to personal property vests in the personal representative during probate. See In re McLeod's Estate, 159 Or 687, 82 P.(2d) 884 (1938), and Wright v. Kroeger, 219 Or 103, 345 P.(2d) 809 (1959).

(2) Title to real and personal property should be treated alike. Since the committees have heretofore agreed that in descent and distribution the distinction between real and personal property should be abolished, we suggest that the same rule be applied to the problem of title to real and personal property.

(3) Basye's views. From the letter of Paul E. Basye, July 16, 1965, to Otto J. Frohnmayer, we give you the benefit of his views on the subject of title during administration:

> "As to title during administration, I think the best thinking on the subject is expressed in Section 84 of the Model Probate Code, giving title to the heirs or devisees subject to possession by the personal representative. This was

taken from Section 25 of the Texas Probate Code and Section 300 of the California Probate Code. We just completed a long discussion of this problem and decided to embody this idea in the final draft. Under present English law adopted in 1925, title to both real and personal property passes to the personal representative. Our own Committee felt that this invited difficulties when no administration was necessary - a matter which does not arise under our proposed solution giving title immediately to the heirs or devisees, subject only to the right of possession by the executor or administrator, if and when appointed."

It may be observed that since 1925 in England title to both real and personal property passes to the personal representative.

(4) Suggested alternatives. This problem has been handled in varying ways:

a. Iowa, §350 provides when a person dies, title to his property, real and personal, passes to the person to whom it is devised by his will or in the absence of such disposition to the person who succeeds to his estate. All of the property is subject to the possession of the personal representative and to the control of the court for the purposes of administration, sale or other disposition under the provisions of law. Such property, except homestead and other exempt property, is chargeable with the payment of debts and charges against the estate. It is explicitly provided that there is no priority between real and personal property except as provided in the code or by the will of the decedent.

§351 provides if there is no distributee of real estate present and competent to take possession or if there is a lease of the real estate or if the distributee present and competent consents thereto, the personal representative shall take possession of the real estate except for the homestead and other exempt property. It further provides the personal representative shall take possession of all personal property of decedent except the exempt property. The personal representative may maintain an action for the possession of real and personal property or to determine the title to any property of the decedent.

The comment to the last section states that the committee recommend to the legislature that the personal representative take possession of all property of the decedent which is said to be in

line with the comment on pages 133 and 134 of the Model Probate Code "It seems preferable that the personal representative should have not only the right but also the duty of possession of the entire estate until distributed or delivered over to the heir or devisee upon a showing that it is not needed for the purpose of administration." The comment goes on to say that the legislature did not concur in the recommendation of the committee.

> §352 says that unless otherwise provided in the will the personal representative shall collect the income from the property, pay the taxes and fixed charges thereon and apply the balance of the income to general estate obligations. Also unless otherwise provided, any unexpended portion of the income shall become a part of the general assets of the estate.

The comment under this section says that it changes the law. Under the former Iowa law the personal representative was not ordinarily entitled to the rents accruing during probate and any rents he collected normally belonged to the heirs or devisees. After equating realty with personalty, the income from both real and personal properties was made available to pay general estate obligations in the absence of testamentary direction.

> §353, 354 and 355 make provision for the surrender of possession to heirs and beneficiaries of personal and real property in certain situations upon application to the court.

b. Washington §11.48.020 provides that the personal representative shall, after qualifying and giving bond, have the right to the immediate possession of all the real as well as the personal estate of the deceased and may receive the rents and profits of the real estate until the estate shall be settled or delivered over to the heirs or devisees and shall keep in tenantable repair all houses, buildings and fixtures thereon which are under his control.

> §11.48.090 provides for actions for the recovery of any property or for possession thereof by and against the personal representative in all cases in which the same might have been maintained by and against the respective testator or intestate.

We have not researched the prior law of Washington with regard to the title to real and personal property.

c. Wisconsin §857.01 provides that upon letters being

issued the personal representative has title to all property of the decedent. The comment under this section states that this section gives the personal representative title to both the real and personal property and is consistent with the policy of treating real and personal property in the same manner in all phases of probate procedure. Historically in Wisconsin a personal representative has had title to personal property but not to real property, while a trustee has had title to both real and personal property.

§857.03 provides that the personal representative shall collect and possess all the decedent's estate, collect all income and rents from decedent's estate; manage the estate and, when reasonable, maintain in force or purchase casualty and liability insurance, pay and discharge, out of such estate, all expenses of administration, taxes, charges, claims allowed by the court, or such payment on claims as directed by the court; and make distribution and do such other things as directed by the order of the court. There is no pertinent comment to this broad use of the income from the property of the estate.

(5) Uniform probate code (7/19/66).

§393 provides that the personal representative has a right to, and should take, possession of all of the decedent's money and tangible property, including the decedent's interest in any income producing interest in land or tangible personal property. The possession of other estates or interest in, or kinds of, real or personal property of the decedent should be taken by the personal representative where reasonably necessary to any proper purpose of administration, including preservation of the value for those entitled to it, sale, preparation for sale or other transaction. The request by a personal representative for the possession of the property of the decedent shall be conclusive evidence of his right thereto in an action for possession, but any devisee or heir who may show that he was damaged through the wrongful assumption of possession of real and tangible personal property of the decedent by a personal representative may collect therefor from the personal representative in an appropriate proceeding. The personal representative shall pay taxes on property possessed and collect rents and earnings earned by any property of the decedent until such assets are sold or distributed. He should keep the buildings and fixtures under his control in tenantable repair. He

may maintain an action for possession of the real property or to determine the title to the same.

It may be observed that the language of this code is equivocal and undoubtedly would be the source of considerable litigation.

Review of Action Previously Taken By the Committee

By memorandum dated 12/14/66 from Legislative Counsel proposal No. 1 is set forth:

TITLE AND POSSESSION OF DECEDENT'S PROPERTY

Sec. 1. When a person dies intestate, title to his real and personal property passes at his death to his heirs; if a decedent dies testate, title to his real and personal property passes at his death to those to whom it is given by his will. The title of the heirs or beneficiaries to the real and personal property of the deceased owner is subject to the rights of his surviving spouse and minor children and any claims for which the estate is liable. During administration, the personal representative shall be entitled to possession of the real and personal property and shall have power to sell, mortgage, lease or otherwise dispose of the same as provided in this title.

NOTE: ORS 116.105 and ORS 117.320 are to be repealed.

By an exchange of letters between DBF and CEZ dated 8/23/65 and 8/30/65, the following language was suggested by CEZ:

When a person dies intestate, title to his real and personal property passes at his death to his heirs; if a decedent leaves a will, title to his real and personal property passes at his death to those to whom it is given by his will. The title of the heirs or beneficiaries to the real and personal property of the deceased owner is subject to the rights of his surviving spouse and minor children and any claims for which the estate is liable. During administration, the executor or administrator shall be entitled to possession of such real and personal property and shall have power to sell, mortgage, lease or otherwise dispose of the same as provided in this title.

POWERS AND DUTIES OF PERSONAL REPRESENTATIVE (4/27/67) AS DRAFTED BY HERBERT E. BUTLER, ESQ.

Section 1. Possession and control of property. (1) The

personal representative is entitled to possession and control of all property of the decedent and to the rents and profits therefrom. Upon completion of the administration of the estate or upon order of the court, the personal representative shall deliver the property to the persons entitled thereto.

(2) The personal representative shall keep property in his possession and control in repair and preserve it from decay.

(3) The rights of the personal representative as provided in this section, are subordinate to the right to possession and control by a third party who has a valid lease or bailment of the property.

References: Advisory Committee Minutes:
6/17,18/66, pp. 16 and 17; and Appendix
7/15,16/66, p. 2

Conclusions

(1) The committees should agree that the title to all property passes upon the death of the decedent to his heirs, if the decedent dies intestate, and to his beneficiaries, if he dies testate.

(2) This title is subject to being divested by the spouse and minor children as to exempt property and by the personal representative if the property is required for the payment of claims, expenses of administration, etc. In the latter situation the personal representative should be entitled to possession of the property and should have the power to sell, mortgage, lease or otherwise dispose of the same.

(3) The committees should determine whether the personal representative should be entitled to the income of the property during administration in all cases or only in the case that the property may be needed for payment of claims, expenses of administration, etc.

(4) It is suggested that the two subjects of title and possession be either combined in one section or in sections following consecutively in the new code.

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, July 14 & 15, 1967)

Proposed revised Oregon probate code
ADVANCEMENTS
2nd Draft
July 5, 1967

Prepared by:

Otto J. Frohnmayer
A. E. Piazza

This is a second draft, pursuant to the instruction of the committees at the meeting of May 20, 1967. The first draft is attached as Appendix A to the minutes of the Probate Advisory Committee meeting held on May 19 and 20, 1967.

Advancements In Intestate Estates

(1) When gift is an advance. If a decedent dies intestate as to his entire estate, a gift by the decedent during his lifetime to an heir is an advance against his intestate share, only if there is either

a. a writing by the decedent clearly stating that the gift is an advance (whether or not such writing is contemporaneous with the gift) or

b. the heir states by writing or in court that the gift was an advance.

(2) Death of advancee before decedent. If an advancee dies before the decedent leaving lineal descendants who inherit from the decedent, the amount of the advance shall be taken into account in computing the share or shares of the issue of the prospective heir to whom the gift was made, whether or not the issue take by representation.

(3) Effect of advancement on distribution. If the value of the advancement exceeds the share of the heir, the heir shall

be excluded from any further share of the estate but he shall not be required to refund any part of the advancement. If the value of the advancement is less than his share, he shall be entitled upon distribution of the estate to such additional amount as will give him his share of the estate of the decedent.

(4) Valuation. The advancement shall be valued as of the time when the advancee comes into possession or enjoyment or at the time of the death of the intestate whichever first occurs.

References: Advisory Committee Minutes:
5/19,20/67, pp. 11 and 12; and Appendix
9/18/65, p. 7; and Appendix
2/18,19/66, pp. 22 to 24; and Appendix

ORS 111.110 to 111.170

(5) Repeal of existing statutes. ORS 111.110, 111.120, 111.130, 111.150, 111.160 and 111.170 are repealed.

REVISED OFFICIAL COMMENTS TO COMMITTEE PROPOSAL ON ADVANCEMENTS

1. Comment to Section 1.

(a) This section changes present Oregon law in ORS 111.110 by expanding the doctrine of advancements to any person taking by intestate succession as opposed to the present limitation to the issue of the intestate.

(b) Since the intestate share of real and personal property will be the same for all takers under the descent and distribution provisions, there is no need to distinguish between the real and personal property as is done in present ORS 111.150.

(c) Unlike the Iowa Code, Washington Code and Model Probate Code, this draft does not specify that the person to whom the advancement was made must have been entitled to inherit a part of the estate had the intestate died at the time of making the advancement. It would expand the doctrine of advancements to apply to persons who would not have been heirs had the intestate died at the time of the advancement, but who subsequently became

heirs prior to the death of the intestate.

(d) This section specifies that the doctrine of advancements applies only to intestacy and only to persons sharing in the estate of one who has died intestate as to his entire estate. This limitation would not, however, seem to affect the holding of Clark v. Clark, 125 Or. 333, 342, 267 P. 534, 537 (1928), that a will might direct that a previous gift be considered an advancement in the determination of the shares into which an estate is to be divided.

(e) This draft follows the approach of proposed Wisconsin probate code, section 852.11(1). The Iowa, section 224, Washington, section 11.04.041, and Model probate codes provide that the presumption of a gift is rebuttable. However, the Wisconsin code is in accord with the more limited application of the statute of frauds already existing in Oregon law, ORS 111.120. Since the Wisconsin code represents the latest thinking and since the present draft does not substantially change existing Oregon law, it would seem to be the preferred approach.

The early case of Seed v. Jennings, 47 Or. 464, 83 P. 872 (1905) is in conflict with both the old Oregon statute and this new provision. That case suggested the common law presumption that the voluntary conveyance of property by a parent to a child is presumed to be an advancement, unless it is proved to be a gift. This dictum was contrary to the statute in force at the time and would, in any event, be overruled by the proposed version, which reverses the presumption and makes it rebuttable only by evidence in writing.

2. Comment to Section 2.

This section is a substitute for ORS 111.170 and is consistent therewith. It is virtually identical to the Model Probate Code, section 29(c), Iowa Code, section 226, and Washington Code, section 11.04.041. The person to whom an advancement is made is charged for it, whether he takes per capita or by representation. See generally, Model Probate Code's comment at page 67. For a contrary approach, see first tentative draft of revised part 2 Model Probate Code (July 10, 1966), section 211(c), which provides that if the advancee dies before the intestate, the advancement shall not be taken into account in determining descent and distribution of the net intestate estate.

3. Comment to Section 3.

This section is a substitute for ORS 111.140 and substantially reenacts that section.

4. Comment to Section 4.

This section adopts the first tentative draft of the revised part 2 of the Model-Uniform Probate Code (July 10, 1966), section 211(b). This approach is also that of the Washington, Iowa and Model probate codes. Section 4 changes present Oregon law (ORS 111.160), which provides for valuation by the doner or donee in any one of three different writings or its estimated value when granted. The former method presents the possibility of inconsistent valuations arising from each of the authorized writings. In 1 Jaureguy and Love, Oregon Probate Law and Practice, sections 41-46, this problem is noted.

REPORT
July 12, 1967

To: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: Robert W. Lundy, Legislative Counsel

Subject: Probate Courts and Jurisdiction

At your June 1967 meeting a revised draft on the subject of wills, prepared and submitted by Mr. Riddlesbarger, was considered. In the course of the discussion of section 16 of that revised draft, relating to pretermitted children, Mr. Riddlesbarger commented that the section did not contain a provision on the remedy available to pretermitted children, and that this matter had previously been referred to the subcommittee on the probate court and jurisdiction thereof for consideration in connection with the general subject of remedies in probate. Judge Dickson requested that the matter of probate courts and jurisdiction thereof be placed on the agenda for the July 1967 meeting, and indicated that at that meeting he would appoint a subcommittee to study the matter further. He also asked me to report at the July meeting on legislation on the subject enacted at the 1967 regular session of the Oregon legislature.

This is my report on legislation relating to probate court jurisdiction enacted at the 1967 regular session of the Oregon legislature. The report also sets forth the previous action by the committees, as recorded in the minutes, relating to the subject of probate courts and jurisdiction thereof.

PROBATE COURTS

At the present time in Oregon original probate jurisdiction is vested in three courts -- county courts, district courts and circuit courts. Prior to July 1, 1967, of the 36 counties of the state, the county court was the probate court in 14, the district court in 11 and the circuit court in 11. That lineup of probate courts will change somewhat as a result of legislation enacted at the 1967 regular session of the Oregon legislature. The new lineup will show the county court as the probate court in 12 counties, the district court in nine and the circuit court in 15.

The following table shows the probate court in each county prior to July 1, 1967. The effect of the 1967

legislation (i.e., Senate Bill 117, now chapter 533, Oregon Laws 1967) is indicated by [bracketing] those counties deleted and underscoring those counties added. Dates, in parentheses, following counties added are the effective dates of the probate jurisdiction transfers.

County Court	District Court	Circuit Court
Baker	Benton	Clackamas
[Columbia]	Clatsop	Columbia (7/1/68)
Crook	Coos	Douglas
Gilliam	Curry	Jackson
Grant	Deschutes	Josephine
Harney	Hood River	Klamath
Jefferson	Lincoln	Lake
Malheur	[Linn]	Lane
Morrow	[Umatilla]	Linn (7/1/68)
Sherman	Wasco	Marion
[Tillamook]	Washington	Multnomah
Union		Polk
Wallowa		Tillamook (7/1/68)
Wheeler		Umatilla (7/1/67)
		Yamhill

PREVIOUS ACTION BY COMMITTEES

It appears to me that previous action by the committees, as recorded in the minutes, relating to the subject of probate courts and jurisdiction thereof, calls for proposed legislation that will:

(1) Vest original probate jurisdiction in all counties in the circuit courts only.

(2) Define probate jurisdiction in broad terms.

(3) Look to present methods of providing temporary circuit court judges to assist in handling the additional workload possibly resulting from transfer of probate jurisdiction to circuit courts presently not having such jurisdiction.

(4) Authorize appointment (probably by circuit courts and probably only for counties in which there is no resident circuit court judge and no district court) of probate commissioners (Attorneys) to handle ex parte probate matters.

Present methods of providing temporary circuit court judges are:

(1) Assignment of other circuit court judges or of district court judges by Supreme Court (ORS 3.081 to 3.096).

(2) Authorization for district court judge to exercise

certain probate junctions of judge of circuit court for same county where no circuit court judge able to conduct business of circuit court (ORS 3.101).

(3) Appointment of pro tem circuit court judges (attorneys) by Supreme Court (ORS 3.510 to 3.560) and authorization for pro tem circuit court judges (attorneys) by stipulation (ORS 3.570).

Taking into consideration 1967 legislation, there will be 11 counties with no mandatory resident circuit court judge, no district court and probate jurisdiction not in the circuit court. However, circuit court judges in fact reside in 3 of these 11 counties (i.e., Grant, Malheur and Union Counties). The 11 counties are: Crook*, Gilliam#, Grant#, Harney, Jefferson*, Malheur, Morrow, Sherman, Union, Wallowa and Wheeler#. (Notes: *A circuit court judge must be a resident of or have his principal office in Crook, Deschutes or Jefferson County. #A circuit court judge must be a resident of or have his principal office in Gilliam, Grant or Wheeler County. See subsection (4) of ORS 3.041, as amended by section 7, chapter 533, Oregon Laws 1967.)

At your January 1966 meeting, Judge Dickson appointed a subcommittee, consisting of Judge Thalhofer (chairman), Mr. Copenhaver, Miss Field, Mr. Gooding and Judge Warden, to study and report on probate jurisdiction. See Minutes, Probate Advisory Committee, 1/14,15/66, page 9. At the March 1966 meeting that subcommittee reported on its activities and progress. See Minutes, Probate Advisory Committee, 3/18,19/66, page 7. The following excerpts from the minutes of the March 1966 meeting are pertinent:

"Probate Courts and Jurisdiction

"Members of the subcommittee on probate courts and jurisdiction, appointed at the January meeting, reported on activities and progress of the subcommittee. Copenhaver noted that of the 36 counties in Oregon, county courts had probate jurisdiction in 14, district courts in 11 and circuit courts in 11; and that of the 14 county courts with probate jurisdiction, 12 were in eastern Oregon. He indicated that he did not believe the matter of transfer of probate jurisdiction from all county courts to circuit courts had been considered formally by the county judges' association, but that he was aware that many county judges were not opposed to such a transfer and some would favor it. He commented that much of the opposition to such a transfer was found among attorneys in multi-county judicial districts without a resident circuit court judge in each county, and that periodic unavailability of a circuit court judge to handle probate matters in each county of such judicial districts was a problem, particularly, for

example, in the 9th Judicial District (i.e., Harney and Malheur Counties).

"Warden reported that he had sent a questionnaire to all district court judges asking whether they favored transfer of all probate jurisdiction to the circuit court; that of 24 replies, 18 (including seven from judges with probate jurisdiction) were in favor of such transfer; and that of the six replies expressing opposition, four were from judges with probate jurisdiction. He noted that the Bar Committee on Judicial Administration also was studying the matter of centralizing probate jurisdiction in the circuit courts, and that District Judge Henry Kaye of Umatilla County, a member of that Bar committee, had sent a questionnaire to all district court judges with probate jurisdiction asking if they would be willing to handle probate matters on a pro tem circuit court judge basis if the jurisdiction was transferred to the circuit court. Warden indicated that Judge Kaye's survey disclosed that eight of the 11 district court judges were willing to handle probate matters on such a pro tem basis.

"Dickson commented that the probate caseload in some of the eastern Oregon counties in multi-county judicial districts did not appear to be heavy. He called attention to statistics as of the end of 1965 indicating that, for example, there were 150 estates pending in Malheur County, of which 69 were over three years old; 55 pending in Harney County, with 15 over three years old; 25 pending in Sherman County, with 8 over three years old; 57 pending in Grant County, with 27 over three years old; 16 pending in Wheeler County, with 7 over three years old; and 40 pending in Gilliam County, with 26 over three years old.

"Dickson remarked that a large majority of the county and district court judges with probate jurisdiction appeared to be in favor of transfer thereof to the circuit court. He suggested that district court judges could handle some probate matters on a pro tem circuit court judge basis in order to relieve some of the extra burden on regular circuit court judges. In response to a question by Allison, Warden agreed that assignment to other judicial districts was a significant factor in the periodic unavailability of circuit court judges in multi-county judicial districts in eastern Oregon. Allison expressed the view that such assignment might be less frequent if probate jurisdiction was transferred to those circuit courts.

"Warden suggested that utilization of attorneys as pro tem probate judges in county seats with no resident circuit court judge and no district court judge might afford a solution to the problem in multi-county judicial districts without resident circuit court judges in each county. Zollinger commented that such utilization of attorneys presupposed the availability and willingness of attorneys to undertake such service when most such attorneys had a probate practice, and suggested authorization for appointment of attorneys as probate commissioners to sign orders and handle other ex parte matters.

"Zollinger asked whether the committees favored a proposal to transfer all probate jurisdiction to the circuit courts, and if so, whether this proposal should be included in the principal proposed probate revision bill or in a separate bill. Dickson expressed the view that the proposal need not be in a separate bill, since the jurisdiction transfer matter appeared to be noncontroversial in a large majority of the counties that would be affected by the proposal. Riddlesbarger moved, and it was seconded, that the committees approve in principle the inclusion in the principal proposed probate revision bill of provision for transfer of all probate jurisdiction to the circuit courts, for district court judges to handle ex parte probate matters when circuit court judges were unavailable and for probate commissioners, who should be attorneys, to handle ex parte probate matters in counties having no district court. Motion carried unanimously.

"Husband asked whether appointment of probate commissioners should be made by the Supreme Court or the appropriate circuit court. There was general agreement that probate commissioners should be appointed by the circuit court judges.

"Dickson requested that the subcommittee on probate courts and jurisdiction establish and maintain contact with the Bar Committee on Judicial Administration for the purpose of exchanging information on proposals relating to probate courts and jurisdiction thereof. He also asked the subcommittee to keep in touch with Lundy in regard to the drafting of the proposal approved by the probate committees. In response to a question by Lundy, Warden indicated that the Judicial Council was not considering the matter of probate jurisdiction at the present time."

"Probate Courts and Jurisdiction

"Dickson asked Copenhaver and Warden to repeat their reports on probate courts and jurisdiction thereof, previously made at the Friday afternoon session of the meeting, for the benefit of members not present at that time, and they proceeded to do so. In response to a question by Husband, Warden indicated that the three district court judges with probate jurisdiction who had expressed reluctance to handle probate matters on a pro tem circuit court judge basis if the jurisdiction was transferred to the circuit court were Judge Hall of Curry County, Judge Hall of Lincoln County and Judge Jenkins of Washington County.

"Referring to the previous discussion on appointment of probate commissioners, Dickson suggested that there should be a commissioner in each county of the large eastern Oregon multi-county judicial districts.

"In response to a question by Lundy, Dickson and Thalhofer expressed the view that the transfer of all probate jurisdiction to circuit courts should include jurisdiction as to guardianship, adoption, change of name and commitment of the mentally ill and deficient."

In regard to the remedy available to pretermitted children, as well as to heirship determination, it appears to me that previous action by the committees, as recorded in the minutes, calls for treatment of these matters as aspects of proposed general provisions on remedies involved in probate. This treatment may be encompassed in the subject matter of the first draft, dated May 3, 1967, on powers of court in probate (following tab 2 in the blue notebook), or of the first draft, dated April 10, 1967, on accounting and distribution (following tab 23 in the blue notebook), or both. The following excerpts from the minutes of the March 1966 meeting are pertinent:

"Riddlesbarger noted that the subcommittee also recommended that there be no special provision on the remedy of pretermitted heirs, but that determination of pretermission should be made and distribution of pretermitted heir shares accomplished in the probate proceeding as a part of the general procedure on settlement and distribution, and that the subject of all remedies involved in probate should be treated broadly. He commented that centralization of probate jurisdiction in the circuit courts, in accordance with

the proposal approved by the committees at the meeting the previous day, would facilitate implementation of this recommendation. He referred with approval to the broad statement of the jurisdiction of the probate court in section 10, 1963 Iowa Probate Code. He stated that the subcommittee's recommendation included repeal of the present specific Oregon statutes on determining heirship (i.e., ORS 117.510 to 117.560)."

"Riddlesbarger moved, seconded by Zollinger, that the committees reconsider their previous action on a proposed pretermitted heir statute and consider the plan embodied in the proposed New York statute. Motion carried. After further discussion, Zollinger moved, seconded by Warden, that the substance of the proposed New York statute, extending its application to after-adopted children and excluding the provision on remedy of pretermitted children, be approved. Motion carried unanimously.

"Heirship determination generally. Riddlesbarger moved, seconded by Mapp, that the present specific Oregon statutes on determining heirship (i.e., ORS 117.510 to 117.560) be repealed and that general provisions on remedies involved in probate, following the approach of the 1963 Iowa Probate Code (particularly sections 10 and 11 thereof), be approved. Motion carried. Dickson referred the matter of drafting implementation of the approved motion to the subcommittee on probate courts and jurisdiction. Riddlesbarger commented that in drafting such implementation consideration should be given to the role of the probate commissioners, authorization for whom the committees had approved at the meeting the previous day, in the matter of general remedies."

MEMORANDUM
July 11, 1967

To: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: Stanton W. Allison

Subject: Section 2, Riddlesbarger's Revised Draft on Wills

I am requesting reconsideration of the action of the June 1967 meeting in requiring that the testator, in the presence of each of the witnesses, shall "declare that the instrument is his will." I refer you to the Oregon section, ORS 114.030, a Washington section, 11. 12.020, and a Wisconsin section, 853.03, none of which contain a similar requirement.

The declaration requirement appears in section 279 of the Iowa Code, which provides "and declared by the testator to be his will." Section 47 of the model code states: "The testator shall signify to the attesting witnesses that the instrument is his will."

I am firmly persuaded that the committees should consider the language in the proposed uniform code in sections 237 and 238 as follows:

> "Section 237. Execution. Except as hereinafter otherwise provided, every will shall be in writing and signed by the person making the same or by some other person in his presence and by his direction and shall be attested and subscribed in the presence of the person making the will by two witnesses.
>
> "Section 238. Knowledge that instrument is will.

> There is no requirement that the testator inform the witnesses that the instrument they are attesting is his will or that he or they know that it is a will. An instrument in the form of an inter vivos conveyance, contract or trust instrument is effective as a will to the extent that its terms manifest an intent which is testamentary, so long as it is executed in the manner herein prescribed."

The Bar committee comment on the section of the Iowa Probate Code reads as follows:

> "An expansion of the present requirements of 633.7 (1962 Code) by adding the requirement 'declared by the testator to be his will' and the requirement of witnesses signing 'who signed as witnesses in the presence of the testator and in the presence of each other'. The extension of the statute conforms more nearly to the general practice in Iowa and changes the rule as set forth in the case of In re Estate of Bybee, 179 Iowa 1089, 160 N.W. 900, and the case of In re Estate of Hagemeier, 244 Iowa 703, 58 N.W. 2d 593."

It is apparent that the Iowa Code has added this requirement which changes the rule existing under their court decisions.

Mr. Riddlesbarger, on page 3 of his proposed revision, has given a full explanation of his suggestion that this provision be inserted to comply with the case of Erickson v. Davidson, 216 Or. 547. I personally hesitate to change what I think is the present case law of Oregon on the basis of this decision. In Professor Basye's survey of decedents' estates in 39 Oregon Law Review 176, he has this to say about the Erickson v. Davidson decision:

> "It has been held in Oregon that attestation was insufficient under the statute where the testatrix did not indicate to the witnesses what the paper was, or acknowledge that she had signed or attached her

> name thereto, or that the writing was hers, or was intended to be executed by her, and where the paper was so folded that the witnesses could not see or know of its contents or of the presence on it of the name of the testatrix. Upon the authority of this case, the court in Erickson v. Davidson held the attestation of the codicil invalid. However, the opinion did not undertake to set out all of the facts surrounding the witnesses' attestation of the codicil. It is submitted that the rather cursory statement in the opinion that the witnesses did not know the nature of the document the execution of which they were called upon to witness should not be taken to mean that this fact alone would render an otherwise sufficient attestation invalid under the statute."

The case of Richardson v. Orth, 40 Or. 252, which is the only case cited in Judge Sloan's opinion, in my opinion is not a sound authority for Justice Sloan's opinion. In the Orth case, a testatrix had not signed the writing at the time the witnesses subscribed it. It was obvious, therefore, that the Orth will was not executed pursuant to the Oregon statute.

On the other hand, I cite the following cases which were not referred to or cited in Justice Sloan's opinion:

In In Re Christofferson's Estate, 183 Or. 75, at page 82, the court stated: "It is not necessary that the witnesses should sign in the presence of each other, nor is it necessary that the testator should declare the instrument to be his last will. If the testator actually signs the will and the witnesses attest his signature at his request, it is sufficient even though the witnesses may not know the

the purport or contents of the instrument."

"The court states in In re Davis' Will, 172 Or. 354: "It is not necessary that the witnesses should have known either the purport or the contents of the instrument." The court then proceeds to discuss a California decision as follows: "It is sufficient to say that that decision was based upon a specific requirement of the law of California (Probate Code, Section 50, subd. 3.) which provides that the testator, at the time of subscribing the instrument 'must declare to the attesting witnesses that it is his will.' This is not the law in Oregon," citing In re Estate of Neil, 111 Or. 282.

In the case of In re Estate of Verd Hill, 198 Or. 307, the court on page 327 stated: "It was not necessary that the witnesses have any knowledge concerning the contents of the will, nor was it necessary that the testator should declare the document to be his last will or that the witnesses have any idea of the purport or contents of the instrument to which they had so subscribed."

I again call attention to the fact that the Erickson decision did not cite any of the three last cases referred to above, in all of which the Oregon court specifically declared that it was not necessary that the testator should declare the document to be his last will. I heartily agree with Professor Basye's criticism of the Sloan decision, and

hesitate to inject into the new code a provision which is contrary to the existing case law of this state prior to the Sloan decision.

I personally feel it is unwise to add to the technical requirements for execution of a will. For this reason, I strongly urge careful consideration of the provisions of the proposed uniform code which would represent the most recent and considered statement of this problem. I fear that injecting a statutory requirement that the testator declare that the instrument is his will would constitute a technical requirement upon which wills of many competent testators might be attacked. Just for one example, suppose the attorney for the testator, in the testator's presence, asks the witnesses to sign the document he has prepared for the testator. This is obviously a very common practice where the attorney procures the attestation of the witnesses. It seems fairly obvious that in this case the testator has not "declared the instrument to be his will."

I therefore strongly urge careful reconsideration of the action at the July meeting of the two committees.

STANTON W. ALLISON

REPORT
July 13, 1967

To: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: Robert W. Lundy, Legislative Counsel

Subject: Sections 14 and 14 A, Riddlesbarger's Revised Draft on Wills

At your June 1967 meeting a revised draft on the subject of wills, prepared and submitted by Mr. Riddlesbarger, was considered. In the course of the discussion of sections 14 and 14 A of that revised draft, it developed that certain background aspects of the two sections were unclear, and the matter was left to Mr. Allison and myself to investigate and report thereon at the July 1967 meeting. This is my report on the matter. I have not had the opportunity to consult with Mr. Allison in the preparation of this report.

SECTION 14

It is clear, I believe, that the source of section 14 of Mr. Riddlesbarger's revised draft is subsection (3) of ORS 114.230. This is demonstrated by the following comparison of ORS 114.230 with sections 12, 13 and 14 of Mr. Riddlesbarger's revised draft, in the form apparently approved by committee action at the June 1967 meeting:

ORS 114.230	Mr. Riddlesbarger's Draft
(1) A devise of real property is deemed a devise of all the estate or interest of the testator therein subject to his disposal, unless it clearly appears from the will that he intended to devise a less estate or interest.	Section 12. A devise of property passes all of the interest of the testator therein at the time of his death, unless the will evidences the intent of the testator to dispose of a lesser interest.
(2) Any estate or interest in real property acquired by anyone after the making of his or her will shall pass thereby, unless it clearly appears	Section 13. An interest in property acquired by a testator after he makes his will passes as provided in the will.

therefrom that such was not the intention of the testator.

(3) No conveyance or disposition of real property by anyone after the making of his or her will shall prevent or affect the operation of such will upon any estate or interest therein subject to the disposal of the testator at his or her death.

Section 14. An encumbrance or disposition of property by a testator after he makes his will shall not affect the operation of the will upon a remaining interest therein which is subject to the disposal of the testator at the time of his death.

References:

Minutes, 6/16,17/67, pp. 7, 8; and Appendix A, §§ 12-15, pp. 9, 10.
1st Draft, Wills, 1/30/67, §§ 12-14, pp. 7, 8.
Minutes, 12/17,18/65, pp. 9-11; and Appendix A, § 16, pp. 8, 9.

A question was raised at the June meeting as to the relationship of section 14 of Mr. Riddlesbarger's revised draft to the substance of ORS 114.150, which reads:

> "A charge or encumbrance upon any real or personal estate, for the purpose of securing the payment of money or the performance of any covenant or agreement, is not deemed a revocation of any will previously executed relating to the same estate. The devises and legacies therein contained shall pass and take effect subject to such charge or encumbrance."

As demonstrated above, the source of seciton 14 is subsection (3) of ORS 114.230, and not ORS 114.150. It appears, however, that ORS 114.230 and 114.150, as well as ORS 114.140 (the source of section 14 A, to be discussed later in this report), are related in the sense that their purpose is repeal of certain doctrines. The following passages excerpted from Faureguy & Love, Oregon Probate Law and Practice are pertinent on this point.

> "The English Wills Act, 32 Henry VIII, was construed by the English courts to permit a devise of only real property owned at the time of the execution of the will. From 1844 until 1849 the Oregon law of wills (under the provisional government) was governed

by a similar statute. It was also held, probably as a corollary to this rule, that if subsequent to executing his will the testator altered the nature of the estate or interest held by him, this was itself deemed a revocation of the devise.

"It is believed that these anomalous doctrines should no longer trouble Oregon lawyers; but occasionally remnants of them appear to be bothersome so they should be mentioned. Besides, Oregon statutes to be discussed presently, whose primary purpose was the repeal of the above doctrines, [citing ORS 114.140, 114.150 and 114.230] seem as will be shown, to have also accomplished other important results." 1 Jaureguy & Love, Oregon Probate Law and Practice § 377 (1958).

A comment on the status of ORS 114.150 in the context of the proposed revised Oregon probate code appears to be in order, and I must admit that this status, so far as I am able to determine, is less than crystal clear. In the draft on wills submitted by Mr. Riddlesbarger and considered at the November 1965 meeting (see Minutes, 12/17,18/65, Appendix A), section 13 thereof appears to be a replacement for ORS 114.150. See Minutes, 11/19,20/65, pp. 7, 8; and section 13 of the Rewritten Draft that appears as an appendix to those minutes. ORS 116.140 to 116.160, and their status in the context of the proposed revised Oregon probate code, are involved in the matter. See Minutes, 6/17,18/66, pp. 21, 22. The first draft, dated April 20, 1967, on discharge of encumbrances, which appears in the blue notebook following tab 19, pupports to deal with the matter, and this draft will be considered by the committees in due course.

Jaureguy & Love, Oregon Probate Law and Practice, comments on ORS 114.150 as follows:

"Immediately following the section of the statute just discussed is a section which provides that a charge or encumbrance upon property devised by a will executed prior to the encumbrance shall not be deemed a revocation of the devise but that 'the devises and legacies therein contained shall pass and take effect subject to such charge or encumbrance'.

"The Missouri Supreme Court in construing its identical statute has assumed that at common law the placing of a mortgage or other encumbrance upon devised real property resulted in a revocation of the devise; and has held that the effect of the statute is not merely to abrogate this common law rule, but to deprive the devisee of the right which he had at

common law to have the land exonerated from the mortgage by having it paid with property not specifically devised or bequeathed.

"But the Oregon Supreme Court in the Nawrocki case [In re Estate of Nawrocki, (1954) 200 Or. 660, 268 P. (2d) 363], in a carefully reasoned opinion by Justice Brand, has held to the contrary. The Missouri court, the opinion says, was in error in holding that at common law an encumbrance upon devised property revokes the devise. It accordingly follows that 'the statute here in question is not an abrogation of any common law rule, but a codification thereof', and 'It is hardly logical to say that the enactment of a statute which merely states a common law rule has the effect of abrogating another common law doctrine, where both rules were compatible at common law.' The court accordingly held that the devisee was entitled to exoneration of the mortgage debt from the residue of the estate.

"The above decision seems inconsistent with a general statement in an earlier case, Howe v. Kern [(1912) 63 Or. 487, 125 P. 834, 128 P. 818], to the effect that 'the debts of the estate secured by mortgage must first be satisfied out of the mortgaged property.' However, in that case while the property had been specifically devised, it is not clear whether the will was executed prior or subsequent to the execution of the mortgage, and it may have been a purchase money mortgage, in which case the above quoted statement clearly applies."

SECTION 14 A

As Mr. Riddlesbarger correctly pointed out at the June 1967 meeting, section 14 A of his revised draft is based upon ORS 114.140, which was approved in substance at the December 1965 meeting. See Minutes, 12/17,18/65, p. 6; and Appendix A, § 12, p. 5. He also correctly noted that the section did not appear in the first draft, dated January 30, 1967, on wills, which is found in the blue notebook following tab 10. The omission of the section from the first draft apparently was inadvertent; I have discovered a draft of the section in Mr. Sorte's working papers.

ORS 114.140 reads:

"A bond, covenant or agreement made for a valuable consideration by a testator to convey any property devised or bequeathed in any will previously made, is not deemed a revocation of such previous devise or bequest, either

in law or equity; but such property shall pass by the devise or bequest, subject to the same remedies on such bond, covenant or agreement, for the specific performance or otherwise, against devisees or legatees as might be had by law against the heirs of the testator or his next of kin, if the same had descended to them."

Section 14 A of Mr. Riddlesbarger's revised draft reads:

"An executory contract of sale made for a valuable consideration by a testator to convey any property devised in any will previously made, is not deemed a revocation of such previous devise, either in law or equity; but such property shall pass by the devise, subject to the same remedies on such agreement, for specific performance or otherwise, against devisees as might be had against the heirs of the testator or his next of kin, if the same had descended to them."

The draft discovered in Mr. Sorte's working papers reads substantially as follows:

"If a person makes a will and thereafter enters into an enforceable agreement to convey or transfer property devised by the will, the agreement does not revoke any part of the will. The property passes as provided in the will, but the person contracting with the testator under the agreement has the same remedies against the devisee of the property as he would have had against the heirs of the testator if the property had descended to them under the laws of intestate succession."

I conclude by suggesting that section 14 A, since it pertains to revocation, should be located following section 10 of Mr. Riddlesbarger's revised draft. ORS 114.140 is comparably located.

REPORT
June 5, 1967

To: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: Clifford E. Zollinger

Subject: Support of Spouse and Children

One of the matters scheduled for consideration at the June 16 and 17, 1967, meeting of the committees is support of spouse and children. This report consists of a draft of proposed legislation on the subject, and comment on the draft.

PROVISIONS FOR SUPPORT OF SPOUSE AND CHILDREN

Section 1. Occupancy of family abode by spouse and children. The spouse and any minor or incompetent child of a decedent may continue to occupy the principal place of abode of the decedent until one year after his death or, if his estate therein be an estate of leasehold or an estate for the lifetime of another, until one year after his death or the earlier termination of his estate. During that occupancy:

(1) The occupants shall not commit or permit waste to the abode; nor shall they cause or permit mechanic's or materialmen's or other liens to attach thereto.

(2) The occupants shall keep the abode insured against fire or other hazards within the extended coverage provided by fire policies. In the event of loss or damage from such hazards, to the extent of the proceeds of such insurance, they will restore the abode to its former condition.

(3) The occupants shall pay taxes and improvement liens on the abode as payment thereof becomes due.

(4) The abode is exempt from execution to the extent it was exempt when the decedent was living.

Section 2. Support of spouse and children; petition, answer and order. (1) The court by order shall make necessary and reasonable provision from the estate of a decedent for the support of the spouse and any minor or incompetent child of the decedent upon:

(a) Petition therefor by the spouse or the guardian of the estate of any minor or incompetent child;

(b) Citation to the personal representative and persons whose distributive share of the estate may be diminished by the granting of the petition.

(c) Hearing on the petition.

(2) The petition for support shall include a description of any property available for the support of the spouse and children other than property of the estate and an estimate of the expenses anticipated for their support. If the petitioner is the personal representative, the petition shall also include, so far as known, a statement of the nature and estimated value of the property of the estate and of the nature and estimated amount of claims against the estate, taxes and expenses of administration.

(3) If the personal representative is not the petitioner, he shall answer the petition for support. The answer

shall include, so far as known, a statement of the nature and estimated value of the property of the estate and of the nature and estimated amount of claims against the estate, taxes and expenses of administration.

(4) Temporary support, pending hearing upon such petition, may be allowed by order of the court in such amount and of such nature as the court shall deem reasonably necessary for the welfare of the surviving spouse and any minor or incompetent child of the decedent.

Section 3. Nature of support; limitations; change by court. (1) Provision for support ordered by the court as provided in Section 2 of this Act may consist of any one or more of the following:

(a) Transfer of real property.

(b) Transfer of personal property.

(c) Periodic payment of moneys during administration of the estate, but for not more than two years after the date of death of the decedent.

(2) The court, in determining provision for support, shall take into consideration property available therefor other than property of the estate.

(3) If it appears to the court that the estate will be insolvent, provision for support ordered by the court shall not exceed one-half of the estimated value of the property of the estate and any periodic payment of moneys so ordered

shall be for not more than one year after the date of death of the decedent.

(4) Provision for support ordered by the court has priority over claims against the estate and other expenses of administration. Upon final distribution of the remaining assets of the estate, it shall not be charged against any distributive share of the person receiving such support, but it shall be treated as an expense of administration.

(5) Provision for support ordered by the court may be modified or terminated by the court by further order.

Section 4. ORS 23.260 is amended to read:

23.260. Exemption inapplicable to mechanics' and purchase-money liens and mortgages. ORS 23.240 to 23.270 (, 116.590 and 116.595) do not apply to mechanics' liens for work, labor or material done or furnished exclusively for the improvement of the property claimed as a homestead, and to purchase money liens and mortgages lawfully executed.

Section 5. ORS 107.280 is amended to read:

107.280. Decreeing disposition of property. 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 in 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 166.010 and the election provided in ORS 113.050,) the rights of the surviving spouse as provided in ORS are extinguished and barred.

Section 6. Repeal of existing statutes. ORS 113.070, 116.005, 116.010, 116.015, 116.020, 116.025, 116.590 and 116.595 are repealed.

References: Advisory Committee Minutes
6/19/65 p. 5
4/15,16/66 pp. 9 to 14; and Appendix
8/19,20/66 pp. 7 to 13; and Appendix

Report by Gilley and Krause, 5/14/66 "Support of Surviving Spouse and Minor Children; Homestead"

Report by Mapp, 5/20/66 "Support of Surviving Spouse and Minor Children; Exemptions (Homestead), and Family Allowances"

Report by Allison, 4/15,16/66 Appendix

ORS 113.070, 116.005 to 116.125, 116.590, 116.595, 111.030, 107.280, 23.260

Comment: What are the consequences if the surviving spouse commits or permits waste, does not pay taxes or insure the property? Should this section specify that the insurance shall be a standard homeowner's policy?

In section 1 is "abode owned by the decedent that they occupied on the date of death" limited to outright ownership? Would the word "owned" cover a long term lease or a contract for deed?

In section 2 (1)(b) who is included in the citation issued to "interested parties"? Would it be better to either allow the order without notice or provide that notice shall be given to the persons ordered to be notified by the court?

Is section 3 meant to limit the order of the court to the three subparagraphs of that section? Are there other things the court might order for support?

Is support charged against the distributive share at the time of final distribution? This should be provided for, either affirmatively or negatively.

The terminology "transfer of" in section 3 is somewhat inconsistent with the theory that title vests upon death in the person entitled to it. Would the terminology of ORS "set apart" be better?

EDITORIAL COMMENT

The propriety of the provisions of this chapter by which rights to support are somehwat enlarged and the court is granted broader discretion than under existing law should be considered with other provisions in Chapter _____ by which the share of the surviving spouse in real property of an intestate decedent is increased and Chapter _____ by which dower and curtesy are abolished and the right of the surviving spouse to take against the decedent's will is enlarged.

Section 1 replaces ORS 113.070 granting to the widow of a decedent the right to remain in his dwelling house one year after his death without liability for rent. The present law represents an extension of the widow's common law right of quarantine, as a prelude or temporary substitute for the assignment of dower. 1 Jaureguy & Love Oregon Probate Practice, Sec. 181.

Section 1 extends the right of occupancy to a surviving husband and it defines the duties of the occupant to the heir or devisee.

Section 1(4) preserves for the occupant exemptions from execution, continuing, only to that extent, the exemption

presently contained in ORS 116.590 and 116.595 for the benefit of the heir or devisee.

The provisions of ORS 113.070 for "reasonable sustenance out of the estate for one year" for the widow and the provisions of ORS 116.005 to 116.015 for the support of the decedent's surviving spouse and any minor or incompetent child are more adequately covered by Sections 2 and 3 of this chapter. Although Section 1 applies only to the principal place of abode of the decedent owned by him at his death, Sections 2 and 3 permit the court to transfer to them or any of them another more suitable residence or to provide funds for the purchase or rental of other living quarters. The present limitation to exempt property is abandoned.

ORS 116.005 now permits provision for the support of the widow and minor children pending the filing of the inventory, without regard to solvency of the estate; but further support may not be ordered pursuant to ORS 116.015 unless it appears probable that the estate is sufficient to satisfy debts and liabilities of the deceased and pay expenses of administration in addition to the payment of support. Sections 2 and 3 permit support even from an insolvent estate, not exceeding one-half of the estimated value of the property of the estate and continuing for not more than one year after the date of the decedent's death. Provision for such support has priority over claims and other expenses of administration.

Provisions for support extend to either spouse and for the benefit of incompetent as well as minor children.

Provisions for support, unless modified by the court, may continue for two years after the death of a decedent if his estate is solvent.

The amount of the support to be provided from the decedent's estate is discretionary. The court may take into account other resources, as well as other income of the surviving spouse. This is contrary to the present law, as construed in Booth v. First National Bank (1960) 220 Or. 534, 349 P. 2d 840. It also abandons the requirement of ORS 116.015 that no allowance for support shall be made unless it appears that the exempt property is insufficient for the support of the widow and minor children.

Sections 4 and 5 are housekeeping amendments of other statutes containing references to sections which are repealed and superseded.

Section 6 repeals all statutes relating to the support of the family of the decedent and the descent or devise of exempt property.

April 15, 1966

TENTATIVE OUTLINE
Proposed Revised Oregon Probate Code

Present ORS title 12 (Estates of Decedents)		Proposed ORS title 12 (Estates of Decedents)	
Chapter 111	Descent and Distribution	Chapter 111	General Provisions
Chapter 112	Uniform Simultaneous Death Act	Chapter 112	Intestate Succession
Chapter 113	Dower and Curtesy; Election Against Will	Chapter 113	Wills
Chapter 114	Wills	Chapter 114	Commencing Estate Proceedings; Personal Representatives
Chapter 115	Initiation of Probate or Administration	Chapter 115	Administration of Estates Generally
Chapter 116	Administration of Estates	Chapter 116	Claims, Distribution, Accounting & Closure
Chapter 117	Settlement and Distribution	Chapter 117	Estates of Persons Presumed Dead; Small Estates
Chapter 118	Inheritance Tax	Chapter 118	Inheritance Tax
Chapter 119	Gift Tax	Chapter 119	Gift Tax
Chapter 120	Escheat; Estates of Persons Presumed to be Dead	Chapter 120	Escheat
Chapter 121	Actions and Suits Affecting Decedents' Estates and Administration	Chapter 121	Actions and Suits Affecting Estates
Chapters 122 to 125 [Reserved for expansion]		Chapters 122 to 125 [Reserved for expansion]	

REPORT
May 12, 1966

To: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: Judge William L. Dickson, Patricia A. Lisbakken and Campbell Richardson

Subject: Outline of Proposed Revised Probate Code

At the April meeting of the Advisory and Bar Committees, the matter of the outline of, or arrangement of provisions to be included in, the proposed revised Oregon probate code was discussed. Three subcommittees were appointed and each assigned the task of preparing a suggested outline. The following outline was prepared by Subcommittee #3, consisting of Judge Dickson, Miss Lisbakken and Mr. Richardson, and is submitted for your consideration.

TENTATIVE OUTLINE
Proposed Revised Oregon Probate Code

Chapter 111 General Provisions

Definitions
Jurisdiction of Probate Courts
Pleadings and Mode of Procedure
Process
Manner of Service of Citation
Notices
Contempt
Penalties
Validating Acts

Chapter 112 Devolution of Property (Testate and Intestate)

Intestate Succession
Wills
Advancements
Effect of Adoption and Illegitimacy
Felonious Deaths
Escheat
Uniform Simultaneous Death Act
Residue of Dower and Curtesy
Cross reference to Inheritance Rights of Nonresident Aliens; Estates of Persons Presumed Dead

Chapter 113 Proceedings Prior to Administration; Personal Representatives; Initiation of Administration; Estates of Persons Presumed Dead

Proceedings Prior to Administration
    Incorporation of ORS 97.110 to 97.230
        (Disposition of Human Bodies)
    Delivery of Body for Scientific or
        Medical Purposes (ORS 116.115)
    Funeral Charges (ORS 117.150)
    Special Administrator
Personal Representatives
Initiation of Administration
Estates of Persons Presumed Dead
Cross reference to Reopening Estates;
  Notices; etc.

Chapter 114 Administration of Estates Generally

Support of Spouse and Minor Children
Homestead
Election Against Will
Powers and Duties of Personal Representative
Discovery of Assets
Inventory and Appraisal
Sale and Lease of Property
Borrowing
Continuing Business
Application of Revised Uniform Principal and Income Act
Interim Accountings
Partial Distributions

Chapter 115 Creditors' Claims and Rights; Actions and Suits Affecting Decedent's Estate

Filing Claims Against Estate
Determination of Contested Claims
Actions (ORS 121.020 to 121.100)
Suits (ORS 121.210 to 121.370)

Chapter 116 Determination of Rights; Estates and Beneficiaries

Determination of Heirship
Will Contests
Inheritance Rights of Nonresident Aliens

Chapter 117 Settlement and Distribution; Reopening Estates

Right of Retainer
Final Account
Distribution to Legatees, Devisees and Heirs
  (ORS 117.310 to 117.390)
Reopening Estates

Chapter 118 Inheritance Tax

Chapter 119 Gift Tax

Chapter 120 Small Estates

Chapter 121 to 125 [Reserved for Expansion]

REPORT
December 5, 1966

To: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: Thomas W. Mapp

Subject: Proposed Outline, Revised Oregon Probate Code.

(One of the matters scheduled for consideration at the December meeting is the proposed outline of the Probate Code. Three committees working independently are to have submitted drafts by the December meeting.)

Chapter III General Provisions

Definitions
Jurisdiction of Probate Court
Petitions and Method of Procedure
Notice
  Manner of Service
  Proof of Service
  Waiver of Notice
Appearance
Jury Trial
Modification of Judgments
Appeal Procedure
Disposition of Human Bodies (ORS 97.110 - 230)
Delivery of Body for Scientific or Medical Purposes (ORS 116.115)
Funeral Charges (ORS 117.150)

Chapter 112 Devolution of Property (testate and Intestate)

Intestate Succession
  Advancement
Wills
Election against Will
Pretermitted Issue
Effect of Adoption and Illegitimacy
Felonious Deaths
Escheat
Uniform Simultaneous Death Act
Inheritance Rights of Nonresident Aliens

Chapter 113 Initiation of Administration

Venue
Special Administrator
Probate of Will
Will Contests
Appointment of Personal Representative
Bond of Personal Representative

Chapter 114 Administration of Estates

Support of Spouse and Children
Powers and Duties of Personal Representatives (Generally)
Resignation or Removal of Personal Representatives
Inventory and Appraisal
Collection and Management of Estates
Sale, Mortgage and Lease of Property
Claims
Accounting
Distribution and Discharge
  Partial Distribution
  Final Distribution
  Determination of Heirship
Reopening Administration

Chapter 115 Summary Procedures

Small Estates Act
Independent Administration

Chapter 116 Ancillary Procedures

Uniform Probate of Foreign Wills Act
Uniform Ancillary Administration of Estates Act

Chapter 117 Liability of Beneficiaries of Estate for Decedent's Debts

(ORS 121.230 - 370)
See Article 12 of 1966 Revised New York Code (Substantive).

Chapter 118 Inheritance Tax

Chapter 119 Gift Tax

Chapters 120 - 125 (Reserved for Expansion)

REPORT
December 14, 1966

To: Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: R. Thomas Gooding, Duncan L. McKay and Judge Joseph J. Thalhofer

Subject: Proposed Outline, Revised Oregon Probate Code

Chapter 111 GENERAL PROVISIONS

Definitions
Jurisdiction and powers
Proceedings, pleadings and process
Persons feloniously causing death of another
Inheritance by nonresident aliens
Uniform Simultaneous Death Act (ORS chapter 112)
Penalties
Validating Acts

Chapter 112 INTESTATE SUCCESSION (mostly from ORS chapter 111)

Intestate succession
Advancements
Effect of adoption and illegitimacy
Abolition of dower and curtesy

Chapter 113 WILLS (mostly from ORS chapter 114)

Execution
Revocation
Rules of construction
Election against will
Effect of particular legacies and devises
Testamentary additions to trusts
Pretermitted children
Witnesses as beneficiaries

Chapter 114 INITIATION OF ESTATE PROCEEDINGS

Commencing estate proceedings (ORS 115.110 et seq)
Qualification and removal of personal representatives (ORS 115.410 et seq)
Powers and duties of personal representatives generally (ORS 116.105 et seq)

Chapter 115 ADMINISTRATION OF ESTATES GENERALLY (mostly from ORS chapter 116)

Support of surviving spouse and minor children
Discovery of assets
Inventory and appraisal
Processing claims against the estate

Chapter 115 - continued

Payment of claims against the estate (ORS 117,110-180)
Sale or lease of property
Ancillary proceedings

Chapter 116 ACCOUNTING, SETTLEMENT AND DISTRIBUTION
(ORS chapter 117)

Periodic accounting
Partial distributions
Determination of heirship
Final account
Distribution to legatees, devisees and heirs
Reopening estates

Chapter 117 SUMMARY PROCEEDINGS

Small estates
Independent administration

Chapter 118 INHERITANCE TAX

Chapter 119 GIFT TAX

Chapter 120 ESCHEAT: ESTATES OF PERSONS PRESUMED TO BE DEAD

Chapter 121 ACTIONS AND SUITS AFFECTING ESTATES

Chapters 122 - 125

(Reserved for expansion)

REPORT
May 30, 1967

To: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: Mrs. Braun and Mr. Gilley

Subject: Missing Persons - ORS chapter 127

One of the matters scheduled for the June 16, 17, 1967 meeting is the incorporation of ORS chapter 127 into the existing Oregon guardianship law, ORS chapter 126. The following amendments would be necessary to accomplish that goal.

Section 1. ORS 126.006 is amended to read:

126.006. As used in ORS 126.006 to 126.565, unless the context requires otherwise:

(1) "Court" means any court having probate jurisdiction or a judge thereof.

(2) "Guardian" means any person appointed under ORS 126.006 to 126.565 as guardian of the person, guardian of the estate, or both, for any other person.

(3) "Incompetent" includes any person who, by reason of mental illness, mental deficiency, advanced age, disease, weakness of mind or any other cause, is unable unassisted to properly manage and take care of himself or his property.

(4) "Institution" includes any public or private institution located within or outside this state.

(5) "Minor" means any person who has not arrived at the age of majority as provided in ORS 109.510 or 109.520.

(6) "Spendthrift" includes any person who, by excessive drinking, idleness, gaming or debauchery of any kind, spends, wastes or lessens his estate so as to expose or likely to expose himself or his family to want or suffering, or to cause any public authority or agency to be charged for any expense of the support of himself or his family.

(7) "Ward" means any person for whom a guardian has been appointed.

(8) "Missing person" means any person whose whereabouts is unknown and whose absence is unexplained or who is known to be unable to return to his usual place of abode and is unable to manage his affairs during his absence.

Section 2. ORS 126.106 is amended to read:

126.106. Any court having probate jurisdiction may appoint:

(1) Guardians of the person, guardians of the estate, or both, for resident incompetents or resident minors.

(2) Guardians of the person or guardians of the person and estate for incompetents or minors who, although not residents of this state, are physically present in this state and whose welfare requires such appointment.

(3) Guardians of the estate for resident spendthrifts.

(4) Guardians of the estate for nonresident incompetents, nonresident minors or nonresident spendthrifts who have property within this state.

(5) Guardians of the estate for missing persons who have property within this state.

Section 3. ORS 126.126 is amended to read:

126.126. Any person may file with the clerk of the court a petition for the appointment of a guardian. The petition shall include the following information, so far as known by the petitioner:

(1) The name, age, residence and post-office address of the proposed ward.

(2) Whether the proposed ward is an incompetent, minor or spendthrift or missing person, and whether he is a resident or nonresident of this state.

(3) Whether the appointment of a guardian of the person, guardian of the estate, or both, is sought.

(4) The name, residence and post-office address of the proposed guardian, and that the proposed guardian is qualified to serve as guardian.

(5) A general description and the probable value of the property of the proposed ward and any income to which he is entitled. If any moneys are paid or payable to the proposed ward by the United States through the Veterans Administration, the petition shall so state.

(6) The name and address of any person or institution having the care, custody or control of a proposed ward who is an incompetent or minor.

(7) The reasons why the appointment of a guardian

is sought, the relationship, if any, of the petitioner to the proposed ward and the interest, if any, of the petitioner in the appointment.

Section 4. ORS 126.131 is amended to read:

126.131. (1) Except as otherwise provided in ORS 126.136, 126.141 and 126.146, the court, upon the filing of a petition under ORS 126.126, shall order the issuance of a citation requiring the persons or institutions referred to in subsection (2) of this section to appear and show cause why a guardian should not be appointed for the proposed ward.

(2) Citation issued under subsection (1) of this section shall be served:

(a) If the proposed ward is an incompetent, on any person or an officer of any institution having the care, custody or control of the incompetent, and on the incompetent.

(b) If the proposed ward is a minor, on any person or an officer of any institution having the care, custody or control of the minor, and if the minor is 14 years of age or older, on the minor.

(c) If the proposed ward is a spendthrift, on the spendthrift.

(d) If the proposed ward is receiving moneys paid or payable by the United States through the Veterans

Administration, on a representative of the Veterans Administration.

(e) If the proposed ward is a missing person, on the missing person by mail at his last-known address by registered mail with postage-prepaid letter to be forwarded through the United States Social Security Administration to his last address available to that agency, by publication thereof and upon such other persons as the court may direct.

Section 5. ORS 126.411 is amended to read:

126.411. A guardian of the estate may file in the guardianship proceeding a petition for the sale, mortgage or lease of any property of the ward. The petition shall include the following information, so far as known by the petitioner:

(1) The name, age, residence and post-office address of the ward.

(2) Whether the ward is an incompetent, minor or spendthrift or missing person.

(3) The name and address of any person or institution having the care, custody or control of a ward who is an incompetent or minor.

(4) A general description and the probable value of all the property of the ward that has come to the possession or knowledge of the guardian and not theretofore disposed of, and of all the property to which the

ward may be entitled upon any distribution of any estate or of any trust.

(5) The income being received from the property to be sold, mortgaged, or leased, from all other property of the ward and from all other sources, and the application of such income.

(6) Such other information concerning the guardianship estate and the condition of the ward as is necessary to enable the court to be fully informed.

(7) The purpose of the proposed sale, mortgage or lease, a general description of the requirements for such purpose and the aggregate amount needed therefor.

(8) A specific description of the property to be sold, mortgaged or leased.

Section 6. ORS 126.426 is amended to read:

126.426. (1) Except as otherwise provided in ORS 126.431 and 126.471, the court, upon the filing of a petition under ORS 126.411 for the sale or mortgage of real property, or the lease of real property for a term exceeding five years, shall order the issuance of a citation requiring the persons or institutions referred to in subsection (2) of this section to appear and show cause why an order for the sale, mortgage or lease should not be made.

(2) Citation issued under subsection (1) of this section shall be served:

(a) If the ward is an incompetent, on any person or an officer of any institution having the care, custody or control of the incompetent, and on the incompetent.

(b) If the ward is a minor, on any person or an officer of any institution having the care, custody or control of the minor, and if the minor is 14 years of age or older, on the minor.

(c) If the ward is an incompetent or minor in the care, custody or control of any institution, on any person paying or liable for the care and maintenance of the incompetent or minor at the institution.

(d) If the ward is a spendthrift, on the spendthrift.

(e) If the ward is a missing person, to each person who would be an heir at law of the ward if he were dead.

Section 7. 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) For any other reason, 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, or missing person.

(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.

(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.

Section 8. ORS 126.495 is amended to read:

126.495. In case of the sale or other transfer by a guardian of the estate of any real or personal property specifically devised or bequeathed by theward, who was competent to make a will at the time he executed the will but was not competent to make a will at the time of the sale or transfer and never regained such competency or if the ward was a missing person subsequently found to be dead who did not make a valid will subsequent to the sale or transfer, so that the devised or bequeathed property is not contained in the estate of the ward at the time of his death, the devisee or legatee may at his option take the value of the property at the time of the death of the ward with the incidents of a general devise or bequest, or the proceeds of such sale or other transfer with the incidents of a specific devise or bequest.

ADVISORY COMMITTEE
Probate Law Revision
Thirty-ninth Meeting

(Joint Meeting with Bar Committee on Probate Law and Procedure)

Dates) 1:30 p.m., Friday, August 18, 1967
and : and
Times) 9:00 a.m., Saturday, August 19, 1967
Place : Suite 2201 Lloyd Center

(This Board Room is at the head of the spiral stairway on the Central Plaza, or take elevator to the medical section.)

Suggested Agenda

1. Approval of minutes of July meeting.

2. Miscellaneous matters.

3. Report by Professor Mapp on the Boulder, Colorado meeting.

4. Inventory and Appraisement (Discussion to be led by Mr. Carson and Mr. Butler)

5. Powers and duties of Personal Representative (Discussion to be led by Mr. Butler)

6. Elective share of surviving spouse.

   Consideration of section 1 of draft by Allison considered at June meeting and elective share provisions of proposed Wisconsin Probate Code (draft by Mr. Riddlesbarger, Mrs. Braun and Mr. Richardson, and discussion to be led by them).

7. Renunciation of gift under will and renunciation of intestate succession. (Sec. 14C of Riddlesbarger draft of Wills). (Report by special committee of Mr. Carson, Mrs. Braun and Miss Lisbakken).

ADVISORY COMMITTEE
Probate Law Revision

Thirty-ninth Meeting, August 18 and 19, 1967
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The thirty-ninth meeting of the advisory committee (a joint meeting with the Committee on Probate Law and Procedure, Oregon State Bar) was convened at 1:30 p.m., Friday, August 18, 1967, in Suite 2201, Lloyd Center, Portland, by Chairman Dickson.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Frohnmayer, Gooding, Husband, Jaureguy, Mapp and Riddlesbarger. Carson and Lisbakken were absent.

The following members of the Bar committee were present: Bettis, Biggs, Braun, Gilley, Kraemer, Krause, McKenna, Meyers and Richardson. Copenhaver, Lovett, McKay, Mosser, Pendergrass, Piazza, Silven, Thalhofer, Thomas and Warden were absent.

Also present was James Sorte from the staff of Legislative Counsel.

Approval of July minutes

Zollinger requested that the following correction be made in the July minutes, page 5, subsection (2):

"(2) At least two witnesses shall each sign his name thereto in the presence of the testator and at his request:

"(a) See the testator sign the will; or

"(b) Hear the testator acknowledge the signature on the will; or

"(c) Understand that the instrument is the will of the testator."

With the above correction, the minutes were approved as submitted.

Miscellaneous Matters

Sorte advised the committee that he had been requested by Mr. Lundy, Legislative Counsel, to inform the committees that the Oregon State Bar Committee on Taxation and the Oregon Association of Certified Public Accountants were undertaking a study of the inheritance tax laws, and that there was the further possibility that the Legislative Interim Committee on Taxation would also study the subject. He suggested that the

probate committees might wish to confer with the appropriate individuals. Dickson asked Sorte to convey this information to Carson, Lisbakken and Braun, the probate taxation subcommittee.

Report by Mapp on Uniform Probate Code

Mapp distributed his report dated August 14, 1967, entitled "Report on Summer 1967 Draft of Uniform Probate Code." He advised that the report did not cover the entire Uniform Probate Code and, as the committees discussed specific areas at future meetings, he would explain the policy decisions of the draftsmen of the Uniform Probate Code concerning the particular area. The Uniform Probate Code, he said, contains a basic approach to probate administration substantially different from other codes he had seen, and his report was designed to present the basic concepts and not necessarily follow the order in which the sections appeared in the Uniform Probate Code.

Mapp advised that the reporters working on the Uniform Probate Code had decided they would not provide a separate series of sections for independent administration, but would incorporate provisions for independent administration into the code. He characterized the code as a railroad track, one track representing independent administration and the other supervised administration. An estate could begin on the independent administration track, cross over to the supervised administration track at any number of places during the course of administration and, if desired, switch back to the independent track. The personal representative could administer the estate completely independently if he wanted to do so, but at many points, if he wanted adjudication or protection from the court, it was available to him.

Mapp went through his report section by section and explained it in detail. Riddlesbarger inquired if any state had a probate code similar to the Uniform Probate Code and was told by Frohnmayer that the Texas probate code was similar and had been in effect four or five years.

Frohnmayer asked if there was feeling among the reporters working on the uniform code that formal probate should be further simplified in order to do away with most of the requirements for going into court for authority to perform routine acts. Mapp replied that most of the reporters believed that, as in England and in Texas today, very few personal representatives would go into court, but the provisions to provide access to the court were retained for the benefit of anyone who wanted to use them.

Frohnmayer said many believed, as he did, that probate could be much simplified by providing for an informal administration to be followed by a formal and final discharge that would be meaningful and would not leave the matter unsettled for a three-year period as did the Uniform Probate Code. Zollinger agreed with Frohnmayer and expressed the view that if some of the authority for supervision were vested in the county clerk, the code would be more satisfactory to the legal profession.

Allison pointed out that the committees had agreed to abolish notice to interested parties in an ex parte proceeding although notice was to be given on the final account. He urged that provisions be retained for a voluntary alternative procedure for probate in solemn form with notice to interested persons. Zollinger favored that if, in a proceeding for the probate of a will in solemn form, it was alleged that there was a justiciable controversy, access to court should be permitted. In the absence of such an allegation, he believed it should not be permitted because it would cause unnecessary trouble. He said that what Allison was attempting to accomplish was to obtain an early adjudication without waiting for a contest and if that were accepted, some basis for a controversy should be alleged.

Riddlesbarger suggested a detailed comparison be drafted in order to enable comparison of the Uniform Probate Code with the provisions approved by the probate committees. Mapp volunteered to prepare such a comparison with the understanding that no time limit would be placed on the project. Dickson noted that Allison was making use of the Uniform Probate Code in drafting various code sections and suggested that when all policy decisions had been made, a committee could be assigned to compare the two codes.

Inventory and Appraisement

(Note: See tab 17, "Inventory and Appraisement" prepared by Legislative Counsel dated April 8, 1967.)

Section 1. Inventory and appraisement, when and how made. Butler read section 1 and Mapp read section 3-406 of the Uniform Probate Code. Frohnmayer expressed approval of the Uniform Probate Code section, one reason being that he disapproved of disclosing the amount of an estate to the general public. He noted that the code should contain a provision that final accounts could be abbreviated accounts where no one was interested other than a surviving spouse. Butler suggested there should be exceptions to such a provision. In the case of minors, he

said, providing them with copies of the inventory would not be sufficient protection. Riddlesbarger moved, seconded by Butler, that section 1 be approved as submitted.

Gilley moved, seconded by Frohnmayer, that the motion be amended to substitute for section 1 the substance of section 3.406 of the Uniform Probate Code providing for an alternative between filing the inventory and sending a copy of the inventory to interested parties. The section would then read:

> "Within 60 days after his appointment a personal representative shall prepare an inventory of property owned by the decedent at the time of his death, listing it with reasonable detail, and indicating, as to each item, its fair market value as of the date of the decedent's death, and the type and amount of any encumbrances that may exist with reference to any item.
>
> "The personal representative shall send a copy of the inventory to all persons interested in the estate except creditors, or he may file the original of the inventory with the court and furnish a copy to any interested person who requests it."

Dickson ruled Gilley's motion out of order since it could not be construed as an amendment to the original motion. Vote was taken on Riddlesbarger's motion to adopt section 1. Motion carried.

Riddlesbarger moved, seconded by McKenna, that "as of the date of death" be added to section 1. Motion carried. Dickson asked Allison to insert the phrase in the proper place.

Section 2. Extension of time. Butler read section 2 and noted that "a" in line 5 should be changed to "the." Dickson suggested that the entire section be eliminated except "The court may extend the time for filing the inventory for such period as the court determines necessary." Butler so moved, seconded by Gooding. Motion carried.

Section 3. Property discovered after inventory filed. Butler read section 3 and moved it be approved. After a brief discussion, the motion was seconded and carried.

Section 4. No appraisement required except for tax purposes. Butler read section 4 and indicated that Legislative Counsel had varied the wording slightly from what the committees had previously agreed upon and suggested the following wording originally approved be retained: "Unless the court

requires appraisement for inheritance tax purposes or for the purpose of administration or distribution."

Frohnmayer read the following from the Uniform Probate Code: "The personal representative may employ a qualified and disinterested appraiser to assist him in ascertaining the fair market value of any asset the value of which may be subject to reasonable doubt." He urged that the personal representative be empowered to hire an appraiser. Butler pointed out that section 4 dealt with the situation where the court was requiring appraisement of some or all of the assets of an estate and the personal representative might be reluctant to hire an appraiser. Gooding suggested the section read "The personal representative may, but is not required, to have property in an estate appraised . . ." Frohnmayer expressed approval of the Uniform Probate Code phrase "qualified and disinterested appraiser." Gilley noted that the second sentence would need to be changed if that wording were adopted and Butler said that sentence also contained a departure from the language originally intended by the committees. The approved wording, he said, was "The court may direct that all or any part of the property be appraised . . ." Dickson noted that the intention was to put the burden on the personal representative. He suggested the section read "The personal representative may, but is not required to, have property in an estate appraised. Different appraisers may be appointed to appraise different parts of the property." Frohnmayer moved, seconded by Braun, that section 3-407 of the uniform code be adopted with the addition of the following sentence to take care of the question raised by Butler with respect to the reluctant personal representative: "The court may, in its discretion, direct that all or any part of the property be appraised."

Riddlesbarger moved, seconded by Butler, to amend the motion by adding to the above sentence "by one or more appraisers appointed by the court." Frohnmayer and Braun accepted the amendment.

Butler suggested deletion of the sentence beginning "The names and addresses of any appraisers . . ." Frohnmayer and Braun accepted this further amendment to the motion and Frohnmayer read section 4 as proposed by the motion:

> "Section 4. The personal representative may employ a qualified and disinterested appraiser to assist him in the appraisal of any asset the value of which may be subject to reasonable doubt. Different persons may be employed to appraise different kinds of assets included in the estate. The court may, in its discretion, direct that all or any part of the property be appraised by one or more appraisers appointed by the court."

Motion carried.

Section 5. Appraisal to be at true cash value at date of death. Butler moved, seconded by Riddlesbarger, the adoption of section 5 in the following form:

> "Section 5. Property for which appraisement is made shall be appraised at its true cash value as of the date of death of the decedent. Each appraisement shall be in writing and shall be subscribed by the appraiser or appraisers making it."

Motion carried.

Section 6. Fees of appraisers. Frohnmayer expressed disapproval of section 6 and was of the opinion the personal representative should be permitted to pay a reasonable fee without first going to court for authority to do so. He said he would not object to the fee being ultimately approved by the court but thought "allowed by the court" could mean he had to obtain authority before the fee could be paid. Dickson agreed with Frohnmayer and was of the opinion that attorney fees should be handled in the same manner.

The meeting was recessed at 5:30 p.m. and was reconvened at 9:00 a.m. the following morning, August 19, 1967, by Chairman Dickson in Suite 2201, Lloyd Center, Portland, with the following members of the advisory committee present: Dickson, Zollinger, Allison, Butler, Frohnmayer, Husband, Jaureguy, Lisbakken, Mapp and Riddlesbarger.

Members of the Bar committee present were: Bettis, Briggs, Braun, Gilley, Kraemer, Krause, McKay, McKenna and Richardson. Sorte was also present.

Uniform Probate Code and 1967 Wisconsin Bill

A count of the number of Uniform Probate Codes available to the committees was taken. The following members had a copy: Allison, McKay, Mapp, Zollinger. He directed that the remaining four copies be given to Frohnmayer, Riddlesbarger and two to Sorte, one to remain in the office of Legislative Counsel and the other to be placed in the law library in Salem.

Following the discussion of the draft on powers and duties of personal representatives, Dickson suggested the Uniform Probate Code be reproduced in sufficient quantity to furnish a copy to each member. Mapp called attention to the 1967 Wisconsin bill which, he said, was substantially different from the 1966 proposed Wisconsin Probate Code. Zollinger suggested copies of the Wisconsin bill would also be helpful to committee members. Dickson proposed that the members study these two

proposals and that a discussion of their provisions be held at the September meeting. Riddlesbarger was of the opinion the codes would be of greater value if the discussion were based on the views of the person responsible for the various subjects assigned to him, and Zollinger concurred that the codes would be helpful to members in discussing the areas for which they were responsible to lead discussion.

Husband moved, seconded by Allison, that copies of the Uniform Probate Code be obtained and provided to all members of both committees who did not already have them. Motion carried. Mapp agreed to attempt to obtain copies, and, if he was unable to do so, Dickson requested Sorte to be responsible for the reproduction of sufficient copies.

Husband moved, seconded by Zollinger, that a sufficient quantity of the 1967 Wisconsin probate bill be procured to furnish to all members of both committees. Motion carried. Dickson assigned Husband and Sorte the responsibility for obtaining copies or preparing reproductions.

Inventory and Appraisement (Continued)

Section 6. Fees of appraisers. Frohnmayer recapitulated the previous day's discussion of section 6 and reiterated his position that the personal representative should be given authority to pay an appraiser what he considered to be a reasonable fee without prior court approval. He noted that in any case the personal representative would be required to justify the fee at the hearing of the final account. Mapp indicated this subject had been discussed in Boulder, Colorado, and the concensus of opinion was that the payment of fees fell into the category of a private transaction and the court should not be involved in setting the fee unless someone tried to litigate it.

Butler objected to "shall be paid" and suggested "shall be entitled to be paid" would be preferable. He then moved, seconded by Krause, that section 6 be amended to read:

> "Section 6. Each appraiser shall be entitled to be paid from the estate a reasonable fee and necessary expenses."

Motion carried.

Section 7. Naming of personal representative does not discharge claim against him. Butler moved, seconded by Jaureguy, that section 7 be adopted. Frohnmayer questioned the necessity of including section 7 and Richardson commented that the common law was to the contrary and it was included to

abrogate the common law. Zollinger noted that since "executor" had been changed to "personal representative," the purpose of the section was even more obscure. Allison volunteered to research this point. Vote was then taken on Butler's motion which carried with the understanding that the section would be reconsidered when Allison had explored the subject.

Section 8. Discharge or bequest in will of claim of testator. Allison remarked that section 8 involved the same question as raised in connection with section 7 and agreed to include section 8 in his research. Section 8 was approved with the same reservation as applied to the previous section.

Powers and Duties of Personal Representative

(Note: See draft by Legislative Counsel under Tab 15 entitled "Powers and Duties of Personal Representative" dated April 27, 1967.)

Section 1. Possession and control of property. Butler noted that section 1 referred to allocation of income which was to be discussed by Jack McMurchie at the September meeting and requested consideration of the section be postponed until that time.

Section 2. Performance of contract. Butler explained that section 2 broadened ORS 116.110 to cover personal as well as real property and preserved, in deference to the requirements of the title companies, the necessity for court approval prior to the conveyance of real property. (Note: See Minutes, Probate Advisory Committee, 6/17, 18/66, pp. 18 and 19.)

Zollinger recalled that a subcommittee had been appointed to seek an audience with the title companies to determine their attitude toward requiring a court order prior to sales by personal representatives and Allison said that Dickson had suggested waiting until Mapp returned with the Uniform Probate Code before meeting with the title companies. Mapp called attention to section 3-416 of the Uniform Probate Code and read the comment at the end of the section. He expressed the view that this section encompassed the basic concept of the code and emphasized its importance.

Butler moved that section 2 be adopted deleting "with prior approval of the court by order" with the understanding that the title companies would be contacted and if they objected, the matter would be reconsidered. Zollinger was of the opinion the section could be deleted if the personal representatives were given authority to perform contracts. Allison

remarked that the title companies would be most concerned with the type of language used in the code for the protection of bona fide purchasers. Zollinger suggested action on section 2 be postponed pending learning the attitude of the title companies and Butler withdrew his motion.

Dickson directed that Sorte prepare copies of the Uniform Code Provisions, the Wisconsin code provisions and the material behind Tab 21 in sufficient quantity to distribute to title companies and furnish such material to Allison. He appointed Allison, Chairman, and Zollinger as a subcommittee to arrange a meeting with the title companies at the earliest possible moment in order that the matter could be placed on the September agenda. Zollinger was not in favor of expecting the title companies to reach an immediate conclusion. He suggested they be furnished the material, be given an opportunity to study it in detail and said he would then be optimistic about their accepting the provisions of the uniform code.

Riddlesbarger suggested the committees first decide what approach they wished to adopt. Frohnmayer moved, seconded by Zollinger, that in connection with the powers of the personal representative the committees adopt the general policy of the Uniform Probate Code; namely, that the personal representative be given full power to deal with the assets of the estate and that if he dealt with a bona fide purchaser, the bona fide purchaser could rely upon the title given him by the personal representative. Motion carried unanimously.

Dickson indicated the meeting with the title companies would be left to the discretion of Allison and Zollinger and would be placed on the agenda when they were prepared to report on the subject.

Section 3. Gift of body of decedent; nonliability for delivery. Butler read section 3 and noted that it referred to written instruments other than the will. Zollinger noted that the section permitted a person authorized by writing to take such action as was necessary to implement a gift but did not say whether he was under an obligation to take such action. He suggested the section read ". . . may but shall not be required to take such action..." Butler said he did not see how "may" could be construed as anything other than permissive in this situation. Frohmayer agreed that to include the suggested revision would open the door to problems. Riddlesbarger moved, seconded by Butler, that section 3 be approved as submitted. Motion carried.

Disposition of bodies (Chapter 97). Dickson suggested the committees consider the statutes dealing with the problem of decedent's remains and specifically determine whether or not the personal representative was entitled to make funeral arrangements when the next of kin could not be located. Allison called attention to a draft giving special administrators this authority and read portions of that draft which had not yet been distributed to committee members. Riddlesbarger expressed the view that the next of kin should be given preference in making funeral arrangements, but if none were available, the personal representative should be empowered to act. Butler maintained that such a provision should be placed in Chapter 97 and Allison expressed agreement.

After further discussion, Riddlesbarger moved, seconded by Gooding, that a section be inserted authorizing the personal representative to take charge of and dispose of the remains of the decedent within five days after his demise with the understanding that the next of kin or spouse had the prior right to make funeral arrangements. McKenna noted that the body would not actually have to be disposed of within the five-day period if the arrangements had been made within that time. Motion carried.

Section 4. Right to file notice of and perfect lien. Zollinger suggested "security interest" be included in section 4. He commented there were various kinds of security interests requiring filing of a notice either in order to perfect or in order to maintain perfection of the security interest.

Lisbakken moved, and the motion was seconded, that section 4 be approved with the addition of "a security interest." Motion carried.

Section 5. Right of personal representative to borrow money. Butler suggested subsection (1) of section 5 be amended to read:

> "(1) The personal representative may borrow money when authorized by the will, or by order of court, to pay debts; taxes; expenses of administration; or for purposes of administration or distribution."

Zollinger moved, seconded by Butler, that section 5 be approved in the above form. Motion carried.

Section 6. Personal representative may compound for debts due estate. Butler noted that section 6 restated the ORS section whereas the committees had agreed to adopt the 1963 Iowa Probate Code provisions. The April 8 draft, he said, contained some of each with resulting confusion and he had therefore

rewritten the section. He called attention to the fact that his proposal substituted "compromise" for "compound" because "compromise" was more readily understandable. He proposed that section 6 read:

"Section 6. If it appears in the best interests of the estate, the personal representative may:

"(1) Compromise a claim of the estate against a debtor or other obligator; or

"(2) Extend or remove or otherwise modify the terms of an obligation owing to the estate; or

"(3) Accept a conveyance or transfer of property which is encumbered by a mortgage, pledge, lien or other security agreement in satisfaction of indebtedness to the estate secured by such encumbrance."

Riddlesbarger moved, seconded by Butler, that section 6 be approved as set forth above. Motion carried.

Section 7. Right to redeem mortgaged property. Butler explained that at the May and June, 1966, meetings it was agreed that a secured creditor should not be deprived of his right to receive payment according to the terms of a mortgage and should not be required to accept a lesser amount simply because the personal representative wanted to pay the debt in advance of its due date. If the committees stood by their previous decision, ORS 116.160 would be repealed and subsection (2) of section 7 of the draft should be deleted.

Zollinger expressed the view that the personal representative was not the one who should have the right to redeem from foreclosure sales. Frohnmayer commented the personal representative should have this right in limited situations. Butler disagreed stating that the personal representative's function was not the investment of estate assets and when he redeemed property sold on foreclosure, he was in effect making investments. Zollinger concurred with Butler.

Mapp read section 3-516 of the Uniform Probate Code and Riddlesbarger suggested "mortgage, pledge, security interest or other lien" be used in section 7 in order to conform to the Uniform Commercial Code. Mapp read the uniform code's definition of "mortgage" and Frohnmayer suggested the Oregon revised probate code also include a definition of "mortgage."

Butler moved, and the motion was seconded, that section 3-516 of the Uniform Probate Code relating to payment of liens on the property of decedent's estate be adopted with the inclusion of "security interest." Motion carried.

Section 8. Personal representative continue business. Butler noted that section 8 in large measure paraphrased section 83 of the 1963 Iowa Probate Code. He was of the opinion the section should be rewritten to provide authority for the personal representative to continue the business of the decedent. Allison read section 3-416 subsection (S), of the Uniform Probate Code and expressed apprehension over giving the personal representative authority to carry on a business without court authority. Butler noted that the reporters on the Uniform Probate Code apparently shared his apprehension and said he considered the provisions of the 1963 Iowa Probate Code to be far better than the Uniform Probate Code in this respect.

Riddlesbarger suggested that because an existing business needed attention in order to survive, the personal representative be given authority to continue operation of a business subject to an express provision that he could be ordered to discontinue its operation.

Frohnmayer called attention to the provisions contained in the Wisconsin probate bill introduced in the legislature March 1, 1967, giving the court the right to authorize the personal representative to continue a business.

Dickson was of the opinion that a court order should not be required in the first instance and operation of a business should not require the court's attention until and unless it was a subject of controversy. Frohnmayer agreed that a court order was unnecessary and suggested the committees consider including in the revised Oregon code certain Uniform Probate Code provisions contained in sections 3-412, 3-413, 3-414 and 3-415 in addition to 3-403.

Powers of Personal Representative (Tab 15); Sale, Mortgage and Lease (Tab 21)

Frohnmayer asked if the subjects under Tabs 15 and 21 were to be considered at the September meeting and Dickson replied in the affirmative. Frohnmayer suggested the material under the two tabs be combined and updated and that the sections be presented in the same order in which they appeared in the uniform code.

Braun noted that tab 19 also concerned powers and duties of the personal representative and Dickson directed that the three tabs be combined and placed on the September agenda. Allison volunteered to perform this task and Dickson requested Butler, Zollinger and Allison to lead the discussion.

The committees recessed for lunch at 11:45 a.m. and reconvened at 1:15 p.m. with the following members of the advisory committee present: Dickson, Zollinger, Allison, Butler, Gooding, Husband, Jaureguy, Lisbakken, Mapp and Riddlesbarger. Members of the Bar committee present were: Bettis, Braun, Gilley, Kraemer, Krause and Richardson. Sorte was also present.

Elective Share of Surviving Spouse

(Note: See Minutes, Probate Advisory Committee, 6/16, 17/67, Appendix B.)

Riddlesbarger discussed generally the possible approaches to provide rights for the surviving spouse. Allison contended two revisions should be made in proposal #6:

(1) Inasmuch as dower and curtesy had to do with intestate estates, this provision should be placed in the intestate statute.

(2) The preliminary approach retaining language referring to real and personal property is out of line with the balance of the code and the separate reference to real and personal property should be eliminated. There should be a section on election of spouse without making a distinction between real and personal property.

Braun noted that the present proposal made no reference to the situation where a husband depleted his estate by transfers to third persons leaving the widow nothing against which she could elect. Riddlesbarger read the comment under section 861.17 of the 1967 Wisconsin bill and explained that inasmuch as it was virtually impossible to prove the primary purpose of the transfers was to defraud the spouse, Wisconsin had taken a position that would provide a deterrent to a spouse to deplete the estate in what could be regarded as a fraudulent manner by providing that the elective right against the estate was barred if the widow had already received property amounting to half the value of the estate. Mapp discussed the manner in which the reporters on the Uniform Probate Code had arrived at the provisions which required some property transferred by the decedent to be brought back into the estate properties.

Butler expressed opposition to a provision which would bring transfers made during a decedent's lifetime back into an augmented estate. He said this would not only complicate the statute but would create a vast amount of litigation. Dickson agreed that such a provision would go far beyond what the committees ought to do.

Riddlesbarger asked for an expression of the attitude of the committees on whether an augmented estate would be used as the basis for the spouse's election or whether the net probate estate would be used as the basis for election. Butler asserted that the committees should first decide whether there should be an elective right of the spouse and moved, seconded by Riddlesbarger, that the elective right be perpetuated. Braun spoke in opposition to the motion. She expressed the view, and Dickson agreed, that the support provisions adequately took care of the widow.

Riddlesbarger contended that the widow was entitled to have assets available to her in addition to support. Dickson was of the opinion that the code was broad enough to permit the court to set aside everything to the widow. Allison remarked that the philosophy under consideration was that a wife was entitled to a substantial share of the estate left by the will and it was not considered just for a husband, by provisions in his will, to entirely eliminate any provision for his widow. He maintained that the election statute and the support statute were entirely separate questions. Vote was then taken on Butler's motion to include provision for election against a will. Motion carried.

Zollinger moved, seconded by Butler, that the elective interest be confined to 1/4 of the net probate estate. Braun asked if this motion would permit a decedent to deplete his estate leaving nothing to his widow and received an affirmative reply from Dickson. Vote was then taken on the motion which carried.

Richardson explained that section 861.07 of the 1966 proposed Wisconsin probate code contained a provision barring the surviving spouse from electing against a will where it would upset a testamentary plan. Wisconsin, he said, gave the widow 1/3 of the net probate estate and barred her election if she received 1/2 of the total property reported for purposes of the federal estate tax. He read the comment under the Wisconsin section and expressed approval of the provision limiting the right to elect against the will to the situation where the spouse was completely cut out of the will. He moved, seconded by Zollinger, that this provision be adopted. Motion carried.

Zollinger suggested that if the surviving spouse elected to take the 1/4 share, the 1/2 figure should be used as the basis for barring the election. In other words, if the widow received 1/2 of the augmented estate, the right to elect the 1/4 share would be barred by the circumstance that she had

received 1/2 of the estate. Allison read the section from the 1967 Wisconsin bill comparable to section 861.07 of the 1966 proposed Wisconsin Probate Code. Kraemer noted that it would totally bar the widow's rights if she received 50% of the estate and would have no effect if she received 49%. He suggested his objection could be cured by stating that her share would not exceed 50%. The committees agreed with this amendment. Zollinger reviewed the action of the committees by indicating they had adopted the Wisconsin approach to barring the right of election with the further provision that the exercise of the right of election should not produce more than 50% of the augmented net estate. It was also understood, he said, that the estate would be considered in terms of a net probate estate rather than a gross estate subject to deductions as provided in the present statute.

Allison noted that the Wisconsin statute provided for six months and Dickson suggested that 90 days from admission of the will to probate would be a sufficient amount of time. He pointed out that the widow's decision was not irrevocable; she could, if she wished, withdraw her election or it could be barred. After further discussion, the concensus of the committees was that 90 days was ample time.

Mapp called attention to the provisions in the Uniform Probate Code dealing with the effect of separation of the parties and Dickson asked Allison to include those provisions in his draft in order that they could be considered at a later time.

Renunciation of Gift Under Will and Renunciation of Intestate Succession

(Note: See Minutes, Probate Advisory Committee, 6/17, 18/67, Appendix A, pp. 14 and 15, section 14 (c).)

Riddlesbarger explained that section 14 (c) of the wills draft was copied verbatim from the 1966 proposed Wisconsin Probate Code which had been amended by section 853.21 of the 1967 Wisconsin bill. He read section 853.21 and section 202-801 of the Uniform Probate Code together with the comment and addendum to comment in the uniform code. He was of the opinion that the right to renounce should be expressed in the proposed Oregon code and indicated preference for the Uniform Probate Code provisions.

Zollinger suggested the code provide that the renunciation of all or part of a share in the estate would apply unless the

will expressly prohibited partial renunciation. He also thought it was important to say that restriction upon alienation was not a prohibition of a partial renunciation.

Butler noted that the comment following section 14 (c) stated the section was intended to resolve the question of whether or not the renunciation would constitute a gift for tax purposes and asked if anyone had had the experience of state or federal authorities seeking to impose a tax on property that had been renounced. Braun pointed out that federal regulations looked to the local law on vesting and unless local law permitted renunciation, it would be taxed. She suggested that Oregon law be worded so as to receive the benefit of the federal exception.

Riddlesbarger moved that the substance of section 202.801 of the 1967 Wisconsin bill be adopted to provide the basis for a new section prohibiting partial renunciation of a will and including a provision that restrictions on alienation would not constitute such a prohibition.

Gilley objected to the inclusion of a provision applicable to a will which denied a right of partial revocation. He was of the opinion this was too fine a point to include in the code and the Uniform Probate Code should be adopted without the addition of such a provision. Gilley moved, seconded by Butler, that the changes suggested by Zollinger be eliminated.

Riddlesbarger moved, seconded by Butler, that instead of voting on Gilley's motion, the language of the uniform code on renunciation be adopted. Motion carried.

The meeting was adjourned at 3:15 p.m.

September meeting

The following matters were scheduled for the September 1967 meeting:

1. Powers of personal representative, sale, mortgage and lease
(Combine tabs 15, 19 and 21) Discussion to be led by Butler, Zollinger and Allison

2. Elective share of surviving spouse
(Consideration of section 1 of draft by Allison considered at June meeting and elective share provisions of proposed Wisconsin Probate Code (draft by Riddlesbarger, Braun and Richardson and discussion to be led by them.)

3. Title to property
Allocation of income. Discussion to be led by Frohnmayer.

4. Advancements
Discussion to be led by Frohnmayer.

REPORT
August 14, 1967

To: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: Thomas W. Mapp

Subject: Report on Summer 1967 draft of Uniform Probate Code, prepared by Reporters at Boulder, Colorado.

The Boulder draft of the Uniform Probate Code is a complete probate code, and, consequently, contains provisions covering essentially the same materials as the draft Oregon Probate Code. At innumerable points the Uniform Probate Code will reflect a different approach to a specific problem than that tentatively being taken by our Oregon Probate Code. Sometimes the difference will be substantial, and sometimes only a matter of language. Because of the extensive scope of the two codes, I would prefer to report, in some detail, on the Uniform Probate Code approach reflected in specific sections when we discuss the comparable section of the Oregon Probate Code.

Flexible System for Administering Decedents' Estates. The Uniform Probate Code, however, reflects a relatively new concept in estate administration, which is probably best characterized as a "flexible system for administering decedents' estates," and I would like to sketch the broad outline of this system as background for much that I will be saying about the Uniform Probate Code in the future.

Section 1-205 Powers of Registrar [clerk]. A Registrar, or clerk, may hear and determine all non-contested matters, thus reserving the attention of the judge for contested matters requiring adjudication. The Registrar acts upon applications for informal probate of wills and informal appointments of personal representatives.

Section 3-101 Devolution of Estate at Death; Restrictions. Property of a decedent devolves at his death to his heirs, or the devisees under his will, subject to allowances, statutory

share of children or spouse, rights of creditors, and administration.

Section 3-203 Wills; Informal or Formal Probate; Necessity. Except where personal property can be collected by affidavit under section 3-901, to be effective to prove the transfer of property a will must be probated.

Section 3-233 Informal and Formal Probate and Testacy Proceedings; Ultimate Time Limit. No will may be probated, nor may an informal probate be contested, more than three years after a decedent's death. If no will has been probated, an assumption of intestacy, not judicially confirmed under section 3-231, becomes final.

Section 3-601 Successors' Rights Where No Administration. In the absence of administration, successors are entitled to a decedent's estate in accordance with the terms of a probated will or the laws of intestate succession, but they take subject to allowances, statutory share of children or spouse, rights of creditors, and administration. Person entitled to property by allowance, exemption or intestacy may establish title by proof of the decedent's ownership, his death, and their relationship to the decedent.

Section 3-504 Limitations on Presentations of Claims. All creditors claims which arose before the decedent's death are barred three years after the decedent's death.

Comment: Because of the bar to probate of a will after three years from the decedent's death, and the bar to creditors' claims three years from the decedent's death, interested persons may prefer to avoid administration if they have possession of the decedent's property and no problems re proof of title are involved. If title devolves directly to heirs at death,

their preference in this regard can be satisfied.

Section 3-208 Informal Probate or Appointment Proceedings; Application; Contents. Verified applications for informal probate, and informal appointment of a personal representative under a will or in intestacy, are directed to the Registrar. No notice is required. Informal probate is conclusive until and unless superseded by a formal probate under

Section 3-210 Informal Probate; Proof and Findings Required. If the will contains a recital by attesting witnesses of facts constituting due execution, the Registrar may presume due execution from the appearance and recital.

Section 3-220 Formal Testacy Proceedings; Nature; When Commenced. A formal testacy proceeding is a noticed judicial proceeding to probate a will, set aside an informally probated will, or obtain an order that the decedent died intestate.

Section 3-221 Formal Testacy or Appointment Proceedings; Petition; Contents. If an order that the decedent died intestate is sought in a formal testacy proceeding, a finding of heirship is also required.

The formal appointment proceeding, with its notice requirement under section 3-222, would also be used where disagreement may exist as to who should be appointed personal representative.

Section 3-231 Formal Testacy Proceeding; Effect of Order. The order is final after the time for appeal has passed.

Exceptions, however, exist as follows: A later discovered will may be probated, or heirship reconsidered, no later than six months after the estate is closed.

If the alleged decedent is alive, distributees are liable to restore the estate or its proceeds to him, through the normal process of tracing assets, without time limitation.

Section 3-404 Personal Representative to Proceed Without Court Order; Exception. Except for a supervised personal representative, a personal representative should proceed expeditiously to settle and distribute an estate, without court order if possible. Under section 3-416, he is given authority broad enough to permit him to carry out this general policy. He may, however, obtain judicial directions when he conceives them necessary.

Section 3-405 Duty of Personal Representative; Information to Heirs and Devisees. Within 30 days of appointment, an informally appointed personal representative must give INFORMATION of his appointment to heirs, or devisees, depending on the decedent's testacy status. This is not a notice, and failure to give it does not affect the powers and duties of the personal representative, but will constitute a breach of duty to persons entitled to the information. Specifically, the various protective devices discussed later would not be available to an interested party who simply had no information as to the estate administration, and such a person might well have a cause of action for damages against the personal representative.

Section 3-409 Duty of Personal Representative; Possession of Estate. The personal representative may take possession of any property of the estate necessary for purposes of administration.

Section 3-412 Powers of Personal Representative; In General. The personal representative has the same POWER over the title to estate property which an absolute owner would have, but in trust for those interested in the estate. This power may be exercised without notice, hearing, or order of court.

Section 3-416 Transactions Authorized for Personal Representatives; Exceptions. The personal representative is AUTHORIZED to do virtually anything with estate assets which the decedent would do, and without court order. However, this general statutory authority may be restricted by the will, or a judicial order under section 3-308.

Section 3-105 Supervised Administration; Petition. The personal representative, or any interested party, after notice to interested parties, and if the judge finds it necessary, may obtain an order that administration continue under court supervision.

Section 3-108 Supervised Administration; Powers of Personal Representative. The supervised personal representative has the same authority as a non-supervised personal representative under section 3-416, except that he is not authorized to pay creditors or distribute the estate without judicial order.

He has the same power as a non-supervised personal representative under section 3-412, but the judge may restrict his power and have his letters so endorsed, If the letters are so endorsed, the acts in violation of the restriction are void.

Section 3-308. Order Restraining Personal Representative. Any interested person may petition the court for an order restraining the personal representative from exercising an authority which he would otherwise have under section 3-416. A personal representative who violated a restraining order could be punished for contempt, and would be liable for any losses occurring as a result of the violation.

If the petition sought an order restraining the personal representative from affecting the title to estate real property, notice of the proceeding could be recorded, which would be effective to prevent a purchaser from acquiring a marketable title under the usual rules relating to recordation of real property titles.

Section 3-413 Improper Exercise of Power; Breach of Fiduciary Duty. If the personal representative's statutory AUTHORITY under section 3-416 were restricted by the will, or a judicial restraining order under section 3-308, but the personal representative violated the will or order by the exercise of his POWER under section 3-412, he would be liable for breach of his fiduciary duty to interested persons for any resulting losses.

Section 3-415 Persons Dealing With Personal Representative; Protection.

A person dealing with a personal representative without knowledge that the personal representative is exercising his power in violation of his authority under the will or court order is fully protected. Such a person is not bound to inquire concerning the provisions of the will or any restraining court order. A will can restrict a personal representative's authority under section 3-416, but it cannot affect his power under section 3-412 unless the purchaser from the personal representative has actual knowledge of the restricted authority.

Section 3-306 Demand for Bond by Interested Person. An interested person may seek an order requiring bond from a personal representative who has not been required to funish one.

Section 3-312 Termination of Appointment; Cause for Removal; Procedure. An interested person may seek an order removing a personal representative for cause at any time.

Section 3-502 Notice to Creditors. A personal representative is required to publish notice to creditors.

Section 3-504 Limitations on Presentation of Claims. Claims arising before the decedent's death are barred unless presented to the personal representative:

1) If notice to creditors has been published, four months after the first published notice;

2) If notice has not been published, three years after the decedent's death.

Section 3-508 Payment of Claims. The personal representative may pay valid claims at any time, but if he pays before the four month non-claim statute (section 3-504(a)(1)) has run, he is liable to any claimant who is injured by the payment.

Section 3-701 Formal Proceedings Terminating Administration; Order of General Protection. A personal representative or any interested person may petition for an order of complete settlement of the estate. Such an order may determine testacy, construe a will, determine heirs, approve a final account and distribution, and discharge the personal representative from further claim of any interested person. Notice to all interested persons is required.

Section 3-702 Formal Proceedings Terminating Testate Administration; Order of Limited Protection. This proceeding is comparable to that under section 3-701, except that it is used where a will was informally probated and testacy was never formally adjudicated under sections 3-220 through 3-232. Hence no notice is given to heirs, and their rights are not affected.

Section 3-703 Closing Estates; By Sworn Statement of Personal Representative. A non-supervised personal representative may close the estate by filing a sworn statement summarizing his administration of the estate. A copy of the statement must be sent to all distributees and creditors whose

claims are neither paid nor barred.

Section 3-705 Limitations on Proceedings Against Personal Representatives. Unless already barred by adjudication, the rights of successors and of creditors not then barred shall be barred against the personal representative for breach of fiduciary duty unless a proceeding is commenced within six months after the filing of the closing statement. Rights to recover from a personal representative for fraud, misrepresentation, or nondisclosure related to the settlement of the estate are not barred.

Section 3-609 Improper Distribution; Liability of Distributee. A distributee of property improperly distributed is liable to return the property, or its value if disposed of, unless the distribution can no longer be questioned because of adjudication (see sections 3-701 and 3-702) or limitation (see section 3-706).

Section 3-706 Limitations on Actions and Proceedings Against Distributees. Unless previously adjudicated in a formal testacy proceeding, or in a proceeding settling the accounts of a personal representative, or otherwise barred, the rights of successors or creditors to recover property improperly distributed or its value from distributees is barred at the later of:

(a) three years from the decedent's death, or

(b) one year from the time of distribution.

Comment: It should be noted that this code does not contain a separate Article or Part devoted to "Independent Administration." Rather, the theory of independent administration is an integral part of the entire code, and is reflected in the provisions for informal probate and appointment of a personal representative, in the broad statutory power and authority of a non-supervised personal representative, and in the verified non-judicial close statement permitted. On the other hand, the judicial authority of the court is available at any time to interested parties who have good cause for judicial supervision.

Appendix A, Minutes 6/17, 18/67, pp. 14 and 15,
Section 14(c) of Wills, Draft of Riddlesbarger.

Section 14 C. Renunciation of gift under will. Any person to whom property is given by the terms of a will may renounce all of such property, or unless the will expressly provides otherwise any part of such property, by filing a signed declaration of such renunciation with the county court and serving a copy on the personal representative within 180 days from admission of the will to probate; but the court may extend the time for cause shown. No interest in the property or part thereof so renounced is deemed to have vested in such person; but the renounced property or part passes as if such person had predeceased the testator unless the will provides otherwise. However, a renunciation is invalid to the extent that the person renouncing has prior to filing the renunciation effectively assigned or contracted to assign the renounced property, if prior to entry of the final judgment, or earlier distribution by the personal representative in reliance on the renunciation, the assignee files with the county court a copy of the assignment or contract and serves a copy on the personal representative.

Comment: This section is copied verbatim from the proposed probate code of Wisconsin. It is recommended primarily to resolve the question, at least in Oregon, as to whether or not the renunciation would constitute a gift for gift tax purposes. It would, of course, settle the question as to the right of a devisee or legatee to renounce a provision made for his benefit.

PROBATE ADVISORY COMMITTEE
Probate Law Revision

Fortieth Meeting

(Joint meeting with Bar Committee on Probate Law and Procedure)

Dates) and: Times: 1:30 p.m., Friday, September 15, 1967
and
9:00 a.m., Saturday, September 16, 1967
Place: Suite 2201 Lloyd Center
(This Board Room is at the head of the spiral stairway on the Central Plaza, or take elevator to the medical section.)
Portland, Oregon

Suggested Agenda

1. Approval of July minutes.

2. Miscellaneous matters.

3. Powers and duties of personal representative. Discussion to be led by Mr. Allison, Mr. Butler and Mr. Zollinger.

4. Elective share of surviving spouse. Discussion to be led by Mr. Allison and Mr. Richardson.

5. Probate courts and jurisdiction. Discussion to be led by Mr. McKay, Mr. Copenhaver, Judge Warden, Judge Thalhofer and Mr. Gooding.

6. Inheritance tax. Discussion to be led by Mr. Carson, Mrs. Braun and Miss Lisbakken.

7. Restricted access to wills filed and inventorys.

8. November meeting dates.

9. Next meeting.

PLEASE NOTE MEETING PLACE, LLOYD CENTER

ADVISORY COMMITTEE
Probate Law Revision

Fortieth Meeting, September 15 and 16, 1967
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The fortieth meeting of the advisory committee (a joint meeting with the Committee on Probate Law and Procedure, Oregon State Bar) was convened at 1:30 p.m., Friday, September 15, 1967, in Suite 2201, Lloyd Center, Portland, by Chairman Dickson.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Frohnmayer, Gooding, Husband, Jaureguy, Mapp and Riddlesbarger. Carson and Lisbakken were absent.

The following members of the Bar Committee were present: Bettis, Gilley, Krause, Lovett, Meyers, McKay, Piazza, Thalhofer, Thomas and Richardson. Biggs, Braun, Kraemer, Mosser, McKenna, Silven, Pendergrass, Copenhaver and Warden were absent.

Also present was James Sorte from the staff of Legislative Counsel.

Report from Allison

Allison reported on the status of his drafting of the proposed Oregon probate code. He advised the committees that he had not drafted the section on definitions of terms, and that draft would be at the conclusion of his work. With reference to the draft on the powers of the court he indicated that there is still some difference of opinion concerning the powers to be given to the clerk of court. Allison told the committees that the draft on intestate succession has been circulated among a small group of members of the committees for their comments or suggestions. The drafts on advancements, adoption, feloneous death and illegitimacy have been completed. The draft that defines the rights of an alien to inherit is being delayed pending a decision of the United States Supreme Court. The draft of the rights of persons to inherit when there has been a simultaneous death was not changed from the draft in the book of drafts distributed to the members. The draft on wills has been sent to Legislative Counsel. The draft on initiation of probate has been sent to a few members of the committees for their comments or suggestions. Allison explained to the members that he had

discussed the draft on allocation of income with Mr. McMurchie, and that he and Mr. McMurchie had tentatively decided that this draft should be in the chapter relating to distribution.

Judge Dickson advised the committees that Mr. Carson wrote to him and asked that another member be appointed to the subcommittee on taxation and that Mr. Butler would be the fourth member and work with that subcommittee.

Approval of August Minutes

Allison called attention to an error in the minutes of the August meeting. Butler moved the approval of the minutes with the following correction in subsection (2) of section 6 (page 11):

(2) "...extend or renew"

and this would replace "extend or remove." The motion was seconded and carried.

Miscellaneous matters

Mapp advised the members that he had ordered copies of the Uniform Probate Code and that they will be distributed before the October meeting.

Frohnmayer suggested that the committees hold the October meeting some place other than Portland, and after discussion, it was decided to hold the October 20, 21 meeting in Eugene.

Powers and Duties of Personal Representative Section 1

Section 1 was amended to read: "The provisions of this code shall apply without any distinction between real and personal property."

Section 2

Section 2 was amended to read: "Upon the death of a person, his real and personal property vests in the persons to whom it is devised by his last will, or, in the absence of testimentary disposition in his heirs, subject to family allowance, rights of creditors, elective share of the surviving spouse, and administration."

Krause questioned the wording of section 1 that explained that the purpose of the chapter is the prompt settlement of the estate. Mapp explained that the policy statement was

merely public relations and that the provision was inserted for that purpose. Frohnmayer suggested that if such a statement is to be made, it should be made at the very beginning of the code. Dickson agreed with Frohnmayer.

There was some discussion of whether the wording concerning title of property "passes" to or "vests in" the heirs. Jaureguy favored "vests in" and although no formal motion was made, the members agreed with Jaureguy.

Allison explained that he had discussed the matter of allocation of income with Mr. McMurchie, and that they felt that under the powers and duties of a personal representative section there should be a provision substantially as follows: "The personal representative shall collect all income and rent from decedent's estate and pay taxes on all property in his possession. He shall keep buildings and fixtures in his possession in full repair and maintain action to recover any property or to determine title thereto."

Piazza was of the opinion that the committees had gone to great length to spell out the powers and duties in these matters in section 14 and further elaboration was not necessary.

Zollinger was of the opinion that the personal representative should not be charged with the duty of collecting rent or taking possession of property unless necessary to pay claims or costs of administration.

Dickson said that he favored limiting the obligations of the personal representative to collecting rent and receiving income from property in the possession of the personal representative. Frohnmayer agreed with Dickson.

Frohnmayer said that he was against the provision in section 2 that would make the request for possession of property by the personal representative conclusive evidence of the necessity of possession by the personal representative. He favored a prima facie presumption if there is to be a presumption at all.

Zollinger suggested the further change to limit the duty of the personal representative to pay taxes and keep the property in repair to a duty only to do so the exent that funds were available for those purposes.

Richardson said that he would give the personal representative the right to all of the income except to the extent that the personal representative released the income.

Gilley indicated that the purpose the members intended could be accomplished by giving the personal representative the right to waive his right to personal property.

Butler was of the opinion that section 14 provided the personal representative sufficient power to take possession.

McKay favored giving the personal representative possession unless there was a showing made that possession by him was unnecessary.

Zollinger favored the following provision: "A personal representative has a right to and shall take possession of or be accountable for property in the possession of persons presumptively entitled thereto as heir or devisee and not reasonably required for administration."

Riddlesbarger said that he would add the following: "During the time the property is in the possession of the executor or administrator it is his duty to keep the same in repair and preserve it..."

The committees adopted the substance of Zollinger's proposed wording.

There followed a discussion of whether or not the powers should be in a separate section from the duties of the personal representative and it was the consensus of opinion of the majority of the members that the sections should be separate.

It was moved, seconded and the motion carried to amend section 3 to read:

> "(1) A personal representative is a fiduciary who, in addition to the specific duties and authority expressed under authority of law, is under a general duty to collect income of the estate, preserve and distribute the estate of the decedent in accordance with the terms of the will and provisions of law, and as expeditiously and with as little sacrifice of value as is reasonable under the circumstances. He shall use the authority conferred upon him as provided by law, the terms of the will, if any, any order of the court, and the rules generally applicable to fiduciaries, for the best interests of creditors of the decedent and

successors to the estate."

"(2) A personal representative of a decedent who was domiciled in this state at his death has the same standing to sue and be sued in the courts of any jurisdiction as his decedent had immediately prior to death."

There followed a discussion over whether the chapter on powers and duties should also provide for the authority of the personal representative to bring actions and suits and the members agreed that there should be a separate chapter providing for actions and suits by the personal representative.

Section 3

Section 3 was amended to read: "The duties and powers of a personal representative commence upon the issuance of his letters. The powers of a personal representative relate back in time to give his acts occurring prior to appointment the same effect as those occurring thereafter. A personal representative may ratify and accept acts on behalf of the estate done by others where such acts would have been proper for a personal representative."

Section 4

Allison explained to the committees that he had not defined the authority of the personal representative in as broad of terms as the Uniform Probate Code. He said that he was opposed to the theory of allowing the personal representative to act without court authority. Mapp favored providing broad authority for the personal representative to act and without prior court authority. Mapp explained that the theory of the Uniform Probate Code was that the personal representative would have very broad powers, but that if any interested party thought the personal representative was acting wrongfully, they could petition the court to supervise the acts of the personal representative. He said that the Uniform Probate Code also made provision for the personal representative to petition the court for authority or supervision when necessary. Allison said that it was his opinion that the Uniform Probate Code provided two separate proceedings, one formal and one informal.

Frohnmayer called attention to the action of the committees at the August meeting at which time it was decided that the personal representative should have broad powers, and that he could take what action he deemed necessary except in specified exceptional situations provided by the code.

The committees adopted the following language proposed by

Zollinger: "Except when otherwise provided in this code or by order of the court, a personal representative shall proceed expeditiously with the settlement and distribution of decedent's estate without notice of hearing or order of court, but he may apply to the court for an adjudication of questions concerning the estate or its administration."

Section 5

Mapp explained that the Uniform Probate Code intended the provisions of section 5 of Allison's draft, (taken from the Uniform Probate Code) to give the personal representative absolute power over property of an estate. He explained that by giving this power to the personal representative, he could transfer property, and even though improper, a bona fide purchaser would receive good title. He noted that this would free title companies and transfer agents of possible liability even if the personal representative acted improperly. Zollinger was of the opinion that section 5 was too brief and that sections 15 and 21 of the draft said the same thing but in much more detail. He favored deleting section 5. The committees decided to defer consideration of section 5 until the rest of the sections of the draft had been considered.

Section 6

Consideration of section 6 was passed temporarily.

Section 7

Consideration of section 7 was passed temporarily.

The meeting was recessed at 4:30 p.m.

The meeting was reconvened at 9 a.m., Saturday, September 16, 1967, by Chairman Dickson in Suite 2201, Lloyd Center, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Frohnmayer, Gooding, Husband, Jaureguy, Mapp and Riddlesbarger.

The following members of the Bar committee were present: Gilley, Krause, Lovett, Meyers, McKay, Thalhofer, Thomas, Richardson, and Bettis.

Also present was James Sorte.

Section 14 Transactions authorized by personal representative

Riddlesbarger moved that "...acting reasonably for the benefit of the interested persons..." be deleted from section 14. Motion carried.

Mapp moved that the wording be that the personal representative be "authorized" to take the action outlined in section 14. He said that he preferred that particular wording to distinguish authority from power. The committees decided that Allison should include in the section on definitions the words "power", "duty" and "authority."

The committees changed the word "improper" to "unsuitable" in subsection (2) of section 14.

Frohnmayer moved the adoption of subsection (3) of section 14. Motion carried.

Subsection (4) of section 14 was amended to read: "Execute and deliver a deed of conveyance upon satisfaction of any sums remaining unpaid, or receipt of the purchaser's note, adequately secured.

With the changes indicated above subsection (4) of section 14 was approved.

Subsection (5) of section 14

Subsection (5) was amended to read: "Satisfy written pledges of the decedent irrespective of whether such pledges constituted binding obligations of the decedent or were property presented as claims."

Subsection (6) of section 14

Subsection (6) was amended to read: "Deposit funds not needed to meet debts and expenses currently payable and not immediately distributable, in banks or savings and loan accounts or invest the same in short-term United States government obligations."

Subsection (7) of section 14

Dickson voiced his objection to allowing the personal representative the power to abandon property without prior court order. Gooding agreed with Dickson and noted that the bankruptcy courts require prior authority before a trustee abandons property. Allison said that he would favor giving the property, even if worthless, to the people entitled to it, and if they want to abandon it they could do so. Butler said

that the personal representative should be authorized to abandon property when it was a burden to the estate. Gilley said that to restrict the power of the personal representative would be inconsistent with prior action, and if this was to be the position now taken, then reconsideration of other powers granted the personal representative should be made.

Zollinger's motion to adopt the following language carried: "Abandon burdensome property when it is valueless or is so encumbered or is in such a condition that it is of no benefit to the estate;"

Subsection (8) of section 14

Subsection (8) was adopted as drafted.

Subsection (9) of section 14

Subsection (9) was amended to read: "Pay calls, assessments, and other sums chargeable or accruing against or on account of securities."

Subsection (10) of section 14

Subsection (10) was adopted as drafted.

Subsection (11) of section 14

There was some discussion concerning whether the personal representative should insure only the assets of the estate or the assets and himself against personal liability. Butler moved adoption of the following language: "Insure the assets of the estate against damage and loss and himself against liability to third persons."

Subsection (12) of section 14

Subsection (12) of section 14 was adopted as amended to read: "Advance or borrow money with or without security."

Subsection (13) of section 14

Subsection (13) of section 14 was amended to read: "If the personal representative holds a mortgage, pledge, lien or other security interest, in lieu of foreclosure he may accept a conveyance or transfer of the encumbered assets in full or partial satisfaction of the indebtedness."

Subsection (14) of section 14

After discussion over whether or not there should be a

time limitation written into subsection (14) the section was adopted to read: "Pay taxes, assessments and expenses incident to the administration of the estate."

Subsection (15) of section 14

Subsection (15) was adopted with the understanding that Allison would move the section so that it would follow subsection (9) or (10).

Subsection (16) of section 14

The committees decided to delete subsection (16) because there is to be a separate provision elsewhere in the code dealing with the allocation of income.

Subsection 17 of section 14

Zollinger moved, seconded by Butler, that subsection (17) be deleted. Motion carried.

There was discussion of whether it was proper to authorize the personal representative to compensate persons associated in business with him. The majority of members felt that to allow such a practice would open the door to many irregular practices. It was the consensus of opinion that to give the personal representative unrestricted authority to hire others help him administer the estate would encourage him hiring work done that he should be doing himself. There was also a discussion concerning the extent of liability of the personal representative for acts of others hired by the personal representative to assist in the administration of the estate. Butler favored limiting his liability if he acted reasonably in selection of assistants and took reasonable action to keep informed of the action of the party hired. Riddlesbarger called attention to the fact that subsection (17) and subsection (10) overlapped somewhat. Richardson said that the committees should reconsider their action by which they deleted from the first part of section 14 the wording "Acting reasonably for the benefit of the interested persons..." The committees voted to reinstate the wording quoted.

Frohnmayer called attention to the possible ethical problem involved if the personal representative could hire a member of his own firm to assist in the administration of the estate. The committees voted to omit "...even if they are associated with the personal representative..." There followed

considerable discussion of whether the personal representative should be forced to make independent investigations of action of persons hired to administer the estate. Dickson said that the language adopted "...acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary..." would relieve the personal representative of liability for acts of the person hired to help administer the estate.

Subsection (17) was amended to read: "Employ qualified persons, including attorneys, accountants and investment advisors, to advise and assist the personal representative and to perform acts of administration, whether or not discretionary, on behalf of the personal representative."

Subsection (18) of section 14

Subsection (18) was adopted as drafted.

The committees recessed at 12:10 p.m.

When the meeting reconvened at 1 p.m., the following members were present: Advisory Committee, Dickson, Zollinger, Allison, Butler, Gooding, Husband, Jaureguy, Mapp and Riddlesbarger; Bar committee, Gilley, Krause, Lovett, Meyers, Piazza, Thalhofer, Thomas, Richardson and Bettis.

Also present was Sorte.

Subsection (19) of section 14

Riddlesbarger questioned the use of the word "unincorporated" before the word "business." A motion carried to have subsection (19) read: "Continue any business or venture in which decedent was engaged at the time of his death to preserve the value of the business or venture."

Subsection (20) of section 14

Subsection (20) was amended to read: "Discontinue and wind up any business or venture in which the decedent was engaged at the time of his death."

Subsection (21) of section 14

Subsection (21) was adopted as drafted as follows: "Provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate."

Subsection (22) of section 14

Subsection (22) was adopted as drafted as follows: "Satisfy and settle claims and distribute the estate as provided in this Code." Riddlesbarger favored adding language to the effect that the personal representative had such further authority as necessary to administer the estate. After discussion the following language was added to section 14: "Perform all other acts required or permitted by law or by the will of decedent."

Section 15

Section 15 was adopted as drafted.

Section 16

Section 16 was amended to read: "Property sold, mortgaged or leased by a personal representative shall be subject to liens and encumbrances of record but shall be free and clear of rights of creditors based on the filing and allowance of a claim of the estate. The filing and allowance of a claim in an estate does not make the claimant a secured creditor."

There followed a discussion of whether or not the personal representative should be given the power to create a servitude on estate property. It was the consensus of opinion that Allison should draft the section to include in the powers of the personal representative the power to create a servitude. Zollinger opposed the motion saying that this is an area that has not, in the past, created problems, and that specific provision to create a servitude was not necessary.

The committees adopted the following language: "A transfer agent or a corporation transferring its own securities incurs no liability to any person by making a transfer of securities in an estate as requested or directed by a personal representative."

Section 17

Zollinger moved the deletion of section 17. Motion carried.

Section 18

Thalhofer moved the deletion of section 18. Motion carried.

Section 19

Riddlesbarger questioned whether section 19 would be useful. He expressed his belief that the statute could not cure a jurisdictional defect because of the due process clause of the United States Constitution. Riddlesbarger moved that the committees refer the problem to Mapp for research. McKay seconded the motion and it carried.

Section 20

McKay questioned the wording of section 20 and suggested that the word "void" replace "voidable." Allison was of the opinion that the word "voidable" was the proper one. McKay asked for what period of time a transfer would be voidable and Riddlesbarger said for the statute of limitations on the action. The committees amended section 20 by deleting the following: "(1) The transaction was consented to by all interested persons affected thereby except any who were under legal disability for whom no guardian had been appointed; ..."

Section 21

Section 21 was amended to read: "If the exercise of power by the personal representative in the administration of the estate is improper he shall be liable for breach of his fiduciary duty to interested persons for resulting damage or loss to the same extent as a trustee of an express trust. Exercise of power in violation of a court order is a breach of duty. Exercise of power contrary to the provisions of the will may be a breach of duty."

Section 22

The committees discussed the right of a personal representative to file or otherwise perfect a lien right of the decedent. The section was adopted as drafted.

Section 23

Section 23 was adopted as drafted.

Section 24 and 25 (Section 24 will be put in chapter 97.)

The committees adopted section 25 but eliminated the following: "...and the knowledge or information is otherwise unavailable to the personal representative." Subsection (5) of section 25 was amended to read: "That officers or agents

of a corporation refuse to allow examination of the books and records of the corporation which the decedent had the right to examine."

Section 26

Section 26 was adopted as drafted.

Section 27

Gooding moved that section 27 be broadened and correlated with existing law. Motion carried with instructions to Allison to redraft the section.

Section 28

There was some question of whether or not the personal representative should be held liable for double the damage to the state. Zollinger favored compensatory damages in place of double damages. Bettis moved the deletion of section 28. Motion carried.

Powers of clerk at court [Note: A copy of the draft is Appendix A without the changes.]

Allison pointed out that paragraphs (a), (b), and (c) should be changed to subsection (1), (2), and (3) and under subsection (2) the numbered paragraphs should be changed to (a), (b), (c), etc. Allison suggested a paragraph under subsection (2) relating to "Appointment of appraisers." He also made a change in subparagraph (c) "Allowance of attorney fees, appraiser fees and fees for the personal representative.", and in subparagraph (d) "Approval of accounts." Zollinger suggested the clerk be allowed to perform these functions even if the court is available. Thalhofer did not want the clerk to appoint the appraisers. Zollinger felt that the clerk should be authorized to fix the amount of bond, subject to judicial review. Dickson felt the judges could set up guidelines for the clerks. Husband felt the judge should designate the newspaper for publication of notice to creditors and final account. Dickson closed the discussion indicating that Gooding and Thalhofer knew what the committees had in mind.

November Meeting

It was decided that the November meeting would be held November 24,25, at the Lloyd Center if this can be arranged.

The meeting adjourned at 4:30 p.m.

APPENDIX A

(Note: This draft has not been corrected to reflect the Committees' action. Refer to minutes for changes.)

Section ____. Powers of the Clerk. (a) Except as set forth in subsection (b) the clerk shall act upon applications for informal probate of wills and informal appointment of personal representatives; and may hear and determine any matters and make all orders, judgments and decrees in connection therewith which the judge could make, subject to being set aside or modified by the judge at any time within 30 days thereafter; but if not so set aside or modified, his orders, judgments and decrees shall have the same effect as if made by the court or judge.

(b) Clerks powers shall not extend to the following matters:

(1) A matter contested in any way.

(2) Allowance of support money for widows and children.

(3) Allowance of attorney fees.

(4) Approval of final accounts.

(5) Determination of heirship.

(6) When approval of the judge is required under [UPC Sec. 3-211 or 3-218] or until notice is given as required under [UPC Sec. 3-212].

(c) Any matter presented to the clerk may be referred by him to the judge.

Proposed revised Oregon probate code
POWERS AND DUTIES OF PERSONAL REPRESENTATIVE
2nd Draft
September 1, 1967

Prepared by
Stanton W. Allison

Section 1. Devolution of estate at death; restrictions. The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations expressed or implicit in this chapter to facilitate the prompt settlement of estates. Upon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will, or, in the absence of testamentary dispostion, to his heirs, subject to family allowance, rights of creditors, elective share of the surviving spouse, and to administration. The provisions of this chapter shall apply without any preference or priority as between real and personal property.

References: Uniform Probate Code,
Sec. 3-101 (1967)

Section 2. Duty of personal representative; possession of estate. Every personal representative has a right to, and shall take possession or control of the decedent's estate, except that property in the possession of the person presumptively entitled thereto as heir or devisee shall be possessed by the personal representative only when reasonably necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by the heir or devisee shall be conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is reasonably necessary for purpose

of administration. The personal representative shall pay taxes on all property in his possession. He shall keep buildings and fixtures in his possession in tenantable repair. He may maintain an action to recover possession of any property or to determine the title thereto.

References: Uniform Probate Code, Sec. 3-409 (1967)
ORS 116.105

Section 3. Time of accrual of duties and powers. The duties and powers of a personal representative commence upon the issuance of his letters. The powers of a personal representative relate back in time to give his acts occurring prior to appointment the same effect as those occurring thereafter where beneficial to the estate. A personal representative may ratify and accept acts on behalf of the estate done by others where such acts would have been proper for a personal representative.

References: Uniform Probate Code, Sec. 3-401 (1967)

Section 4. General duties; relation and liability to persons interested in estate; standing to sue.

(1) A personal representative is a fiduciary who, in addition to the specific duties expressed in this chapter, is under a general duty to settle and distribute the estate of the decedent in accordance with the terms of the will and this chapter, and as expeditiously and with as little sacrifice of value as is reasonable under all of the circumstances. He shall use the authority

conferred upon him by this chapter, the terms of the will, if any, any order of the court, and the rules generally applicable to fiduciaries, for the best interests of creditors of the decedent and successors to the estate. A personal representative shall not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time.

(2) A personal representative of a decedent who was domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as his decedent had immediately prior to death.

References: Uniform Probate Code, Sec. 3-403, (1967)

Section 5. Powers of personal representative; in general. Until termination of his appointment a personal representative has the same power over the title to property of the estate as an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing, or order of court.

References: Uniform Probate Code, Sec. 3-412, (1967)

Section 6. Notice to creditors. (See Section 11.A of chapter on Initiation of Probate draft dated 7/5/67.

Section 7 - 13, inclusive. Inventory and Appraisal. (See

second draft pursuant to minutes of 8/18, 19/1967.)

Section 14. Transactions authorized for personal representative. Except as restricted or otherwise provided by the will or by court order, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

(1) Direct and authorize disposition of the remains of the decedent pursuant to ORS 97.130 and incur expenses for the funeral, burial or other disposition of the remains in a manner suitable to his condition in life.

(2) Retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested or which are otherwise improper for trust investment.

(3) Receive assets from fiduciaries, or other sources.

(4) Complete, compromise, or refuse performance of the decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may:

(a) Execute and deliver a deed of conveyance, for cash payment of all sums remaining due, or the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or

(b) Deliver a deed in escrow with directions that the

proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement.

(5) Satisfy written charitable pledges of the decedent irrespective of whether such pledges constituted binding obligations of the decedent or were properly presented as claims when, in the judgment of the personal representative, the decedent would have wanted the pledges completed under the circumstances.

(6) When funds are not needed to meet debts and expenses currently payable and are not immediately distributable, deposit liquid assets of the estate, including moneys received from the sale of other assets, in federally insured interest-bearing accounts or other short-term loan arrangements that may be reasonable for use by trustees generally.

(7) Abandon property when, in the opinion of the personal representative, it is valueless, or is so encumbered or is in condition that it is of no benefit to the estate;

(8) Vote stocks or other securities in person or by general or limited proxy.

(9) Pay calls, assessments, and other sums chargeable or accuring against or on account of securities, unless barred by the provisions relating to claims.

(10) Hold a security in the name of a nominee or in other form without disclosure of the interest of the estate but the

personal representative shall be liable for any act of the nominee in connection with the security so held.

(11) Insure the assets of the estate against damage, loss and liability and himself against liability in respect to third persons.

(12) Borrow money with or without security to be repaid from the estate assets or otherwise; and advance money for the protection of the estate.

(13) Effect a fair and reasonable compromise with any debtor or obligor, or extend, renew or in any manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge or other lien upon property of another person, he may, in lieu of foreclosure, accept a conveyance or transfer of encumbered assets from the owner thereof in satisfaction of the indebtedness secured by lien.

(14) Pay taxes, assessments, compensation of the personal representative, and other expenses incident to the administration of the estate.

(15) Sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(16) Allocate items of income or expense to either estate income or principal, as permitted or provided by law.

(17) Employ persons, including attorneys, auditors,

investment advisors, or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary.

(18) Prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties.

(19) Continue any unincorporated business or venture in which the decedent was engaged at the time of his death:

(a) In the same business form for a period of not more than four months from the date of appointment of the personal representative where continuation is a reasonable means of preserving the value of the business including good will.

(b) In the same business form for any additional period of time that may be approved by order of the court, or

(c) Throughout the period of administration if the business is incorporated by the personal representative and if none of the probable distributees of the business who are competent adults object to its incorporation and retention in the estate.

(20) Upon order of the court discontinue and wind up any business or venture in which the decedent was engaged at the time of his death.

(21) Provide for exoneration of the personal representative

from personal liability in any contract entered into on behalf of the estate.

(22) Satisfy and settle claims and distribute the estate as provided in this Code.

References: Uniform Probate Code, Sec. 3-416,(1967) and

ORS 116.110, 116.125, 116.130, 116.135, 116.170, 116.175 & 116.180.

Section 15. Power of personal representative to sell, mortgage and lease. A personal representative has power to sell, mortgage or lease property of the estate without notice, hearing or court order. The rights and title of any purchaser, mortgagee or lessee from the personal representative are in no way affected by any provision in a will of the decedent or any procedural irregularity or jurisdictional defect in the administration of the decedent's estate. A transfer agent or a corporation transferring its own securities incurs no liability to any person by making a transfer of securities in an estate as requested or directed by a personal representative.

Section 16. Free of claims and creditors. Property sold, mortgaged or leased by a personal representative shall be subject to liens and encumbrances of record but shall be free and clear of rights of creditors based on the filing and allowances of a claim in the estate. The filing and allowance of a claim in an estate does not make one a secured creditor.

Section 17. Contract of decedent to sell or lease land.

When any person legally bound to make a sale, mortgage or lease dies before making the same and the personal representative fails or refuses to perform in accordance with the decedent's contract, any person claiming to be entitled to the sale, mortgage or lease may petition the court for specific performance of the contract. Upon satisfactory proof the court may order the personal representative to make a sale, mortgage or lease or may by its own order make a conveyance, mortgage or lease to the person entitled thereto upon the performance of the contract.

Section 18. Except as may be required by section 17, any sale, mortgage or lease of property by a personal representative shall be without express or implied warranties.

Section 19. Persons dealing with personal representatives; protection. A person dealing with or assisting a personal representative without actual knowledge that the personal representative is improperly exercising his power is protected as if the personal representative properly exercised the power. The person is not bound to inquire whether the personal representative is properly exercising his power, and is not bound to inquire concerning the provisions of any will or any order of court that may affect the propriety of the acts of the personal representative. No provision in any will or order of court purporting to limit the power of a personal representative shall be effective except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets

paid or delivered to a personal representative. The protection here expressed extends to instances where some procedural irregularity or jurisdictional defect, including the case where the alleged decedent is found to be alive, occurred in proceedings leading to the issuance of letters.

References: Uniform Probate Code, Sec. 3-415, (1967)

Section 20. Sale or encumbrance to personal representative voidable; exceptions. Any sale or encumbrance to the personal representative, his spouse, agent or attorney, or any corporation or trust in which he has more than a one-third benefical interest, is voidable unless,

(a) The transaction was consented to by all interested persons affected thereby, or approved by the court.

(b) The will expressly authorized the transaction by the personal representative with himself.

The title of a purchaser for value without notice of the circumstances of the transaction with the personal representative is not affected unless the purchaser should have known of the defect in the title of his seller.

References: Uniform Probate Code, Sec. 3-414, (1967)

Section 21. Improper exercise of power; breach of fiduciary duty. If the exercise of power concerning the estate is improper, the personal representative shall be liable for beach of his

fiduciary duty to interested persons for resulting damage or loss to the same extent as a trustee of an express trust. The exercise of power in violation of court order, or contrary to the provisions of the will may be breaches of duty. The rights of purchasers and others dealing with a personal representative shall be determined as provided in ORS_____and_____and may be unaffected by the fact that the personal representative breached his fiduciary duty in the transaction.

References: Uniform Probate Code, Sec. 3-413, (1967)

Section 22. Right to file notice of and perfect lien. The personal representative shall have the same rights to file notice of or otherwise perfect a lien or security interest as the decedent would have had if he were living.

References: Advisory Committee Minutes: 6/17, 18/66 p. 19; and Appendix

ORS 116.120

Section 23. ORS 97.130 is amended to read:

97.130. Right to Control Disposition of Remains. The right to control disposition of the remains of a decedent, unless other directions have been given by him, vests in his surviving spouse, his surviving children, his surviving parents and the person in the next degree of kindred to him, in the order named. If disposition of the remains has not been directed

and authorized within ten days after the death of decedent the special administrator or the personal representative of the deceased may direct and authorize disposition of the remains.

Section 24. Authority of executor when will includes gift of body for scientific and medical purposes; nonliability for actions. The authority of a person named executor of a will which includes a gift pursuant to ORS 97.132 extends to performing acts necessary to carrying out the gift although letters testamentary have not been issued. A person named executor who carries out the gift of the testator before issuance of letters testamentary or under a will which is not admitted to probate shall not be liable to the surviving spouse or next of kin for performing acts necessary to carry out the gift of the testator. Reference: ORS 116.115

Section 25. Discovery of assets during procedure by personal representative. The court may order any person to appear and give testimony as provided in ORS chapter 45 if it appears probable:

(1) That he has concealed, secreted or disposed of any property of the estate of a decedent.

(2) That he has been intrusted with property of the estate of a decedent and refuses or neglects to account therefor to the personal representative.

(3) That he has concealed, secreted or disposed of any writing or other instrument or document relating or pertaining to the estate.

(4) That he has knowledge or information that is necessary to the administration of the estate and the knowledge or information is otherwise unavailable to the personal representative.

(5) That corporate officers or agents refuse to allow inspection of books and records of a corporation in which there are stocks, bonds or debentures of the estate.

References: Advisory Committee Minutes:
6/17, 18/66 Appendix
7/15, 16/66 pp. 5 and 6; and Appendix

ORS 116.305
116.320

Section 26. Proceedings when person refuses to appear and give testimony. If the person cited as provided in ORS_____ refuses to appear, or to answer questions asked of him as authorized by the order of the court, he is in contempt and may be punished as for other contempts.

References: Advisory Committee Minutes:
6/17, 18/66 Appendix
7/15, 17/66 pp. 5 to 7; and Appendix

ORS 116.315

Section 27. Power to avoid transfers. The property liable for the payment of debts of a decedent shall include all property transferred by him by any means which is in law void or voidable as against his creditors, and the right to recover such property, so far as necessary for the payment of the debts of the decedent, shall be exclusively in the personal representative.

References: Uniform Probate Code,
Sec. 3-410, (1967)

ORS 116.330, 116.335,
116.340

Section 28. Property embezzled or converted. If any person embezzles or converts to his own use any of the personal property of a decedent before the appointment of a personal representative, the person shall be liable to return the property or its value to the estate. No person shall be charged as executor by his own wrong [de son tort].

References: Uniform Probate Code, Sec. 3-411, (1967)

ORS 116.325

Section 29. Repeal of existing statutes:

Proposed revised Oregon probate code
POWERS AND DUTIES OF PERSONAL REPRESENTATIVE
2nd Draft
September 1, 1967

Prepared by
Stanton W. Allison

COMMENTS

In view of the general directive to your draftsman at the meeting of August 18 and August 19, 1967, to incorporate to a substantial extent the applicable language of the 1967 Draft Uniform Code, I suggested that I prepare a tentative draft of Tabs 15, 19, and 21 to be combined in a single chapter. However, since Tab 19 covering discharge of incumbrance has not been on the agenda for consideration by the committees, I have not included this material in the present draft. Since Section 7 of the first draft of April 27 also appears in Tab 19, I have not included that section.

The sections on notice to creditors and inventory and appraisal have been separately redrafted, and since these were thoroughly considered at the previous meeting and at earlier meetings, I have not included these items.

Tab 21 covering sale, mortgage, and lease of property was considered and discussed at previous meetings as noted on the draft. Although powers in this category are included within the general section of the Uniform Code, because Tab 21 had been carefully discussed and also because in your draftsman's opinion it will be preferable to have a separate section on real property sales, I have included the separate section from Tab 21.

In preparing this tentative draft I followed as closely as possible the general order and outline of the first draft. As

will be noted, a number of the sections use the language of the first draft. However, where I felt the language of the Uniform Code covered the same material and in some cases with broader language, I have incorporated the language of the Uniform Code.

The following separate comments are not intended for use when the final draft is approved and written but are primarily for the understanding of the two committees to explain the changes or substitutions from the former draft. It should also be stated that minor changes and some eliminations have been made in the Uniform Code sections, but, somewhat to your draftsman's surprise, the sections seemed appropriate without any extensive editing.

Section 1. Devolution of estate at death.

Although the discussion of this subject is on the agenda for the September meeting, I felt the language taken from Section 3-101 of the Uniform Code was so in line with our previous discussion that it would be helpful to have it included here.

Section 2. Duty of Personal Representative; Possession of Estate.

The comment on Section 1 is equally applicable to Section 2. The language has been taken from Section 3-409 of the Uniform Code without change.

Section 3. Time of accrual of duties and powers.

This section is taken verbatim from Section 3-401 of the

Uniform Code. There is no precise counterpart in ORS but this supplies language applicable in a number of situations, particularly in regard to ORS 116.115.

Section 4. General Duties; relation and liability to persons interested in estates; standing to sue.

The language of this section, with minor modifications, is the same as Section 3-403 of the Uniform Code. Although there is now a counterpart for this section in ORS, it was felt advisable to include this language to implement the general theory of the new code that the personal representative, except in special instances where order of court was required, would be given powers to operate without court order. It is, however, the general understanding that the administrator should have the supervision of the court and complete permission to secure court order when needed. Please note, however, that the draftsman has not included the language of Section 3-404 of the Uniform Code which reads as follows: "Except where supervised administration has been ordered, a personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate without adjudication, order, or direction of the (judge), but he may invoke the jurisdiction of the (probate) court, in roceedings authorized by this Code, to resolve questions concerning the estate or its administration." The proposed code does not adopt the distinction in the Uniform Code between informal probate and supervised administration. In view of the proposal that the county clerk act in ex parte matters, it would seem advisable to make it permissive

in all cases for a personal representative to seek the advice and the authority of the probate court. Any hard and fast legislation in the form of the above-quoted section might tend to change this concept.

Section 5. Powers of personal representative; in general.

This language is taken verbatim from Section 3-412 of the Uniform Code. No comparable section is now in ORS. This is the basic section for the protection of persons dealing with a personal representative under the broad powers given by the proposed code. It was thought advisable to place this basic section prior to the later specific sections on powers and particularly that of the power of sale. It is the intention to incorporate all or at least a major part of the comment in the Uniform Code when the definitive comments are prepared on these individual sections.

Section 6. Notice to creditors.

This has been drafted and placed temporarily in the second draft of the Initiation of Probate chapter which has been already circulated to key members of the committees.

Sections 7 to 13, covering Inventory and appraisal, as stated above, have been drafted separately and will be circulated separately.

Section 14. Transactions authorized for personal representatives.

As instructed by the last joint meeting, this language was incorporated from Section 3-416 of the Uniform Code. The changes

from 3-416 have been minimal. To comply with directions of the August meeting, I have included a section which would authorize disposition of the remains of the decedent when authority was given under ORS 97.130, which provides that authority can be given when no directions have been received for ten days following the death. I have eliminated the provisions for sale, mortgage, and lease since, as stated, those are included in a separate section and I have included a specific section authorizing a discontinuing and winding up of a business upon court order, which complies with present ORS.

Sections 15-21 cover Tab 21. Minor editing changes have been made. However, the sections covering breach of duty have been taken from comparable provisions of the Uniform Code and appear as Sections 16, 17, and 18.

Section 22 is Section 4 of Tab 15.

Section 23 implements the instructions from the August meeting to give the power to the personal representative to provide for funeral and burial of the remains where the family failed to act for ten days. The amendment is to ORS 97.130.

Section 24 is identical with the present ORS 116.115. However, since the reference to ORS 97.130 is incorporated in the general section giving the power of the personal representative to control the remains, it would seem preferable that 116.115 be placed to follow ORS 97.134. It should be noted that 97.132 was Section 1 of Chapter 674, Session Laws of 1961, 97.134 comprised Sections 2 and 3 of this chapter, and ORS 116.115 was Section 4 of the same chapter, Please note also that 116.115 applies

not only to wills which have been probated but also applies to unprobated instruments. There therefore seems no reason why this section would have to be incorporated in the probate code.

Sections 25 and 26 cover Sections 11 and 12 of Tab 15. Please note that Section 7 of Tab 15 will be considered as a part of Tab 19; that Section 9 of Tab 15 is now included as Section 19 of Tab 23. I suggest that Section 10, Recording with copies, be considered where it is later shown as Section 16 of Tab 23.

Section 27 would substitute Section 3-410 of the Uniform Code for ORS 116.330, 116.335, and 116.340 shown as Sections 14, 15, and 16 of Tab 15.

Section 28 covers present ORS 116.325. I have incorporated the language of Section 3-411 of the Uniform Code which would seem more comprehensive than Section 13 of the present Tab 15.

To summarize, your draftsman has checked the comparable ORS sections and believes that all of the pertinent sections have been covered by the proposed draft or the drafts for future consideration.

PROBATE ADVISORY COMMITTEE
Probate Law Revision

Forty-first Meeting
(Joint meeting with Bar Committee on Probate Law and Procedure)

Dates) 1:30 p.m., Friday, October 20, 1967
and : and
Times) 8:00 a.m., Saturday, October 21, 1967
Place: President's Conference Room
Johnson Hall (on 13th Street)
University of Oregon Campus
Eugene, Oregon

Suggested Agenda

1. Approval of September minutes.

2. Miscellaneous matters.

3. Claims. Discussion to be led by Mr. Gooding.

4. Jurisdiction and Powers of Probate Courts. Discussion to be led by Mr. Gooding.

5. Restriction of access to filed wills and inventories.

6. Next meeting.

PLEASE NOTE:

The meeting will be held in EUGENE, OREGON.

ADVISORY COMMITTEE
Probate Law Revision

Forty-first Meeting, October 20 and 21, 1967
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The forty-first meeting of the advisory committee (a joint meeting with the Committee on Probate Law and Procedure, Oregon State Bar) was convened at 1:30 p.m., Friday, October 20, 1967, in the President's Conference Room, Johnson Hall, University of Oregon Campus, Eugene, Oregon, by Vice Chairman Zollinger.

The following members of the advisory committee were present: Zollinger, Allison, Frohnmayer, Gooding, Husband, Jaureguy, Mapp and Riddlesbarger. Dickson, Butler, Carson and Lisbakken were absent.

The following members of the Bar Committee were present: Bettis, Gilley, Kraemer, Krause, Pendergrass, Piazza, Thalhofer and Thomas. Biggs, Braun, Copenhaver, Lovett, McKay, McKenna, Meyers, Mosser, Silven, Richardson and Warden were absent.

Also present was James Sorte from the staff of Legislative Counsel.

Approval of September Minutes

Jaureguy moved approval of the minutes, and there being no objection, they were approved.

Report from Allison

Allison advised the members of the committees that he had drafted all of the proposed revised Oregon probate code that the committees had approved in final form. He said that he had not, however, drafted all of the comments. He said that at the next meeting, November 24, 25, 1967, the committees would take final action on intestate succession. A draft will be mailed to all members prior to the meeting, and the draft will reflect the suggestions made by Frohnmayer. Allison asked whether he was authorized to make minor changes in the final decisions of the committees where it was evident that there was an error or omission. The members approved of his making corrections, but asked that when there was a major change in a draft, that the matter be brought to the attention of the

committees at a regular meeting. Allison advised the members that he was delaying drafting the chapter dealing with the rights of aliens to inherit until after December because of a pending United States Supreme Court decision dealing with that subject which is expected in December. He said that the draft on allocation of income will be discussed at the next meeting. The drafts on actions and suits, partial distribution, accounting and distribution and ancillary administration have not been considered. The drafts on discharge of encumbrances and missing persons have been discussed by the committees, but they are not in final form. He said that the proposed changes in the inheritance tax laws are being considered by the subcommittee on taxation, and that Judge Dickson advised him that Miss Lisbakken would report the recommendations of the subcommittee to the committees.

Miscellaneous Matters

Frohnmayer advised the members that he had discussed the proposed chapter on intestate succession with members of the Bar at the annual meeting on the coast, and that those with whom he spoke expressed surprise at the scope of review and revision being undertaken by the committees. He said, however, that the response to the probate revision was favorable.

Mapp suggested that a possible means of explaining the work being done on the probate revision could be at the meeting in the Spring of 1968 of the Continuing Legal Education group. No final action was taken.

Husband explained to the members the procedure followed after the code revision in 1953. He said that the method followed then was for various persons familiar with what had been accomplished went out to speak at meetings of the local Bar associations and other associations.

Zollinger explained to the committees that the current timetable was to have a final draft by the date of the meeting on Continuing Legal Education. He said that the committees should strive for a draft as early in 1968 as possible to allow time to give the revision the widest possible publicity and explanation.

Gilley said that he would favor meeting with small groups of lawyers to explain the work of the committees and that this would insure an opportunity for a question and answer session following the discussion. Zollinger agreed and said that the present plan was to distribute copies of the proposed probate code as early as possible so that lawyers could review it and

raise any questions they might have.

Sorte advised the members that the Law Improvement Committee will probably be appointed soon, and that because of possible new membership, the Law Improvement Committee might benefit from a status report. Allison said that he would prepare a status report for the Law Improvement Committee.

Zollinger asked whether or not the West Publishing Company had been contacted to determine a procedure to publish the proposed Oregon probate code. Sorte said that he was uncertain but that he would inquire and advise the members.

Tab 2. Probate Court. Powers of Court in Probate

Gooding led the discussion of powers and duties of the probate court. Gooding advised the members that the draft on powers and duties of the court was drafted by Legislative Counsel. Sorte said that most of the material in tab 2 was taken from the Wisconsin code.

Section 1

Frohnmayer moved that section 1 be amended to read: "The circuit court shall have jurisdiction of all probate matters, specifically including, but not limited to probate of wills; determination of heirship; administration, settlement and distribution of estates of decedents, whether consisting of real or personal property, or both; determination of title to and rights in property claimed by or against estates of decedents, minors and disabled persons; granting of letters testamentary, of administration, of guardianship; construction of wills, whether incident to the administration or distribution of an estate or as a separate proceeding; guardianship of the person of minors and incompetents; protection of property of minors and disabled persons; and supervision and disciplining of personal representatives, guardians and conservator-trustees." The motion carried.

Section 2

Zollinger asked whether it was the intent of the members to authorize a probate court to appoint trustees and administer trusts. He said that this is a substantial departure from present procedure and that he was opposed to such a change. Frohnmayer expressed the view that this would improve the existing law and also be in conformance to the Uniform Probate Code. He said that he favored expanding the jurisdiction of the probate courts.

Piazza was of the opinion that the court should not be involved in trusts unless something became a problem. He said that many trusts do not require court supervision. He pointed out that section 2 would complicate rather than simplify the existing procedure.

Pendergrass expressed the view that under existing law the court has jurisdiction to grant letters of trusteeship and that no change is necessary. Piazza and Zollinger both expressed their opinion that the probate court should be a court of general as opposed to limited jurisdiction.

Bettis said that he favored spelling out the jurisdiction of the probate court.

Husband pointed out that other states inclined toward enumeration of the jurisdiction of the probate court.

Section 1

Frohnmayer moved that the following language be added to section 1. "Any appeal shall be to the Supreme Court as in other cases." The motion carried.

Section 2

Thalhofer and Gooding both expressed the view that there was no need for section 2 and a motion by Thalhofer to delete the section carried.

Section 3

A motion by Piazza carried and section 3 was amended to read:

"All matters, causes and proceedings relating to probate jurisdiction, authority, powers, functions and duties pending in a county court or district court, on the effective date of this Act, are transferred to the circuit court for the county."

Allison moved and the motion carried to delete from subsection (2) of section 3 the following language: "...except that the circuit court shall be considered the court appealed from."

Section 4

Section 4 was approved as drafted.

Section 5

Section 5 was approved as drafted.

Section 6

After brief discussion the members of the committees noted that section 6 was repetitious and a motion carried to delete the entire section.

Section 7

There was a discussion of whether the county courts will have any function if probate jurisdiction is transferred to the circuit courts. Husband pointed out that there would still be many functions of the county courts including zoning and planning highways. Section 7 was adopted as drafted.

Section 8

Section 8 was adopted as drafted.

Sections 9, 10, 11, 12, 13 and 14

A majority of the members voted to adopt the above sections subject to minor changes by Legislative Counsel.

Section 15

The committees adopted section 15 as drafted.

Allison asked whether it was the intent of the members to repeal all of the existing statutes relating to the transfer of jurisdiction of some of the county and district courts to the circuit courts. The members indicated that the purpose they intend is to draft the measure in such a manner as necessary to give the circuit courts exclusive jurisdiction in probate matters. They indicated that the particular wording would be left to Legislative Counsel.

Tab 23. Sections 20 and 21

Gooding called attention to the fact that the draft on jurisdiction of the courts was similar to sections 20 and 21 of tab 23, Accounting and Distribution. In view of the duplication Gooding moved that sections 20 and 21 of tab 23 be deleted. The motion carried.

Initiation of Probate

Allison asked for an expression of opinion as to whether sections 3 and 19 of tab 12, Initiation of Probate, might more appropriately be placed in the chapter on the jurisdiction of

the courts. Jaureguy said that he thought the sections should be placed in the chapter on jurisdiction, and that he also felt the provisions for the support of the family should be in the chapter. Riddlesbarger disagreed and called attention to the fact that the committees have already considered the outline of the various chapters and action has already been taken. It was decided to leave the matter to the discretion of Legislative Counsel.

Powers of the Clerk of the Circuit Court

(Note: A draft of the proposals of Allison and Gooding is Appendix B to these minutes. The draft does not reflect the action by the committees.)

Bettis raised the question of whether or not the deputy clerks would have the same powers as the clerk. The consensus of opinion of the members was that they would have the same powers.

The committees discussed the provision for determining the amount of bond to be given by a personal representative. The conclusion reached was that the clerk would probably work with the court in setting up guidelines for determining the amount of a bond.

Bettis expressed the opinion that the proposed changes would vest powers in the clerk that have been historically and solely the powers of the judge, and he did not approve of the change. Mapp pointed out that the Uniform Code, in sections3-304, 3-305 and 3-306, states specifically when a bond is required, how much it is to be and there is no determination by the clerk. Allison explained that he did not use the language of the Uniform Code because he did not believe a clerk, without legal training, would be able to analyze the provisions of the Uniform Probate Code.

Allison explained to the committee that one of the reasons probate matters have been kept in the county courts was because sometimes one could not find a circuit court judge when they needed him, but with the clerks performing some of the functions of the judge, probate matters could be transacted in the absence of the judge. He pointed out that there is also the safeguard because the court can overrule the actions of the clerk.

Pendergrass thought there should be some direction from the court for the clerk to issue orders such as admitting the will to probate, appointing the personal representative, etc. Zollinger agreed, as did Frohnmayer, Riddlesbarger and Gilley.

Amendments were suggested, which are to be prepared by Legislative Counsel, to section 1 (Appendix B) as follows:

In line 1, delete "upon" and after "ex parte" insert "upon".

In line 4, after the period, insert "When and to the extent authorized by rule of court."

In line 8, delete "at any time within 30 days after the orders are entered."

The committees then passed the section as amended.

Tab 18. Claims

(Note: Gooding distributed a copy of a letter he had written to Mr. Allison regarding tab 18, which is attached hereto as Appendix C.)

Section 1

Krause questioned the matter of limiting the time for presentation of claims to 12 months when the estate might be open beyond that time.

Zollinger asked for an expression of opinion on barring claims after 12 months from the date the estate is opened, and the majority favored this approach.

There was considerable discussion among the committees regarding "equitable relief" as mentioned in subsection (3). Pendergrass did not believe the words "peculiar circumstances" covered the entire matter. After discussion, the committees agreed to direct Legislative Counsel to amend subsection (3), after the semicolon, to read in substance, "but if the court shall find that the presentment of a claim has been delayed because of excusable neglect, the claim is not so barred."

The meeting adjourned at 5:15 p.m.

The forty-first meeting of the advisory committees reconvened at 8:00 a.m., October 21, 1967, with Vice Chairman Zollinger presiding.

The following members of the advisory committee were present: Zollinger, Allison, Frohnmayer, Gooding, Husband, Jaureguy, Mapp and Riddlesbarger.

The following members of the Bar Committee were present: Biggs, Bettis, Gilley, Krause, Kraemer, Pendergrass, Piazza and Thalhofer.

Also present was Sorte from the staff of Legislative Counsel.

Section 2

Section 2 was adopted as drafted.

The committees discussed whether or not they should have a maximum time limit within which a creditor would file his claim. It was decided that all claims would be barred after 12 months of the first publication of notice to creditors except in cases of excusable neglect.

Section 3

The committees discussed whether or not the personal representative should be required to pay only claims presented. It was decided that the personal representative should have the authority to pay claims without formal presentment and the particular language was left to Legislative Counsel.

Section 4

Pendergrass moved that section 4 be changed to subsection (3) of section 3. The motion carried.

Section 5

With reference to the payment of claims Zollinger called attention to previous consideration of the problem and the decision that a creditor with a note not due could be paid the amount due as of the date of presentment or delay and rely on any security he might have. Frohnmayer moved that section 5 be adopted as drafted and the motion carried.

Section 6

Bettis questioned whether a security instrument should be required to be described by volume, page, etc. Pendergrass did not feel the second sentence of subsection (2) was necessary. Riddlesbarger pointed out that the language proposed did not make it mandatory to describe the security by volume, page, etc.

Pendergrass then suggested the following as a new section:

" Upon receipt and allowance of a claim for a debt on which a creditor has security, the personal representative

shall either pay the claim and obtain the right to the security, or require creditor to withdraw the security as provided by a security agreement and pay all the remaining debt."

The majority of members felt that five days would not be enough time to allow the personal representative an opportunity to obtain the money to pay the obligation. The committees felt it might be better to allow the court to order the enforcement of the security or it could authorize a longer time in which to raise money to pay claims. The feeling was that in an ordinary situation a secured creditor would not present a claim at all.

Zollinger suggested the following wording: "A secured creditor may not exercise remedies under the security agreement without having presented his claim to the personal representative or its being rejected by a personal representative."

After discussion of whether or not a time limit of from 10 to 60 days should be set for presenting claims, or if the court should be permitted to set the time for secured creditors to exercise their rights, the committee accepted Zollinger's recommendation that the Legislative Counsel draft a section providing in substance:

"A secured creditor shall not exercise the remedies provided by his security agreement until 30 days after a claim shall have been presented to the personal representative, unless notice shall have been given of his intention to exercise remedies under the agreement, except the court may, on motion of the creditor, permit foreclosure of the security agreement at an earlier time."

Allison questioned the meaning of the words "finally allowed" in subsection (4) and Zollinger said it should be deleted.

The committee then adopted the substance of the draft of section 6.

Section 7

Allison suggested a new subsection (d) beginning with the words in subsection (c) "If the debt thereafter becomes absolute or liquidated, the . . ."

The committee authorized this change and adopted section 7 as amended.

Section 8

Pendergrass recommended section 8 be amended to read:

"The claim of a personal representative shall be filed within the time required by law for presentment and shall be presented to the court for allowance or disallowance."

Gooding moved approval of section 8, with Legislative Counsel authorized to make any changes as to form that are necessary. The motion was seconded and carried.

Section 9

Allison recommended substitution of the following wording at the beginning of section 9:

"If the assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:"

Pendergrass suggested deleting "are" and inserting "appear to be".

The committee discussed the order for payment of debts and expenses and the inclusion of provisions for family support. Zollinger recommended that section 10 be included as a sub-section of section 9.

Further discussion was held regarding the payment of expenses for last illness and funeral expenses.

Section 9 was then adopted, with Legislative Counsel to make any further revision, in order of subsections as follows:

"(1) Family support.

"(2) Expenses of administration.

"(3) Reasonable expenses for the disposition of the remains of the decedent.

"(4) Funeral and burial expenses (section 10).

"(5) Debts and taxes with preference under federal law.

"(6) Expenses of last sickness of the decedent.

"(7) Debts and taxes with preference under the laws of this state.

"(8) Debts owed employes of the decedent for labor performed within the 90 days immediately preceding the date

of death of the decedent.

"(9) The claim of the State Public Welfare Commission for the net amount of public assistance, as defined in ORS 411.010, paid to or for the decedent, and the claim of the Oregon State Board of Control for care and maintenance of any decedent who was at a state institution to the extent provided in ORS 179.610 to 179.770.

"(10) All other claims against the estate."

Section 11

Pendergrass moved to amend section 11 to read as follows:

"The personal representative may compromise a claim for or against the estate of the decedent."

The motion was seconded and carried.

Section 12

There was general discussion among the members about the order in which claims will be paid that are presented and allowed and whether a claim that is presented must be specifically allowed. Zollinger suggested substituting the language in the Uniform Probate Code for subsection (1). Allison moved the substitution, seconded by Gooding, and the motion carried.

Frohnmayer recommended that Allison be authorized to make section 13 a new subsection (3) of section 12.

"If the estate is insufficient to satisfy all claims or expenses of any one class specified in section 9, each claim or expense of that class shall be paid only in proportion to the amount thereof."

Section 12 was adopted with Legislative Counsel authorized to make appropriate changes.

Section 14

The committees discussed the liability of a distributee with relation to property he received, and at what date the property value should be computed; the date it is received or the date it is returned. Mapp referred the members to section 7 which leaves it to the court to require a bond, and to the provisions of the Uniform Probate Code.

Allison moved the substitution of the language in the Uniform Probate Code, section 3-512, for sections 7 and 14. The motion was seconded by Jaureguy and carried.

Section 15 and Section 16

Allison suggested that there should be an allowance requirement which would set out how the personal representative would pay the claims that are allowed.

The committee then discussed the time limitation within which a claim is allowed or disallowed, and the right of the personal representative to rescind an allowance within a specified time prior to the filing of final account.

Allison suggested the two sections be combined to read as follows:

"Claims shall be allowed as presented unless the personal representative causes notice of disallowance to be mailed to claimant or his attorney within 60 days after his disallowance."

Pendergrass asked for the following additional provision:

"The personal representative shall be permitted to rescind the allowance of any claim, whether it has been expressly allowed, or allowed by inference, at any time prior to 30 days of filing of final account."

Frohnmayer thought this would be unfair to the creditor who would get notice of rejection 30 days before the final account is filed.

Pendergrass added to his motion: "the presumption of allowance occurs 60 days after receipt of the claim or five months from the date of first publication, whichever last occurs."

Allison suggested the following wording: "It is allowed unless the personal representative shall cause notice of disallowance to be published or delivered to the claimant."

Gilley recommended a change to: "cases of error, misinformation or excusable neglect on the part of the personal representative."

Kraemer seconded a motion to amend by Gilley. The motion carried. Zollinger explained the amendment is to limit the right of the personal representative to rescind his allowance of the claim by making it conditioned upon the showing of error, misinformation or excusable neglect.

Zollinger then called for a vote on the motion by Pendergrass and the motion carried.

Section 17

Frohnmayer asked about the possibility of having the filing of a separate suit in the proceeding right in the probate court. After discussion it was decided to adopt section 17 as drafted.

Section 18

Jaureguy recommended deletion of the language in section 18, starting at the bottom of page 13 with the words "The personal" and all of the wording on page 14 relating to section 18.

Section 18 was approved as modified by Jaureguy.

Section 19

Section 19 was adopted as drafted.

Section 20

Section 20 was approved by the committee with the recommendation that Legislative Counsel restate it in line with Piazza's suggestion that the section should read: "In a proceeding for summary determination by the probate court of a claim, any person interested in the estate may be heard on the matter of allowance or disallowance of the claim."

Section 21

Gooding moved to delete section 21. Carried.

Section 22

Jaureguy moved that section 22 be adopted with the following amendment:

In the fourth line, after "direction" insert "or consent of those". The motion carried.

The meeting adjourned at 11:15 a.m. after the adoption of a unanimous resolution expressing the appreciation of the members for the hospitality of Mr. and Mrs. Riddlesbarger and the University of Oregon for the use of the President's conference room.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, October 20,21,1967)

(This is a draft of Mr. Gooding without the changes made at the meeting.)

TRANSFER OF PROBATE JURISDICTION OF OTHER COUNTIES TO CIRCUIT COURT. (1) All probate jurisdiction, authority, powers, functions and duties of the District Courts and Judges thereof, are transferred to the Circuit Courts and the Judges thereof in Benton, Clatsop, Coos, Curry, Deschutes, Hood River, Lincoln, Wasco, and Washington Counties.

(2) All probate jurisdiction, authority, powers, functions and duties of the County Courts and the Judges thereof are transferred to the Circuit Courts and the Judges thereof in Baker, Crook, Gilliam, Grant, Harney, Jefferson, Malheur, Morrow, Sherman, Union, Wallowa and Wheeler Counties.

(3) The Circuit Courts and the Judges thereof are governed by the existing laws relating to the exercise of the probate jurisdiction, authority, powers, functions and duties transferred under subsections (1) and (2) of this section, insofar as they are applicable, as though the Circuit Courts and the Judges thereof were originally referred to in the existing laws.

Comment: The form of this statute is taken from ORS 3.180, and it would have to provide for the repeal of ORS 5.040, vesting probate jurisdiction in certain County Courts, and ORS 46.092 vesting probate jurisdiction in District Courts.

Section 4. ORS 3.101 is amended to read:

3.101. District court judge acting as circuit court judge in certain cases; orders; effect. (1) (omitted).

(2) A district court judge exercising the powers and duties of circuit court judge as provided in subsection (1) of this section also may, within the county, give and make any order, [other than one setting apart exempt property or

fixing a widow's allowance, that by law is ex parte in nature or is upon default of the appearance of, or expressly consented to in writing by, the adverse party or parties,] in any matter, cause or proceeding in probate pending in the county.

(3) (omitted)

Section 5. ORS 5.080 is amended to read:

5.080. County judge as interested party. Any judicial proceedings commenced in the county court in which the county judge is a party or directly interested, may be certified to the circuit court for the county in which the proceedings are pending[. If the matter is one in probate, then all the original papers and proceedings shall be certified to the circuit court, and the judge of that court shall proceed in the manner in which the county judge would be required to proceed had the matter remained in the county court. If the matter is other than a probate matter,] and it shall be proceeded with in[this] the circuit court as upon appeal from the county court to the circuit court.

Section 6. Repeal of existing statutes. ORS 5.040, 5.050, 5.070 and 5.100 are repealed.

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, October 20,21,1967)

(This is a draft by Gooding without the changes made at the meeting.)

POWERS OF THE CLERK OF THE CIRCUIT COURT. (1) The Clerk of the Circuit Court may act upon applications for probate of Wills and appointment of personal representatives and may make and enter orders admitting Wills to probate and appointing personal representatives subject to being set aside or modified by the Judge; after entering such order, the Clerk may receive a bond executed by a surety company in the form prescribed by (Tab 12, Section 10), but in a sum not less than the probable value of the personal property of the estate plus the probable value of the annual rents and profits from the real property of the estate, and then may issue letters testamentary or letters of administration.

(2) The Court may increase, reduce the amount of the bond, or require a new bond as provided in (Tab 12, Section 11).

(3) Any matter presented to the Clerk may be referred by him to the Judge.

POWERS OF THE CLERK OF THE CIRCUIT COURT

Section 1. The clerk of the circuit court may act upon ex parte petitions for appointment of special administrators, for probate of wills and for appointment of personal representatives. He may make and enter orders on behalf of the court admitting wills to probate, appointing special administrators and personal representatives, and setting the amount of the bond as prescribed in ORS_____, subject to his orders being set aside or modified by the judge at any time within 30 days after the orders are entered.

Section 2. Any petition presented to the clerk may be referred by him to the judge.

Section 3. Unless set aside or modified by the judge the orders of the clerk pursuant to section 1 shall have the same effect as if made by the judge.

APPENDIX C

(Minutes, Probate Advisory Committee Meeting, October 20,21,1967)

September 20, 1967

Mr. Stanton Allison
2444 S. W. Broadway Drive
Portland, Oregon

Dear Stan:

As you know, I was largely responsible for the "claims" section, now Tab 18 in the drafts prepared by Legislative Counsel. I am now going over the copy of the Commissioner's Probate Code (Boulder, Colorado) supplied to me by Tom Mapp.

As to certain matters in the Uniform Code which cause me concern, I am sending a copy of this letter to Tom, asking that he comment directly to you with a copy to me.

Section 3-501 of the Uniform Code has good language, especially the second sentence. I am wondering why there is included the third sentence providing for recovery against distributees. The present Oregon counterpart is ORS 121.230 at et sequitur, which, I understand, the advisory committee has voted to repeal.

Section 3-502, the Notice to Creditors, seems to say substantially what is meant by our Tab 12, Section 13 (Initiation of Probate or Administration), and in fewer words. I am not warm about the option of mailing notice to creditors.

Section 3-503, Statute of Limitations, is contrary to our Section 22 (Waiver of Statute of Limitations) and Section 24 (Extension of Statute of Limitations). In the latter, we extend it for one year after death. I believe this is more reasonable than four months.

Section 3-504, Limitations on Presentation of Claims, contains language similar to the old model Probate Code which has been adopted by Iowa, Missouri and others, but seemingly did not pass the committee. I remember presenting it, but do not find it in the draft. Our draft touches on it in Section 1 (3) and Section 25. I think it might be feasible to distinguish between claims arising before death and those arising after death. Sub-section C, Liens, etc., is touched upon in Section 28.

Section 3-505, Manner of Presentation to the Personal Representative, is found in our Section 3, which I believe is better. It also discusses the unmatured claim, the contingent claim and the secured claim, which we describe in Sections 5, 6, 7 and 14. Our organization is somewhat different, in that we apparently intend to treat these matters fully in the above sections. The Uniform Code also treats them in Sections 3-510, 3-511 and 3-512. Respecting the payment and treatment of claims not due, our Section 5 and the Uniform's Section 3-510, ours appears to be adequate, and more explanatory. The Uniform Code does not address itself to a secured claim which is not yet due.

Respecting secured claims which are due, Section 6, and Section 3-511 of the Uniform Code, again, I believe that ours is somewhat more complex, but more explanatory.

On the matter of contingent claims, Section 7, and Section 3-512 of the Uniform Code, I believe that ours is preferable.

Referring back to Section 3-505 of the Uniform Code, Sub-paragraph B, we have resolved not to have claims filed with the clerk of the court. Sub-Section C seems to allow an independent action without running through the claim procedures, which seems to be contrary to our committee's intent in Sections 17-19, although we recognize the availability of an independent action that is already pending at death. See Section 26 and 27. Sub-Section C of the Uniform Code also provides for an action against the personal representative individually for breach of a fiduciary duty to the claimant.

Section 3-506 concerns Classification of Claims. Our counterpart is found in Section 9 and Section 12. I prefer our classification. Moreover, since insolvent estates are a rarity, I prefer that the executor obtain court order for payment as provided in Section 12 (2).

Section 3-505, the Allowance of Claims, has a section dealing with "interest on allowed claims" which might be worthy of your consideration. I don't believe the procedures for allowance and disallowance and subsequent action has any more merit than our present draft.

Section 3-508, Payment of Claims, reminds the personal representative of statutory allowances, claims not allowed or on appeal, which might be incorporated into our Section 12.

As for the creditors' rights to obtain an order for payment, it is stated in less words than our Section 13. It also contains a meritorious provision allowing the personal representative power (Tom Mapp) to pay a claim with or without formal presentation.

Section 3-509 may well be worth consideration.

Section 3-513, Counter-Claims, merits consideration. See Iowa, Section 445.

Section 3-514, insofar as it prohibits execution and levy, should be added to our Section 28. In my review of the other Codes, most of them expressly provide for this prohibition.

Section 3-515, Compromise of Claims, is found in our Section 12.

Section 3-516, Encumbered Assets, gives additional powers to the personal representative and would appear to apply even though a claim wasn't filed. It would merit consideration.

Sincerely yours,

/s/ R. THOMAS GOODING

RTG:ce

cc: Mr. Thomas Mapp
Law School
University of Oregon
Eugene, Oregon

PROBATE ADVISORY COMMITTEE
Probate Law Revision

Forty-second Meeting
(Joint meeting with Bar Committee on Probate Law and Procedure)

Dates) and: Times) 1:30 p.m., Friday, November 24, 1967 and 9:00 a.m., Saturday, November 25, 1967
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland, Oregon

SUGGESTED AGENDA

1. Minutes of the October meeting.
2. Miscellaneous matters.
3. Claims, Section 23 to end. Discussion to be led by Mr. Gooding.
4. Actions and suits. Discussion to be led by Mr. Gooding.
5. Suggested changes in intestate succession draft. Discussion led by Mr. Allison.
6. Restriction of access to filed wills and inventories.
7. Elective share of surviving spouse. Discussion to be led by Mr. Richardson.
8. Discharge of encumbrances. Discussion to be led by Mr. Riddlesbarger and Professor Mapp.
9. Next meeting.

PLEASE NOTE:

The meeting will be held in JUDGE DICKSON'S COURTROOM. Nov. 24 - 25

ADVISORY COMMITTEE
Probate Law Revision

Forty-second Meeting, November 24 and 25, 1967
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The forty-second meeting of the advisory committee (a joint meeting with the Committee on Probate Law and Procedure, Oregon State Bar) was convened at 1:30 p.m., Friday, November 24, 1967, in Judge Dickson's Courtroom, Multnomah County Courthouse, Portland, Oregon, by Chairman Dickson.

The following members of the advisory committee were present: Allison, Butler, Dickson, Mapp and Zollinger. Carson Frohnmayer, Gooding, Husband, Jaureguy, Lisbakken and Riddlesbarger were absent. (Senator Husband did attend the meeting on Saturday morning.)

The following members of the Bar Committee were present: Buhlinger, Heisler, Krause, Lovett, Mayer, Meyers, Rhoten Smith, Thalhofer and Thomas. Anderson, Field, Kraemer, McKay, Pendergrass, Piazza, Shetterly and Warden were absent. (Shetterly did attend the Saturday morning session.)

Also present were former Bar Committee members Gilley, Richardson and Bettis.

Others present were Robert W. Lundy, Legislative Counsel and James Sorte from the staff of Legislative Counsel.

Fiscal Report by Mr. Lundy

Lundy informed the committee of the budget reduction for Legislative Counsel, which is approximately $13,000, and that money would not be available to pay Allison's salary past December. He asked the committee what their plans were with respect to completion of the proposed probate code revision and suggested that a meeting might be held with the Legislative Counsel Committee when it is appointed by Senator Mahoney.

Zollinger and Allison both agreed that the work should be completed by the end of April.

Lundy further advised the committee that the Legislative Counsel Committee will have to act on the appointment of

Allison because the original authorization for his employment was for six months.

Zollinger moved, seconded by Thalhofer, that the Chairman be authorized and requested to arrange for a meeting with the Legislative Counsel Committee, if possible either jointly with the Law Improvement Committee or alone, to explore the possibility of continuing Mr. Allison's employment for as long as necessary to complete the drafting. The motion carried.

Allison advised the committee that he has submitted a redraft and comments to Legislative Counsel on the chapter on jurisdiction and powers of the probate court. The claims section is partially drafted and will be completed after the current meeting. A full agenda is planned for December, which will include discussions of much of the material that has not yet been covered and there will have to be a meeting in January to take care of carryovers from the December meeting. Allowing a month and a half for drafting any changes it would probably extend through March or April. Allison felt checking sections, definitions, arrangment into bill form, etc., could be done in Salem.

New Members of the Bar Committee

Chairman Dickson requested Krause to introduce the new members of the Bar committee. They are: Ernest J. Buhlinger, Donald E. Heisler, J. Ray Rhoten, Kenneth E. Shetterly, Herman F. Smith and Frank D. Mayer.

Research Committee Appointments

Dickson announced the appointment of Robert Gilley and Campbell Richardson as members of a research committee to work with the committees.

Miscellaneous Matters

Sorte advised the committee that the Judiciary Committee in Wisconsin legislature voted their bill, the new probate code, out with a "Do Pass" recommendation.

Lundy outlined for the committee the proposals he suggested for printing the final draft for distribution. There will be two printings, one to be distributed to the legal profession, and one in bill form, to be distributed to the legislators. Mr. Lundy said that he has in his budget $2,000 for the cost

of the printing and that he felt this would cover it. He did suggest that the committee prepare comments to accompany the bill to the legislators, similar to the comments on the draft distributed to the legal profession.

The members of the committees felt that perhaps West Publishing Company would print the draft for them as a public service. Lundy indicated that this should be taken up with the Law Improvement Committee, which will also review the draft before it is published.

Tab 18 - Claims - Section 23

Zollinger led the discussion on claims in the absence of Gooding. Allison felt that sections 23, 24, 25, 26, 27 and 28, should be put in the chapter on Actions and Suits and Allison agreed.

Zollinger questioned the use of the words "and the cause of action survives" in subsection (1) of section 23, because he did not know of any cuase of action that does not survive under present law. Zollinger moved approval of subsection (1) with the deletion of the words "and the cause of action survives." The motion was seconded by Krause and carried.

Zollinger moved approval of subsection (2) as proposed. The motion was seconded by Meyers and carried.

Section 24. Extension of statute of limitations

Zollinger moved approval of section 24. The motion was seconded by Krause and carried.

Section 25. Claim barred when personal representative appointed

Zollinger moved to delete section 25. The motion was seconded by Krause and carried.

Section 26. Nonabatement of action or suit by death, disability or transfer; continuing proceedings

Zollinger questioned the use of the words "if the cause of action survives or continues" in subsection (1) of section 26, and moved its deletion. The motion was seconded by Thalhofer and carried.

Discussion on whether or not there should be two separate sections relating to suits against representatives in the case of death or disability, resulted in the deletion of the words "death or" in subsection (2) on motion of Thalhofer, second by

Lovett. Zollinger then moved "death and disability" be treated separately. The motion carried.

Zollinger objected to a time limitation on the substitution of the personal representative in any suit, as provided in subsection (3) (a).

A motion was made and carried that the word "legal" be inserted at the top of page 19 and the "s" be deleted from the word "representatives."

Zollinger requested substitute language for "disability" and Allison suggested "appointment of a guardian or conservator." Zollinger moved this wording be accepted. The motion was seconded by Gilley and carried.

Allison felt that subsection (3) should be deleted because he did not feel it was necessary since such a provision is in present law. Thalhofer said he felt it was intended to force somebody to do something within four months after the first publication. Zollinger agreed and moved adoption of subsection (3). The motion was seconded by Thalhofer and carried.

Discussion was held on Mapp's position that subsection (2) was unnecessary because those claims would not abate. The general feeling was that this was to allow the personal representative to be appointed and substituted for the decedent.

Mapp moved deletion of subsection (2), seconded by Thalhofer. No vote was taken on this motion.

Discussion continued on the substitution of the personal representative of the decedent in a suit and whether it should be handled as a claim against the estate. The consensus seemed to be that it should be continued as a suit by the personal representative.

Section 27. Continuation of action or suit without claim presentation.

Zollinger moved approval of section 27. The motion was seconded by Thalhofer and carried.

Mapp expressed his belief that section 27 should be placed under the presentation of claims section, as in the Uniform Probate Code.

Section 28. Enforcement of encumbrances

Zollinger moved adoption of section 28. The motion was

seconded by Krause and carried.

Section 29. Repeal of existing statutes

Zollinger moved adoption of section 29. Allison seconded the motion but said that the section would be checked and possibly revised at a later date. The motion carried.

Tab 20 - Actions and Suits

Section 1. What causes of action survive; parties

Butler commented on the use of the singular and the plural on personal representative and felt that perhaps this should be singular in all places the words appeared. He also pointed out that the first sentence of section 1 referred to "actions and suits" and later to "actions" only.

Bettis questioned whether the wording ". .but the personal representative may maintain action there . . ." was a duplication of the material in ORS 13.080, which was covered in Tab 18. Zollinger suggested this be corrected by Legislative Counsel.

Zollinger moved that section 1 be amended to read as follows:

"All causes of action or suit by one person against another survive to the personal representative of the former and against the personal representative of the latter.";

Deletion of the second sentence and deletion of "in equity" and "whether arising on contract or otherwise," in the first sentence. The motion was seconded by Butler and carried.

Section 2. Several representatives regarded as one person

Discussion on the appointment of more than one personal representative raised the question of whether this would be two different decedents, but it was resolved that it would not. Zollinger did not like the word "several" and Gilley suggested saying "one or more". Lovett questioned whether all the personal representatives should be served, and Dickson pointed out that this was a good requirement. As a result, Zollinger moved deletion of section 2 and repeal of ORS 121.030. The motion was seconded by Allison and carried.

Mapp suggested that there should be a provision in the new code to provide service of process, and recommended sections 3-417, 3-418 and 3-419 of the Uniform Probate Code. Allison pointed out that section 3-417 is now section 13,

subsection (4) of the draft on initiation of probate which has not yet been circulated to all members.

In considering section 3-418, Zollinger felt the court should rule on any delegation of duty when there are corepresentatives, and suggested a new paragraph (v) as follows: "When the Court shall otherwise direct. . ." Mapp moved for adoption of section 3-418 as amended by Zollinger. The motion was seconded by Meyers and carried.

After reading section 3-419, Mapp moved adoption. The motion was seconded by Butler and carried.

Allison asked for consideration of a draft of amendments to ORS 13.010, Tab 20, which he felt tied in with the above discussion, but there was no motion to reconsider the committee's previous action.

Uniform Probate Code Section 3-509

Mapp brought up the question of when the personal representative would be held personally liable for his actions in behalf of the estate in connection with contracts and trusts, outside his fiduciary responsibility to the estate. The Uniform Probate Code, in section 3-509, takes the position that the personal representative is an agent for a disclosed principal, the estate; relieves the personal representative of responsibility to persons with whom he contracts on behalf of the estate, without having it in writing in the contract. The personal representative is not personally responsible for obligations arising from his possession or control of the property unless he is personally at fault; and then proceeds to outline the manner in which claims may be brought. Mapp moved adoption.

Zollinger did not like the idea of having the personal representative appear in the same action both on his behalf and for the estate, primarily because it was the reverse of the present law. Mapp did not agree. Allison expressed the opinion that there was not a provision in the draft for such an action to be brought in the probate court. He further indicated that his understanding of prior committee action was that when a personal representative was being sued for personal liability, he would resign and a substitute representative would be appointed to represent the estate.

Because of his disagreement with some of the provisions of section 3-509, Zollinger moved adoption of paragraphs (a) (b), (c) and (d) of section 3-509 of the Uniform Probate Code. The motion was seconded by Krause and carried.

Elective Share of Surviving Spouse

Discussion of this chapter was led by Richardson, who pointed out that this chapter was similar to the Wisconsin Code, 860.107.

Because all sections of this chapter were so closely related, they were read first and then there was discussion of the entire chapter.

Discussion centered around whether there would be a partial distribution in an estate, since the value of the estate could not be determined until after the claims against the estate were known.

Zollinger moved to amend section 5 by deletion of the words "guardian ad litem." The motion was seconded by Allison and carried.

The question of including a provision for the appointment of a conservator was discussed, but Dickson pointed out that normally if there is a conservator, the conservatorship is merely continued.

Lovett pointed out that the language in ORS 126.300, is in conflict with the proposed draft. Allison said that he will add a section repealing ORS 126.300.

Butler raised a question on the provision for transfers within two years of death. After discussion, Zollinger moved deletion of "two years" and insertion of "three years" in the second line of page 3 and 8 lines from the bottom page 2. The motion was seconded by Allison and carried.

Butler moved the following amendments to subsection (2) of section 2: Delete "life" and "as to which" and before "decedent" insert "on the life of" and after "decedent" insert "whether or not he". This would then read: "proceeds of insurance on the life of decedent whether or not he had any of the incidents of ownership at the time of his death,". The motion was seconded by Mapp and carried.

Mapp discussed the problems of section 6 regarding an assignment of the elective share. He outlined the idea in the Uniform Probate Code which provides the shares of the wife and pretermitted heirs should be made up by everyone receiving property, in a proportionate share, rather than having it come out of the residue. Following this idea, the committee agreed to have Allison prepare wording in line with the pretermitted

heir statute and omitting subsections (2) and (3) of section 6. Richardson moved that this be done, seconded by Zollinger and the motion carried after an amendment was made to include a reference in this section as well as in the pretermitted heir statute, substantially as follows: "except that persons to whom the will gives tangible personal property...".

Thomas questioned that part of section 2 that would authorize property settlement agreements after marriage. He said that to authorize postmarriage agreements would encourage one party to badger the other to force such an agreement. Following discussion it was agreed that if one party coerced the postmarriage agreement the court would void the agreement.

Zollinger then moved that sections 1 to 6, inclusive, be approved as amended. The motion was seconded by Butler and carried.

On motion of Allison the meeting recessed from 4:30 p.m. until 9 a.m., November 25, 1967.

The meeting was reconvened at 9 a.m., Saturday, November 25, 1967, by Chairman Dickson, in his courtroom in the Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Allison, Butler, Husband, Mapp, Zollinger and Dickson.

The following members of the Bar committee were present: Gilley, Krause, Lovett, Meyers, Thalhofer, Thomas, Bettis, Heisler, Buhlinger, Smith, Mayer and Shetterly.

Also present was James Sorte.

Miscellaneous Matters

Dickson asked that all members of the committee accept all available speaking dates to discuss the proposed code. An outline will be prepared by Legislative Counsel and Allison for each member to use and also to submit to the Law Improvement Committee to show the committee's present problems.

Intestate Succession

Allison explained what had transpired up to this point for the new members of the committee. He outlined the provisions of section 5 and compared them with the Uniform Probate Code, section 2-103. Allison also pointed out that the way the

committee had decided previously, it would permit inheritance on only one side of the family if a maternal grandparent were living and no paternal grandparents were living. The Uniform Probate Code permits inheritance from both sides, regardless of living grandparents, by representation. In addition, the committee limited inheritance to the 5th degree of kinship, while the Uniform Probate Code has no limitation.

Allison moved adoption of the language of the Uniform Probate Code in lieu of subsections (4), (5) and (6). There was a second by Zollinger, with an amendment deleting the reference to "those of more remote degree" where it appears.

ORS 111.020 (5)

Allison discussed subsection (5), which provides for the estate of any child who dies under the age of 21 to pass to the heirs of the ancestor from which the real property descended. He mentioned that Frohmayer had suggested that in lieu thereof, section 2-104 of the Uniform Probate Code be considered, which requires that the heir survive the decedent for five days, or he is presumed to have predeceased the testator. This also brought the suggestion that section 2-601 be considered in regard to devisees.

Zollinger expressed opposition to the term "deemed to have predeceased," as it referred to devisees, and to section 2-601. Mapp suggested that the reason this was included might be because such a statement is often in a will and this would eliminate the necessity of a statute.

Allison moved adoption of section 2-104 of the Uniform Probate Code, in lieu of the present ORS section. The motion was seconded by Thalhofer. Zollinger asked amendment to delete the last sentence and Allison concurred. The amendment will read as follows:

"Any person who fails to survive the decedent by five days is deemed to have predeceased the decedent for purposes of intestate succession, and the decedent's heirs are determined accordingly." The motion carried.

Allison then moved adoption of section 2-601 in regard to devisees. Zollinger expressed opposition because it expressed a proposition that might not be in harmony with decedent's purposes, that he is deemed to have predeceased the testator is not an appropriate way to say the devisee shall not take and that the presumption is not an appropriate one, rather it is in each instance a question of fact. Mapp felt it was good, and

if the testator didn't want it that way, he could change it in the will.

Gilley suggested an amendment as follows: "If a devisee fails to survive the testator by five days, the testator's property passes as though the devisee had predeceased the testator. . . ." Thalhofer disagreed because he felt this could be provided for in the will.

Dickson asked for a division of the vote on the motion to adopt section 2-601. The advisory committee voted 3 for and 3 against. The Bar Committee voted 3 for and 4 opposed. The chair then ruled the motion failed to pass.

Restriction of access to filed wills and inventories

Dickson advised the committee that Frohnmayer had been the primary sponsor of restriction of access to probate files, and, since he was not present, the matter was moved to the December meeting. Allison indicated he would notify him and let him know that no one else on the committee expressed any interest in such a provision, because it is rightly a matter of public record. Allison read the sections on restriction of access in the adoption and competency statutes for the benefit of the committee.

Tab 19. Discharge of Encumbrances

Mapp led the discussion in the absence of Riddlesbarger, who was the original author.

Mapp advised the committee that he felt the shorter proposal in the Uniform Probate Code was better and referred them to section 3-516. The Uniform Probate Code takes the position that the paying off of encumbrances falls into two categories: (1) Whether or not the distributee is entitled to exoneration, and (2) What the rights and duties are of the personal representative in terms of paying off an encumbrance. He then referred the members to section 2-607 entitled "Exoneration." The Uniform Probate Code reverses the common law rule under which the devisee would take the property, subject to the encumbrance if the encumbrance was in existence at the time of execution of the will, but if the security interest was created after the execution of the will, the devisee would be entitled to exoneration.

Dickson mentioned that Riddlesbarger had wanted to change the rule of exoneration as it presently exists.

Mapp led a discussion on the draft by Riddlesbarger. There was discussion as to what constituted a voluntary encumbrance

and involuntary encumbrance as they relate to the right of exoneration. This draft also would require court approval to redeem a mortgage, whereas the Uniform Probate Code provides that the personal representative can do this without prior approval. Zollinger questioned where the title would be if the personal representative used estate money to convert a latent title to full title. Dickson thought that perhaps these provisions should be covered in substantive law and then they would fall under the enumeration of the powers of the personal representative. Mapp pointed out that exoneration is placed in the chapter on wills in the Uniform Probate Code. Sorte advised the members that Lundy had felt exoneration should be separated from the chapter on wills and be a separate chapter.

Dickson suggested that further discussion of this chapter might be put off until the January meeting to allow Mr. Riddlesbarger to appear to lead the discussion in connection with abatement and exoneration.

Zollinger moved that the matter be tabled until Riddlesbarger can discuss it and to adopt the provisions of the Uniform Probate Code, in substance, section 2-607. Krause seconded the motion. Zollinger then moved for deferral of action until the committee could hear Riddlesbarger. The motion carried.

Allison advised the committee that he had prepared a final draft of the chapter on wills. Dickson announced that the subject of exoneration, antilapse statute, after-acquired property, acquisitions, redemption, abatement, etc., would be the first item on the January agenda to give Mapp and Riddlesbarger time to compare the proposed draft with the Uniform Probate Code.

Approval of Minutes of the October Meeting

The minutes of the October meeting were approved.

Tab 2 - Powers of the Probate Court

Thalhofer reported on a request made to him at the last meeting with regard to the proposed second section 3, which was deleted by committee action. He advised the committee that there is a provision in the county court statutes that the court must be open for business at all times, but nothing in the circuit court statutes. However, by reference, this section is in the circuit court statute whenever the probate power has been transferred to the circuit court. After

discussion the committee decided to leave the draft the way it is, deleting the second section 5.

Next Meeting

Dickson announced that the December meeting would be held in the Director's Room at the Lloyd Center, Portland, on December 15 and 16, 1967.

Dickson advised the committee that Sorte will request the return of all books and material from the members of the Bar committee who are no longer serving in that capacity, so that they may be given to the new members, with the exception of those former members who will be scheduled for speaking engagements on behalf of the proposed code.

Butler moved the meeting adjourn. The meeting adjourned at 11:30 a.m.

SUPPLEMENTAL MEMORANDUM
November 7, 1967

To: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: Stanton W. Allison

Subject: INTESTATE SUCCESSION

Under date of October 25, 1967, you were furnished with a proposed rewrite of section 5 of the Intestate Succession draft, as well as two additional proposed sections. In view of some questions raised about the proposed amendment to incorporate the language of section 2-103 of the 1967 Uniform Code, it now seems preferable to adopt verbatim the language of section 2-103 with the one addition of the language previously adopted vesting title in married parents or grandparents as tenants by the entirety or joint owners of personal property with the right of survivorship. A comparison of the Uniform Code section with that previously circulated will indicate that there is no change in content. However, in view of this it seems advisable that we adopt verbatim the Uniform Code language.

Section 5. Share of others than surviving spouse. The part of the net intestate estate not passing to the surviving spouse shall pass:

(1) To the issue of the decedent; if they are all in the same degree of kinship to the decedent they shall take equally, but if of unequal degree, then those of more remote degrees take by representation.

(2) If there is no surviving issue, to his parent or parents equally.

(3) If there is no surviving issue or parent, to the brothers and sisters and the issue of any deceased brother or sister by representation; if there is no surviving brother or

sister, the issue of brothers and sisters take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree then those of more remote degrees take by representation.

(4) If there is no surviving issue, parent or issue of a parent, to the grandparents and the issue of any deceased grandparent by representation; if there is no surviving grandparent, their issue take equally if they are all of the same degree of kinship, but if of unequal degree then those of more remote degrees take by representation.

(5) If at the time of taking surviving parents or grandparents are married to each other they shall take real property as tenants by the entirety and personal property as joint owners with the right of survivorship.

MEMORANDUM
October 25, 1967

To: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: Stanton W. Allison

Subject: INTESTATE SUCCESSION

Enclosed find a proposed redraft of Section 5 of the second draft of Descent and Distribution of Real and Personal Property, and two sections taken from the 1967 Uniform Code which would eliminate probate requirements where heirs or devisees died within five (5) days of the death of the parents or the testator.

I have redrafted the Intestate Succession section to conform to Section 2-103 (d) of the 1967 Uniform Code. The changes from the draft we previously adopted are indicated by the deletion of some present language and the underlined portion would be the new language required to conform to the Uniform Code.

The comment by the Reporters is as follows:

> This section provides for inheritance by lineal descendants of the decedent, parents and their descendants, and grandparents and collateral relatives descended from grandparents; in line with modern policy, it eliminates more remote relatives tracing through great-grandparents.
>
> In general the principle of representation (which is defined in section 2-106) is adopted as the pattern which most decedents would prefer.

If the pattern of this section is not desired, it may be avoided by a properly executed will or, after the decedent's death, by renunciation by particular heirs under section 2-801.

I quote from Mr. Frohnmayer's letter of September 7, 1967:

First, I have noted that the legislative draft of the proposed Wisconsin Probate Code (Assembly Bill 280) section 852.01(g) at page 22 differs from the proposed Wisconsin Probate Code (study draft), section 852.01(2). Under the study draft collateral kindred under either the parents or grandparents have to be related within the fourth degree of kindred. You will recall that we have selected the fifth degree of kindred as a limitation, but have deceded to impose that limitation only on takers under the grandparents. It now appears that Wisconsin has eliminated any limitation on takers as long as they claim under the grandparents.

I have also noted that the 1967 Uniform Probate Code (Boulder Draft) in section 2-103(d) has deviated from earlier tentative draft of the Uniform Probate Code in two respects. First, as in the new draft of the Wisconsin Probate Code, the new Uniform Code places no limitation in degree on the issue of takers under the grandparents. Secondly, it provides that issue of the grandparents take by representation rather than as in the Oregon proposal, per capita. In light of these recent developments, I wonder if we might be well advised to reconsider our limitation to the fifth degree imposed on issue of deceased grandparents of the intestate.

In my reply to Mr. Frohnmayer's suggestion, I wrote in part as follows:

I have taken a new look at the fact that every person has not one but two sets of grandparents, two grandparents on the paternal side and two on the maternal side. I visualize the not uncommon situation where an intestate would be survived by one or both grandparents on the maternal side and no grandparents on the paternal side. Our present proposal would disinherit all of the uncles and aunts, or their issue,

> on the paternal side, purely because both grandparents on the paternal side had predeceased the intestate while a maternal grandparent survived. This now strikes me as not only unjust but perhaps entirely opposite to the intention of the intestate. The aunts and uncles or cousins on the paternal side might be much closer than the issue of the grandparents on the maternal side. It seems more fair than provision be made for the relatives on the maternal as well as on the paternal side as provided in the Uniform Code. I prefer this approach to that of the Washington Code which requires equal inheritance by the maternal and paternal relatives.

I did not realize the full implication of the proposal we previously adopted until I assumed that I was an only child and died intestate without leaving children of my own. In this case my heirs would be my living first cousins both on my father's and my mother's side. If in this case my cousins on my father's side, all of whom are old were deceased, the cousins on my mother's side would take to the exclusion of all the first cousins once removed on my father's side. Of the cousins on my mother's side, of nine cousins six are deceased, leaving children, and three are living. The children of the deceased cousins are the ones who would really be entitled to inherit on a basis of need, rather than the three surviving cousins.

My letter continues:

> I assume the limitation of inheritance to those of the fifth degree was adopted for two reasons: First, to eliminate relatives so remote that they would be beyond the comprehension or intention of the intestate; and, second, to ease the task of determining who might be the heirs in an intestate situation. I have expressed my own reaction in regard to the first

> concept. These relatives in the sixth degree I refer to include several children whom I have met and known personally. They don't seem nearly as remote to me as the chart would indicate. In regard to the second reason, all of the relatives of my paternal grandparents live on the East Coast. There are many whom I have never met and some with whom I have lost contact over the years. As to those relatives, equal inquiry would have to be made under the proposal we have adopted or under the language of the Uniform Code. In either case, the personal representative would have to determine which of these relatives were alive, which were dead, and which had left children surviving them.
>
> It seems to me that the drafters of the new Washington, Wisconsin, and Uniform Codes were well advised to drop the limitation of inheritance to those within any particular degree of relationship. I agree with you that serious consideration should be given as to whether we should not change our thinking in this matter.

If the proposed approach of the 1967 Uniform Code is adopted, Section 7, headed Degree of Kinship could be eliminated.

I have had extensive correspondence with Mr. Frohnmayer regarding the elimination and repeal of ORS 111.020(5) which provides:

> (5) When any child dies under the age of 21 years and leaves no surviving spouse or children, any real estate 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.

Mr. Frohnmayer has suggested that it might be well for the committee to consider Section 852.01(2) of the Wisconsin draft and also Section 2-104 of the new 1967 Uniform Code. The attached contains a proposed section embodying the

Uniform Code provision. The reporter's comment is as follows:

> This section is a limited version of the type of clause frequently found in wills to take care of the common accident situation, in which several members of the same family are injured and die within a few days of each other. The Uniform Simultaneous Death Act provides only a partial solution, since it applies only if there is no proof that the parties died otherwise than simultaneously. This section requires an heir to survive by five days in order to succeed to decedent's intestate property; for a comparable provision as to wills, see section 2-601. This section avoids multiple administration and in some instances prevents the property from passing to persons not desired by the decedent. The five day period should in no case hold up any proceedings relating to a decedent's property.

It is my suggestion that the committee also consider adoption of the similar provision with regard to devisees as set out on the attached.

If we are to apply an anti-lapse statute to a devisee who dies one-half hour before a testator, it would seem equally advisable to apply a similar provision to a devisee who dies one-half hour after a testator. It would seem that enactment of these two sections would be of value in many simultaneous death situations which would not be covered by the simultaneous death chapter.

PROBATE ADVISORY COMMITTEE
Probate Law Revision

Forty-third Meeting
(Joint meeting with Bar Committee on Probate Law and Procedure)

Dates) and: Times) 1:30 p.m., Friday, December 15, 1967
and
9:00 a.m., Saturday, December 16, 1967
Place: Suite 2201 Lloyd Center
(This Board Room is at the head of the spiral stairway on the Central Plaza, or take elevator to the medical section.)
Portland, Oregon

Suggested Agenda

1. Approval of minutes of November meeting.

2. Miscellaneous matters.

3. Allocation of Income Tab 16.
Discussion to be led by Mr. McMurchie.

4. Discharge of Encumbrances Tab 19. (continued)
Discussion to be led by Mr. Riddlesbarger.

5. Partial Distribution Tab 22.
Discussion to be led by Mr. Richardson.

6. Accounting and Distribution Tab 23.
Discussion to be led by Mr. Richardson.

PLEASE NOTE: Presentation of Inheritance Tax by Pat Lisbakken committee will be first item on January 19.

PLEASE NOTE: Meeting Place, Lloyd Center.

ADVISORY COMMITTEE
Probate Law Revision

Forty-third Meeting, December 15 and 16, 1967
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The forty-third meeting of the advisory committee (a joint meeting with the Committee on Probate Law and Procedure, Oregon State Bar) was convened at 1:30 p.m., Friday, December 15, 1967, in Suite 2201, Lloyd Center, Portland, by Vice Chairman Zollinger.

The following members of the advisory committee were present: Allison, Butler, Frohnmayer, Jaureguy, Riddlesbarger and Zollinger. Dickson, Carson, Gooding, Husband, Lisbakken and Mapp were absent. (Dickson and Mapp did attend the Saturday session.)

The following members of the Bar Committee were present: Buhlinger, Gilley, Krause, Meyers, Kraemer, Mayer, McKay, Thalhofer, Smith and Richardson. Anderson, Field, Heisler, Lovett, Piazza, Rhoten, Pendergrass, Shetterly, Thomas, Bettis and Warden were absent. (Field and Thomas did attend the Saturday session.)

Also present was Mr. Jack McMurchie, Portland attorney and James Sorte from the staff of Legislative Counsel.

Approval of Minutes

Frohnmayer pointed out that a motion made by Zollinger was seconded by Allison and not Zollinger, as shown in the minutes on page 3, Tab 18, Claims. Sorte also mentioned a correction in the next to the last sentence of Lundy's Fiscal Report, the words "Legislative Counsel Committee" should be changed to "Law Improvement Committee." With these corrections the minutes of the November meeting were approved as presented.

Miscellaneous Matters

Zollinger reported to the committee of a meeting held between Judge Dickson, Mr. Allison and Zollinger and members of the title companies in connection with Tab 15. Some of their objections were editorial in nature and would be taken care of by Mr. Allison without need for committee action, the others will be discussed during the Saturday session.

Tab 19. Discharge of Encumbrances

Riddlesbarger led the discussion of Tab 19. He outlined the events which preceded the preparation of Tab 19 by himself and Mr. Carson. Further remarks were addressed to the tabled motion by Zollinger that the committees adopt Section 2-607 of the Uniform Probate Code, which Riddlesbarger opposed. Riddlesbarger preferred the language in the Wisconsin Code, Section 863.13. Riddlesbarger also referred to Bill 7, which was presented to the Law Improvement Committee for submission to the 1965 Legislature, but was never introduced. Riddlesbarger did not favor exoneration in all cases, whether voluntary or involuntary.

The committees discussed the probable policy considerations in the courts differentiating between allowing exoneration if the encumbrance was after the making of a will, but not when the encumbrance existed at the time of making the will. The general consensus was that no set rule would guarantee that the wishes of the testator would be fulfilled.

Zollinger asked the committees to vote on his motion to adopt, in substance, the provisions of Section 2-607 of the Uniform Probate Code. The motion failed.

Riddlesbarger then discussed Tab 19 as it related to Bill 7. He suggested an amendment to subsection (3) by eliminating paragraph (b), retaining subparagraphs (A), (B), and (C) and inserting a new subparagraph (D) as follows:

"(D) If the encumbrance is an involuntary one."

Kraemer pointed out the same purpose could be accomplished by changing "voluntary" to "involuntary" in paragraph (a) and "involuntary" to "voluntary" in paragraph (b).

Riddlesbarger moved, seconded by Krause, to approve Section 1 of Tab 19. The motion carried.

Section 2: (Tab 19)

Riddlesbarger read the minutes of previous meetings to the committees so they would remember what they had done before concerning ORS 116.140 and 116.145, and their adoption of both of them in substance. He then read comments from Jaureguy and Love on "Right to Redemption." Zollinger expressed the opinion that the committees intended to permit a personal representative to pay the debt on an encumbrance on the estate when it appeared to be in the best interests of the estate, without prejudice to the creditors. He said that this was completely separate

from the right of the personal representative to redeem from an execution sale, which he did not favor. The committees generally did not favor the language that appeared in Sections 2 and 3 of Tab 19.

Riddlesbarger then suggested that a committee be appointed to prepare language in line with the committees' expressed intent. Zollinger appointed Riddlesbarger, Butler and Allison to make recommendations at the January meeting.

Tab 16. Allocation of Income

Jack McMurchie led the discussion of Tab 16 which had been prepared by him. He pointed out to the committees that this was intended to go in the Principal and Income Chapter when it was first drafted. McMurchie felt subsection (3) did not belong in the Probate Code, but should be in the Principal and Income Chapter. Zollinger expressed the view that it could be placed in the Probate Code, with a possible reference to the Principal and Income Chapter.

Zollinger suggested that Sorte discuss the placement of Section 3 with Lundy to determine where it should go. He also asked that Lundy determine how reference should be made to the federal statute in the proposal.

The committees discussed the various meanings that could be applied to a direction in a will to "pay all my just debts and taxes." There were various proposals advanced and Zollinger asked Riddlesbarger to draft something to go in the definition of wills section to cover this matter.

Tab 22. Partial Distribution

Richardson led discussion of Tab 22, which has comparable provisions in the Uniform Probate Code on page III-77.

Jaureguy suggested amendments to Tab 22 as follows:

"Section 1. Upon application by the personal representative or other interested person and after such notice to such persons, if any, as the court may prescribe, the court may enter an order authorizing the personal representative to deliver any of the property of the estate to the person or persons who under the will or under the rules of intestate succession would, upon final distribution, be entitled to such property if the court finds that:

"(a) (Would be the same.)

"(b) After such distribution there would be sufficient assets remaining to pay all remaining expenses of administration and unpaid claims against the estate.

"Section 4. If after partial distribution of assets, it appears that all or any part of the property distributed is required for the payment of any claim against the estate, including determined and undetermined state and federal tax liabilities, the personal representative shall apply by petition to the court for a decree for the return of the property distributed or any part thereof. Notice of the application shall be given to the distributees and to their sureties, if any, at least ten days before the application is made. Upon hearing of the application, the court may order a return of the property or its value at the time of distribution, or any part or portion thereof, and may specify the time within which such payment or return shall be made. If payment is not made or property returned within the time specified, the persons so failing to return such assets may be adjudged in contempt of court and judgment may be entered against them."

Zollinger felt the changes suggested by Jaureguy for Section 1 could be made by Legislative Counsel without committee action. This would also apply to Section 2.

In Section 4 the general feeling of the committees was that there should be more than notice within ten days of application for return of property. A motion by Kraemer, seconded by Krause, that citation and hearing be held upon application to recover property from a distributee. Carried.

In discussing the provision for establishing the value of the property, Richardson pointed out that the committees had determined earlier that the value of the property would be set as of the date of distribution.

Zollinger expressed opposition to Jaureguy's proposal to provide for contempt of court if property is not returned. Gilley and Butler favored striking the words "by execution" in the proposed language in Tab 22. Butler moved to strike the words "by execution", Myers seconded, and the motion carried.

Richardson inquired of the language in the Uniform Probate Code, Section 3-601, page III-77, which was not contained in the proposed draft. Zollinger suggested that this would be covered in material to be presented at the Saturday session.

Tab 23. Accounting and Distribution

Richardson led the discussion of Tab 23. He pointed out that the draft was similar to pages III-91, 96 and III-77 of the Uniform Probate Code.

Section 1. Liability of personal representative

Krause questioned whether paragraphs (a) and (b) of subsection (2) should be conjunctive, but the consensus was that either one could stand alone.

In discussing subsection (3), Allison pointed out that he had been instructed at the last meeting to incorporate Section 3-509 of the Uniform Probate Code into Tab 15.

Richardson commented that in the Uniform Probate Code, Section 3-701, page III-91, provision was made for a very short closing statement.

The committees then discussed the desirability of having a time within which the personal representative must account for or close the estate. Allison pointed out that there is a provision that any interested party may petition for an accounting and final distribution.

Richardson moved approval of Section 1, as amended. Kraemer seconded the motion, and it carried.

Section 2. Personal representative not liable

Discussion about the duty of the personal representative to insure against loss led to Allison being charged with the responsibility of seeing that the personal representative would not be liable if he was without fault.

Kraemer expressed doubt about the last sentence of Section 2. Richardson read ORS 117.640 and 117.650, which led to Frohnmayer moving that the last sentence of Section 2 be deleted. The motion was seconded by Krause, and carried.

Section 3. Accounting and distribution

Richardson advised the committees that the language in section 3 was taken from the guardianship code.

Frohnmayer moved, seconded by Buhlinger, that paragraph (b) of subsection (2) be amended as follows: delete "property, rents, income, issues, profits and proceeds from property" and insert "money and property". The motion carried. Allison questioned the word "periods" in the last sentence of paragraph

(b) of subsection (2) and the committees agreed it should be changed to "period".

Frohnmayer raised the question of whether the vouchers should be filed with the county clerks. A motion to strike the second sentence of paragraph (c) of subsection (2) failed for lack of second.

Butler moved, seconded by Frohnmayer, the adoption of Section 3. The motion carried, the word "affirmative" had been stricken from paragraph (a) of subsection (3).

Section 4. Notice, hearing on settlement of account and petition for distribution

Richardson pointed out that Section 4 substitutes mailed notice for published notice and protects the rights of creditors or others having claims by requiring that they get notice.

Allison noted that in paragraph (b) it should read "each devisee" because it does not involve legatees. He also advised the new members of the committees that the provisions of this section contains the only requirements for mailed notice to persons who might be interested in the estate, and that is in connection with the filing of the final account. In discussing this, Zollinger informed the committees that he would ask for further discussion of this matter at the Saturday meeting.

Frohnmayer again raised the question of submitting vouchers as provided in paragraph (c) of subsection (2) of section 3 and moved that it be amended to read as follows:

"Vouchers for disbursement shall accompany the account unless otherwise provided by order or rule of court." The motion was seconded by Krause and carried.

Frohnmayer also questioned the necessity of a detailed account when there is a will and everything is left to the widow. Zollinger asked Frohnmayer to prepare wording to take care of such situations for presentation at Saturday's meeting.

Section 5. Objections to final account and petition

Thalhofer pointed out that the reference should be to Section 4, rather than Section 3 in the first sentence.

Richardson returned to Section 4 with respect to setting the time for hearing by the personal representative and Zollinger agreed that should be amended to read "set the day

for filing objections" and not setting the time for hearing. It was amended by acclamation.

After discussing the requirement for setting the time and place, Zollinger suggested that the words "in the court in which the probate is heard" be added to Section 5, and Richardson suggested they be placed at the end of the first sentence, or between "thereof" and "specifying".

Butler moved approval of Section 5, as it is to be amended by Allison. The motion was seconded by Thalhofer and carried.

Richardson moved the meeting adjourn and Meyers seconded the motion and carried. The meeting adjourned at 4:45 p.m.

The meeting was reconvened at 9 a.m., Saturday, December 16, 1967, by Chairman Dickson in Suite 2201, Lloyd Center, Portland.

The following members of the advisory committee were present: Dickson, Allison, Butler, Frohnmayer, Jaureguy, Mapp and Zollinger.

The following members of the Bar Committee were present: Field, Gilley, Kraemer, Krause, Mayer, Meyers, Richardson, Smith and Thomas.

Also present was James Sorte.

Judge Dickson reviewed the events and discussion of the meeting of a subcommittee and the title company representatives.

Allison said the views expressed by the title company representatives was not whether a title be defended, but whether they will have to defend it. His changes are in Tab 12 and Tab 15. In Tab 15, section 2, he changed "elective share of surviving spouse" to "rights of surviving spouse to elect against the will" which he felt was more understandable. In Section 6 he added an exception, "except as provided in this section."

Allison read Section 17 of the third draft as follows:

"A personal representative may sell, mortgage, lease or otherwise dispose of property of the estate and pay claims, family allowance, elective share of surviving spouse, administrative expenses and distribution without notice, hearing or court order, subject to the following:"

He outlined that the title company representatives objected to an earlier provision that the personal representative could treat the property as though it were his own. They did not feel the personal representative should be given such broad powers. Following this, the committees again discussed at length the distinction between power and authority and Mapp explained the theory of the distinction as used in the Uniform Probate Code.

Dickson pointed out that the title company representatives objected first to insurability of title and this was corrected by amendments. The second objection was their belief that real property specifically devised would be sold without notice, which they felt would be highly improper.

Zollinger moved that the following be deleted from subsection (1), "Pay claims, family allowance, elective share of surviving spouse and administrative expenses for the purposes of distribution." Dickson read subsection (1) of Section 17, as it would then read:

"A personal representative has power to sell, mortgage, lease or otherwise deal with property of the estate without notice, hearing or court order, subject to the following:"

The motion carried.

Allison read a suggested amendment, paragraph (a) of subsection (1) so that it would read as follows:

"If the property is specifically devised, unless the will shall otherwise provide, or if its sale would be in contravention of a provision of the will, it may not be sold except on hearing or order of the court."

Allison also discussed the amount of the bond, which he had set at $2,500. The committees discussed leaving it to the court to increase the amount of bond, and it was felt that it should be increased, if necessary, without specific order of the court. The approved language was:

"Unless the court, by rule or order, shall otherwise direct."

It was Allison's feeling that with this provision, if the bond was sufficient, the title company would not question it, but if it was not sufficient to cover the amount of money to be realized from the sale, the personal representative would have to either increase his surety bond or go into court and ask

the court to fix a different amount.

Zollinger moved to amend paragraph (b) of subsection (1) to read as follows:

"If the inventory shows that the value of real property to be sold is more than $5,000, the amount of the bond shall be increased prior to sale by the amount of cash to be realized from the sale, unless the court, by rule or order, shall otherwise direct."

Jaureguy moved to strike "rule or", Kraemer seconded the motion, and the motion failed on a tie vote, with Chairman Dickson voting against the motion.

Richardson then moved to delete "or order". The motion was seconded by Butler and carried.

Allison pointed out that Section 2 is similar to the language of the Uniform Probate Code, except for the deletion of the words "by any provision of the will of the deceased."

The committees discussed whether a bona fide purchaser would get good title if real property was sold in contravention of the will. Allison read Section 21 of the third draft, which is Section 19 in the second draft, as follows:

"A person dealing with or assisting the personal representative without actual knowledge . . . ."

In view of this provision he felt subsection (2) could be eliminated entirely. Frohnmayer moved deletion of subsection (2). The motion was seconded by Krause and carried.

Frohnmayer then moved to delete "jurisdictional defect, including the case where the alleged decedent is found to be alive," from subsection (1). The motion was seconded by Thomas and carried. The last sentence will now read:

"The protection here expressed extends to instances where some jurisdictional irregularity occurred in proceedings leading to the issuance of letters."

Zollinger felt the entire sentence should be deleted and Dickson agreed and suggested it be left to Allison for final drafting.

Mapp again raised the question of the power of the personal representative to sell, mortgage, lease or otherwise convey

title to property of the estate without court order, especially in connection with Section 17 and 21. He then discussed the matter of power and authority. He did not feel that the provisions of Section 17 were consistent with those in Section 21.

Allison expressed concern that the title companies would oppose the proposed probate code, if they felt they had no protection in the code when it is submitted to the legislature. He did not feel the title companies should have to read the provisions of every will because of an isolated few cases where the personal representative might sell property in derogation of the will. He pointed out that the fundamental policy of the whole code is to simplify the probate of 100,000 cases and assume the risk of dishonesty or error in one.

After discussion on the desirability of giving the personal representative broad powers and limit his authority, it was suggested that Section 17 be amended to read:

"The personal representative has power to sell, mortgage, lease or otherwise deal with property in the estate but he is not authorized to exercise that power and he will be liable if he does so, except as provided in paragraph (a) and (b) of this section."

Further amendment would make it read: "but the exercise of such power is not authorized" and then continue with paragraph (a). Mapp suggested the following: "This gives the basic power, if he improperly exercises the power, he will be surcharged, but the purchaser will be protected."

Since no complete agreement was reached by the committees, Dickson suggested that Mapp and Allison prepare some language during the noon recess for further consideration.

In discussing Section 19, Allison pointed out that the words "of record" were taken out. Thomas thought they should be taken out the second time, and he so moved. The motion carried. The section now reads:

"Shall not be subject to rights of creditors of decedent or liens or encumbrances or against his heirs or devisees."

Tab 23. Accounting and Distribution

Zollinger reminded the committees that Frohnmayer had questioned the necessity of requiring a detailed accounting in some estates, as provided in Section 3. He proposed the following amendment:

Subsection (4) of Section 3, "Notwithstanding the

provisions in subsections (2) and (3) hereof, if all creditors have been paid in full and if the beneficiaries of the estate approve in writing, the personal representative need not file any interim accounts as required in subsections (1) and (2), and in lieu of the account required in subsection (3), he may file as his final account his verified statement, including the following information:

"(a) The period covered by the accounting.

"(b) A statement that all creditors have been paid in full.

"(c) A statement that all Oregon income, inheritance and personal property taxes, if any, either have been paid or will be paid prior to final closing of the estate and that receipts, releases or clearances therefor will be procured and filed prior to closing or such taxes will be secured by bond, deposit or otherwise.

"(d) A petition for an order authorizing the personal representative to distribute the estate to the persons and in the portions specified there."

Frohnmayer moved, seconded by Zollinger, the adoption of this additional subsection. The motion carried.

Section 6. Conclusiveness of order settling account

Richardson moved the adoption of Section 6. The motion was seconded by Krause and carried.

Section 7. Decree of final distribution

Zollinger questioned whether the provisions of Section 7 would apply to those who inherit real property as well as personal property. Richardson thought they would both be treated the same way. Allison outlined that, except for income, the decree would not distribute anything because it goes to the parties by intestate succession or by the will.

Zollinger recommended deleting "to whom distribution is to be made" and inserting "in whom title to the estate not otherwise vested" making Section 7 read as follows:

"In a decree of final distribution the clerk shall designate the persons in whom title to the estate is vested and the proportion or parts of the estate or the amounts to which each is entitled by the court or pursuant to the will."

Frohnmayer asked for a better word than "applied" and it was left to Allison to make any change.

Jaureguy suggested adding the words "real and personal" and leaving out paragraph (j). Thomas seconded the motion.

Gilley suggested that the first sentence of subsection (2) be amended by deleting "reopen" and inserting "vacate."

Allison felt the last sentence of subsection (1), before paragraph (a) should be amended to read as follows:

"The decree of distribution shall also contain any findings of the court with respect to:".

With the above amendments, Richardson moved adoption of Section 7.

Dickson also recommended deleting the following from paragraph (i):

", and whether the distributees take the property subject to a claim of this kind".

Zollinger brought up the provisions of Section 7, Tab 18, page 5, relating to the rights and duties which may arise when contingent claims are allowed. Allison then proposed revised language as follows:

"Section 7. Contingent and unliquidated claims. (1) A claim on a contingent or unliquidated debt shall be presented as any other claim.

"(2) If the debt becomes absolute or liquidated before distribution of the estate, the claim shall be paid in the same manner as absolute or liquidated claims of the same class.

"(3) If the debt does not become absolute or liquidated before distribution of the estate, the court shall provide for payment of the claim by any of the following methods:

"(a) The creditor and personal representative may determine, by agreement, arbitration or compromise, the value of the debt, and upon approval thereof by the court, the claim may be allowed and paid in the same manner as a claim on an absolute or liquidated debt.

"(b) The court may order the personal representative to make distribution of the estate, but to retain sufficient funds to pay the claim if and when the debt becomes absolute

or liquidated. The estate proceeding may not be kept open for this purpose more than two years after distribution of the remainder of the estate. If the debt does not become absolute or liquidated within that time, the funds retained, after payment therefrom of any expenses accruing during that time, shall be distributed to the distributees. If the debt thereafter becomes absolute or liquidated, the distributees are liable to the creditor to the extent of the estate received by them. The court may require the distributees to give bond approved by the court and executed by a surety company qualified to transact surety business in this state, for the satisfaction of their liability to the creditor.

"(c) The court may order the personal representative to make distribution of the estate as though the claim did not exist.

"(d) If after the distribution the debt thereafter becomes absolute or liquidated, the distributees are liable to the creditor to the extent of the estate received by them. The court may require the distributees to give bond approved by the court and executed by a surety company qualified to transact surety business in this state, for the satisfaction of their liability to the creditor.

"(e) Such other method as the court may order."

Richardson again moved adoption of Section 7 as amended. The motion was seconded by Thomas and carried.

The meeting recessed at 12 noon.

When the meeting reconvened at 1 p.m., the following members were present: Advisory committee, Dickson, Zollinger, Allison, Frohnmayer, Jaureguy and Mapp. Bar committee, Gilley, Krause, Mayer, Smith, Thomas and Richardson.

Also present was Sorte.

January Meeting

Dickson announced that the next meeting will be January 19 and 20 at the Lloyd Center.

Tab 15. Section 17

Allison reported on the new material prepared by Mapp and himself during the noon recess, which would read as follows:

"(1) The personal representative has power to sell,

mortgage, lease and otherwise deal with property of the estate without notice herein or court order.

"(2) Exercise of the foregoing powers of the personal representative without court order is improper:

"(a) If in contravention of the provisions of the will; or,

"(b) If the property is specifically devised and the will does not authorize its sale; or,

"(c) If the inventory value of the real property sold is more than $5,000 and the amount of the bond has not been increased in an amount equal to the amount of cash to be realized in the sale, unless the court directs otherwise."

Gilley suggested that somewhere in the code, it should be pointed out that power and authority are two different matters, and this might calm the fears of people who see the unlimited power. The committees discussed where this definition should go in the code. Dickson asked Mapp to prepare a draft on this and make suggestions as to where it should go in the proposed code.

After suggestions for amendments to the above proposal, Mapp read the section again as follows:

"(1) A personal representative has power to sell, mortgage, lease or otherwise deal with property of the estate without notice, hearing or court order.

"(2) Exercise of the foregoing power by the personal representative without court order is improper:

"(a) If in contravention of the provisions of the will;

"(b) If the property is specifically devised and the will does not authorize its sale;

"(c) If the inventory value of the property sold is more than $5,000 and the amount of the bond has not been increased in an amount equal to the amount of cash to be realized on the sale, unless the court directs otherwise."

Zollinger raised the question of the necessity for citation and hearing and court order for sale of property specifically devised. He preferred authorizing the court to adjust the bond without citation and court order, but not for

sale of property specifically devised without hearing prior to the sale.

Allsion suggested that paragraphs (a) and (b) could be drafted in one sentence, as follows:

"(a) If in contravention to the provisions of the will, or if the property is specifically devised and the will does not authorize its sale, unless the court so orders, upon citation to interested devisees, hearing and order of the court." He pointed out this language could be improved later.

Mapp then moved adoption of this proposal as amended, seconded by Allison. The motion carried. Krause voted no.

Dickson asked if Section 21 should be amended in view of these changes, but Allison said he felt it would not be necessary.

Frohnmayer called attention to the provision in the Uniform Probate Code, Section 3-405, regarding the requirement for notice of appointment of the personal representative to be mailed to the heirs or devisees within 30 days after the appointment. Dickson had previously favored such a requirement.

Discussion then followed on Tab 12, page 12, and the possibility of amending it to accomplish the purposes of Section 3-405 of the Uniform Probate Code.

Zollinger moved that the committees adopt, in substance, the provisions of Section 3-405 of the Uniform Probate Code, as subsection (4) of Section 7 of the third amended draft in Tab 15. The motion was seconded by Frohnmayer and carried.

Gilley asked if this would not require a mailing of the heirs in a testate situation. Dickson said it would. Because of disagreement on the matter, Zollinger suggested Allison modify the requirements of the petition.

Tab 23. Section 8. Disposition of unclaimed assets

Richardson moved approval. The motion was seconded by Zollinger and carried.

Section 9. Order in which assets appropriated; abatement

Richardson commented that Section 9 appeared to conflict with the abatement provisions in the draft of the election against the will by the spouse. This is Tab 11. He felt

Section 6 of Tab 11 was preferable to Section 9.

Section 10. Contributions

Richardson said he didn't believe the wording "legatee or devisee" was proper and conflicted with the provisions of Section 10.

There was some feeling that Section 10 duplicated Section 9. Mapp pointed out that the whole thing went far beyond what was contemplated in the drafting of the Uniform Probate Code, Section 3-602, page III-77.

Section 11. Retainer

Dickson suggested to the committees the elimination of the wording "statute of limitations and the discharge of the bankruptcy." Zollinger pointed out this was similar to existing law. He also felt a debtor, who is an heir, should have every defense he would have if the action had been brought against him. Richardson mentioned that his experience has been that provision will usually be made right in the will if it is to be taken into account in the distributive share, or if it is to be forgiven.

Zollinger moved substitution of Section 3-603 for Section 11. The motion was seconded by Mapp and carried with Richardson voting No.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, December 15,16, 1967)

(This draft does not show the changes made at the meeting.)

Suggested changes in current drafts pursuant to meeting with title insurance representatives

It is suggested that in Section 8 of the 3rd draft of INITIATION OF PROBATE there be added another sentence (d) to subsection (2) as follows:

(d) The anticipated sales of property of the estate.

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It is suggested that Section 2 of the amended 3rd draft of TITLE AND POSSESSION OF PROPERTY be revised as follows:

Section 2. Devolution of estate at death; title to property.

(1) Upon the death of a decedent title to his property vests: in the absence of testamentary disposition, in his heirs, subject to family allowance, rights of creditors, administration, and to being sold by the personal representative: or in the persons to whom it is devised by his will, subject to family allowance, rights of creditors, right of the surviving spouse to elect against the will, administration, and to being sold by the personal representative.

(2) The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to his property, are subject to the restrictions and limitations expressed or implicit in this Code to facilitate the prompt settlement of estates.

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It is suggested that to the first sentence of Section 6 there be added words "except as provided herein".

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It is suggested that Section 17 be amended to read as follows:

Section 17. Power of personal representative to sell, mortgage, lease and deal generally with property. (1) A personal representative has power to sell, mortgage, lease or otherwise deal with property of the estate to pay claims, family allowance, elective share of surviving spouse and administration expenses, or for purpose of distribution, without notice, hearing or court order, subject to the following:

(a) If the property is specially devised or its sale would be in contravention of a provision of the will, unless the will shall otherwise specifically provide it may not be sold except upon citation to interested devisees, hearing, and order of the court.

(b) If the inventory shows that the true cash value of the property to be sold is more than $2,500 the amount of the bond shall be increased prior to the sale by the amount of cash to be realized on the sale, unless the court shall find that the amount of the bond previously given is adequate.

(2) The rights and title of any purchaser, mortgagee, lessee or other person dealing with the personal representative are in no way affected by any procedural irregularity or

jurisdictional defect in the administration of the estate.

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It is suggested that Section 19 be revised as follows:

Section 19. Title conveyed free of claims of creditors. Property sold, mortgaged or leased by a personal representative shall be subject to liens and encumbrances of record against the decedent or his estate but shall not be subject to rights of creditors of the decedent or liens or encumbrances of record against his heirs or devisees.

Proposed revised Oregon probate code
ADVANCEMENTS
3rd Draft
August 17, 1967

Prepared by:
Stanton Allison

ADVANCEMENTS IN INTESTATE ESTATES

Section 1. When gift is an advance. If a person dies intestate as to all his estate, property which he gave in his lifetime to an heir shall be treated as an advancement against the latter's share of the estate if declared in writing by the decedent or acknowledged in writing by the heir to be an advancement. For this purpose the property advanced shall be valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever first occurs.

Section 2. Effect of advancement on distribution. If the value of the advancement exceeds the heir's share of the estate he shall be excluded from any further share of the estate but he shall not be required to refund any part of the advancement. If the value of the advancement is less than his share, he shall be entitled upon distribution of the estate to such additional amount as will give him his share of the estate.

Section 3. Death of advancee before decedent. If the recipient of the property fails to survive the decedent, the amount of the advance shall be taken into account in computing the share of the receipient's issue, whether or not the issue

take by representation.

Section 4. Repeal of existing statutes. ORS 111.110, 111.120, 111.130, 111.140, 111.150, 111.160 and 111.170 are repealed.

References: Advisory Committee Minutes:
9/18/65, p. 7; and Appendix
2/18,19/66, pp. 22 to 24; and Appendix
5/19,20/67, pp. 11 to 12; and Appendix
6/14,15/67, Appendix B

Frohnmayer and Piazza draft 7/5/67

ORS 111.110 to 111.170

Proposed revised Oregon probate code
ADVANCEMENTS
3rd Draft
August 17, 1967

Prepared by:

Stanton W. Allison

COMMENTS

Section 1. When gift is an advance. The wording of this section is taken from section 2-113 of the 1967 Draft of the Uniform Probate Code.

(1) This section changes present Oregon law in ORS 111.110 by expanding the doctrine of advancements to any person taking by intestate succession as opposed to the present limitation to the issue of the intestate. It also restricts the provisions to those cases where the decedent dies intestate as to his entire estate.

(2) Since the intestate share of real and personal property will be the same for all takers under the descent and distribution provisions, there is no need to distinguish between the real and personal property as is done in present ORS 111.150.

(3) Unlike the Iowa Code, Washington Code and Model Probate Code, this draft does not specify that the person to whom the advancement was made must have been entitled to inherit a part of the estate had the intestate died at the time of making the advancement. It would expand the doctrine of advancements to apply to persons who would not have been heirs had the intestate died at the time of the advancement but who subsequently became heirs prior to the death of the intestate.

(4) This section specifies that the doctrine of advancements applies only to intestacy and only to persons sharing in the estate of one who has died intestate as to his entire estate. This limitation would not, however, seem to affect the holding of Clark v. Clark, 125 Or. 333,342, 267 P. 534, 537 that a will might direct that a previous gift be considered an advancement in the determination of the shares into which an estate is to be divided.

(5) This draft follows the approach of proposed Wisconsin probate code, section 852.11(1). The Iowa, section 224, Washington, 11.04.041 and Model probate codes provide that the presumption of a gift is rebuttable. However, the Wisconsin code is in accord with the more limited application of the statute of frauds already existing in Oregon law, ORS 111.120. Since the Wisconsin code represents the latest thinking and since the present draft does not substantially change existing Oregon law, it would seem to be the preferred approach.

The early case of Seed v. Jennings, 47 Or. 464, 83 P. 872 (1905) is in conflict with both the old Oregon statute and this new provision. That case suggested the common law presumption that the voluntary conveyance of property by a parent to a child is presumed to be an advancement, unless it is proved to be a

gift. This dictum was contrary to the statute in force at the time and would, in any event, be overruled by the proposed version which reverses the presumption and makes it rebuttable only by evidence in writing.

(6) This section also changes present Oregon law (ORS 111.160) which provides for valuation by the donor or donee in any one of three different writings or its estimated value when granted. Present Oregon law thus makes possible inconsistent valuations arising from each of the authorized writings. In 1 Jaureguy and Love, Oregon Probate Law and Practice, sections 41-46, this problem is noted. No such possibility of different and inconsistent valuations is contained in the proposed section.

Section 2. Effect of advancements on distribution. This section is a substitute for ORS 111.140 and substantially reenacts that section.

Section 3. Death of advancee before decedent. This section is a substitute for ORS 111.170 and is consistent therewith. It is virtually identical to the Model Probate Code, section 29(c), Iowa Code, section 226, Washington Code, section 11.04.041. The person to whom an advancement is made is charged for it whether he takes per capita or by representation. See generally, Model Probate Code's comment on page 67. For a contrary approach see 1967 draft of Uniform Probate Code, section 2-112 which provides that if the advancee dies before the intestate, the advancement shall not be taken into account in determining descent and distribution of the net intestate estate.

Prepared by
Mr. Frohnmayer

Proposed revised Oregon probate code
ADVANCEMENTS
1st Draft
May 6, 1967

Final Revised Draft of Proposal in Appendix to February 1966 Minutes

Section 1. Advancements. (1) If a decedent dies intestate as to his entire estate, property transferred during his lifetime as an advancement to a person entitled to inherit a part of the estate shall be counted toward the intestate share of the advancee and, to the extent that it does not exceed the intestate share, shall be included in computing the estate to be distributed.

(2) A gratuitous inter vivos transfer of property is not an advancement unless the decedent expresses that intention in writing or the advancee acknowledges the advancement in writing.

Section 2. Repeal of existing sections. ORS 111.110, 111.120, 111.130, 111.150, 111.160 and 111.170 are repealed.

References: Advisory Committee Minutes
9/18/65 p. 7; and appendix
2/18,19/66, pp. 22 to 24; and Appendix

ORS 111.110 to 111.170

Comment: This draft follows the draft prepared by legislative counsel which was in turn based on the draft discussed at the February 1966 meeting of the committee and printed as an appendix to the minutes thereof.

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
ADVANCEMENTS
1st Draft
January 11, 1967

This draft is based primarily on the draft prepared by Mr. Frohnmayer and distributed to the committees prior to the December 1965 meeting and discussion of the content thereof at the February 1966 meeting. The draft is an appendix to the February 1966 minutes.

Section 1. Advancements. (1) If a decedent dies intestate as to his entire estate, property transferred during his lifetime as an advancement to a person entitled to inherit a part of the estate shall be counted toward the intestate share of the advancee and, to the extent that it does not exceed the intestate share, shall be included in computing the estate to be distributed.

(2) A gratuitous inter vivos transfer of property is not an advancement unless the decedent expresses that intention in writing or the advancee acknowledges the advancement in writing.

(3) If an advancee dies before the decedent, leaving lineal descendants who inherit from the decedent, the advancement shall be considered as if it had been made to the descendant for purposes of that inheritance. If the descendant is entitled to a smaller share of the estate of the decedent than the advancee would have been entitled, the descendant shall be charged with the proportion of the advancement as the amount he would have inherited in the absence of the advancement bears to the amount the advancee would have inherited in the absence of the advancement.

(4) An advancement shall be valued as of the date of the advancement.

References: Advisory Committee Minutes:
9/18/65, p. 7; and Appendix
2/18,19/66, pp. 22 to 24; and Appendix

ORS 111.110 to 111.170

Comment: Is the transfer of property only considered an advancement if it is gratuitous? If so, would this word be more properly placed in subsection (1) rather than (2)?

Could subsection (2) be stated in the affirmative rather than the negative, for example: "A gratuitous inter vivos transfer of property is an advancement only if decedent expressed that intention in writing or the advancee acknowledges the advancement in writing"?

Does the time of the instrument in which the decedent states his intention or the advancee acknowledges the advancement have any significance? In other words, could the deed be made on one day, and a year later in a separate memorandum the decedent state that it was his intention that the property transferred in the deed was an advancement?

Section 2. Repeal of existing statutes. ORS 111.110, 111.120, 111.130, 111.150, 111.160 and 111.170 are repealed.

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
ALLOCATION OF INCOME
1st Draft
April 3, 1967

Section 1. Unless the will of the decedent otherwise provides, income from the assets of the estate of a decedent received after the death of the decedent and before final distribution, including income from property used to discharge liabilities, claims, debts, expenses of administration and inheritance and estate taxes, shall be determined in accordance with the rules applicable to a trustee under this Act and distributed as follows:

(1) To specific legatees and devisees the income received from the property bequeathed or devised to them respectively, less taxes, ordinary repairs and other expenses incurred in the management and operation of the property, any interest paid during the period of administration on account of such property, and an appropriate portion of taxes imposed on income (excluding taxes on capital gains) which are paid during the period of administration.

(2) To all other legatees and devisees, except legatees of pecuniary bequests not in trust which do not qualify for the marital deduction provided for in Section 2056 of the Federal Internal Revenue Code, as of January 1, 1969 the remaining income, in proportion to the respective interests of such legatees and devisees in the assets of the estate

which have not been distributed to them or expended for the payment of inheritance or estate taxes, charged against their particular share of the estate, computed at the time of each such distribution or payment, on the basis of inventory values. As used in this subparagraph, remaining income means the total income from all property which is not specifically bequeathed or devised less the taxes, ordinary repairs, and other expenses incurred in the management and operation of all such property from which the estate is entitled to income, any interest paid during the period of administration on account of such property and the taxes imposed on income (excluding taxes on capital gains) which are paid during the period of administration, and which are not charged against the property specifically bequeathed or devised.

(3) Income received by a trustee under this section shall be treated as income of the trust.

References: Advisory Committee Minutes:
10/14, 15/66 p. 6 et. seq.
11/18, 19/66 pp. 9 to 12
2/17, 18/66 pp. 1 to 3
ORS chapter 129

Proposed revised Oregon probate code
ALLOCATION OF INCOME
3rd Draft
March 21, 1968

Prepared by
Stanton W. Allison

Section 1. Unless the will of the decedent otherwise provides, income from the assets of the estate of a testate decedent received after the death of the decedent and before final distribution, including income realized from property which is sold or otherwise expended for the purpose of discharging liabilities, claims, debts, expenses of administration and inheritance and estate taxes, shall be determined in accordance with the rules applicable to a trustee under ORS 129.010 to 129.140 and distributed as follows:

(1) To specific devisees the income received from the property devised to them respectively, less the taxes, ordinary repairs and other expenses incurred in the management and operation of the property, any interest paid during the period of administration on account of such property, and an appropriate portion of taxes imposed on income (excluding taxes on capital gains) which are paid from the estate during the period of administration.

(2) To all other devisees (except devisees of pecuniary devises which (A) are not in trust, and (B) do not qualify for the marital deduction provided for in Section 2056 of the Federal Internal Revenue Code) the remaining income, in proportion to their respective interests in the assets of the estate which have not been distributed to them or expended for the payment of inheritance or estate taxes charged against their particular

share of the estate, computed at the time of each such distribution or payment on the basis of inventory values. As used in this subparagraph, remaining income means the total income from all property which is not specifically devised, less the taxes, ordinary repairs, and other expenses incurred in the management and operation of all such property from which the estate is entitled to income, any interest paid during the period of administration on account of such property, and the taxes imposed on income (excluding taxes on capital gains) which are paid from the estate during the period of administration, and which are not charged against the property specifically devised.

(3) Income received by a trustee under this section shall be treated as income of the trust.

Proposed revised Oregon probate code
ALLOCATION OF INCOME
3rd Draft
March 21, 1968

Prepared by
Stanton W. Allison

COMMENTS

Attached as an addendum are portions of Mr. Jack McMurchie's comments on the problems covered by the proposed chapter.

The Supreme Court has stated that the Uniform Principal and Income Act (ORS 129.010 to 129.140) does not apply to estates. (In re Feehely's Estate, 179 Or. 250, 260, 170 P2d 757.) The first question before the committees, therefore, was whether to amend the Oregon Uniform Act to include the later revisions commented on by Mr. McMurchie and incorporate them by reference in this code, or to include the revisions and basic matters in the probate code. In preparing this code they have consistantly avoided incorporating by reference matters they felt belonged in the code. The inconvenience and technical interpretation problems involved in the usual incorporation by reference has ruled out this approach in other cases, and the committees considered that the same considerations should apply here.

The proposed chapter limits its application to income received after decedent's death and before final distribution.

It also limits its application to testate estates. It was felt that there were no pressing problems in intestate situations since the residue is divided and the income allocated in the same way. The chapter would have no application if the will provides for income allocation different from that set out here.

Section 1 refers to the Uniform Act as codified in Oregon statutes, for the definitions of income and principal. However, income received from assets sold or expended during probate for payment of administration expenses, claims and taxes is treated as income, even though the expended assets would not become part of the residue. As noted by Mr. McMurchie, this is contrary to In re Feehely's Estate (supra).

Subsection (1) provides that the net income received from specifically devised property is distributed to the specific devisee.

Subsection (2) covers general devises. It includes the periodic adjustment rule as proposed by the later revision of the Uniform Principal and Income Act. It does also, however, provide that spouses receiving pecuniary bequests which qualify under the marital deduction provisions of the Internal Revenue Code share in the income in the same way as a residuary devisee. It was the intent of the committees that this chapter be so drafted that periodic adjustments would not be required on payment of ordinary claims or administration expenses but only where payment of estate and inheritance taxes or substantial claims should require an equitable apportionment. In the interest of simplicity the apportionment when required would be on the basis of inventory values.

The proposed chapter has been discussed with trust officers of banking institutions and with others who deal with problems

of allocations of income in estates, and your committees believe the proposal represents the consensus of experts in this field.

ADDENDUM

(Excerpts from Mr. McMurchie's appearance before the joint committees.)

"The Oregon Supreme Court has spoken very little on this subject. ...the court has held that the Uniform Principal and Income Act does not apply to estates, and as a result we have the situation now that pretty much whatever is brought before the court as a suggested method of allocating income earned during administration is adopted and approved by the court in the final account if the matter is even raised in the final account."

"Everything I say is 'the general rule' or 'the Restatement of Trusts' rule and is not necessarily the rule in Oregon.

"The recipient of a specific devise or bequest or a bequest of an annuity is entitled to the income earned by the property bequeathed during the period of administration. This assumes, of course, that you have a residue out of which you can pay expenses of administration and taxes.

"The next category is a general legacy. A general legacy is usually pecuniary in nature. You may have a general legacy which is in the nature of a specific legacy such as a gift of a number of shares of stock which you don't own at the time of your death. However, even then the legacy would be in the nature of a pecuniary legacy during the period of administration. For one reason or another, the rule has grown up over the years that an outright pecuniary bequest is not entitled to share in the income earned during administration except in the event that the legacy is not satisfied within the 'common law period of administration,' whatever that is in Oregon. There is some feeling that if you have not satisfied a pecuniary legacy within one year after the date of death, the legatee is entitled to interest at the going rate on the bequest from that date until such time as it is paid. This is consistent with the common law except we don't know what the common law period of administration is in Oregon."

(The proposed code provides for paying 3 percent interest on general pecuniary devises after one year from the appointment of the personal representative, unless the will provides otherwise.)

"Contrary to the situation where an outright pecuniary legacy is entitled to no income, courts have generally held that a pecuniary legacy in trust is entitled to participate in the income earned during the period of administration. The amount of the income is another problem, but the general rule is that it is entitled to its proportionate share of the income. The question is whether you must make periodic adjustments in the ratio of the fixed value bequest to the entire estate -- whether you must make periodic adjustments so that the general legacy in trust actually gets a proportionate share of the income earned by the estate. This is a problem that is not covered in Oregon -- that is, whether or not this general rule and the distinction between an outright bequest and a bequest in trust is the law in Oregon or should be the law in Oregon.

"Residue. The present rule and the Restatement rule is that gifts of the entire residue or a portion of the residue in trust and a portion outright all are entitled to share pro rata in the income.

"With respect to the so-called pre-residuary legacies, I don't believe there is any significant problem that needs to be resolved except in the limited situations where people are using pecuniary marital deduction bequests or a pre-residuary marital bequest or pecuniary or net estate type bequests where you don't give a fractional share of the residual estate. This area is not covered by the Uniform Principal and Income Act revision and I think probably needs to be covered because a pecuniary gift intended to take advantage of the marital deduction is certainly to be distinguished from a pecuniary bequest of $10,000 or $25,000 to a person other than the testator's spouse. I think that the pre-residuary marital deduction, whether it be pecuniary or not, should receive a pro rata share of the income.

"To go back to the problem of the allocation of income to the pre-residuary legatees. Where a general legacy of $250,000 is given to A and the residue to B with a provision that all of the taxes and expenses be paid out of the residue, the problem is whether you start out by taking the inventory values of the gross estate and $250,000 over that inventory value times the income to determine what the recipient gets

throughout the period of administration, or whether you try to determine what will be the net residue available for actual distribution and make an allocation of income on the basis of $250,000 over that net. These two methods are called the gross share or the net share methods.

"The so-called gross share rule, where you allocate on the basis of inventory values, without adjustment, is the easiest method. It is not the most equitable because of the fact that the recipient of the general legacy is not actually getting his share of the total income after the taxes and expenses are paid. Of course, the net share rule has the disadvantage of being more difficult and also has inequities.

"The answer to the problem, which is suggested by the revision to the Uniform Principal and Income Act, is to require periodic adjustments in the ratio of the value of general legacy to the entire estate at each time when you make at least a major expenditure. These adjustments would be made when you paid such things as inheritance taxes, attorneys' fees, executor's commission, federal estate tax. ###

"The same problem arises much more often and with much more case authority when you are concerned with the allocation of income among residuary legatees and there is a provision in the will for payment of these expenses or taxes out of a particular share of the residue only. What do you do in these instances? Do you apply the gross share, the net share or the periodic adjustment rule? The same problem occurs in the area of charitable bequests where you have a charitable bequest which is out of the residue, but is not going to bear a portion of the taxes.

"In each of these areas, the solution proposed by the revised Principal and Income Act is the periodic adjustment rule. This is far and away the most equitable rule and certainly when you get into estates where there are significant amounts of income, it can make a substantial difference whether a residuary legatee's share of the estate is going to be reduced at the end of 15 months by a substantial amount to pay federal estate taxes. At that time the executor should make an adjustment and establish a new ratio of the shares of the residue remaining and carry that ratio forth from that time, at all times using inventory values for this purpose.

"One thing which I did not touch on and which is a problem that is more crucial in Oregon than in many jurisdictions is raised by a case which many of you may be familiar with, In

re Feehely's Estate, 179 Or. 250. There the court held that income on assets which are expended and which will never become a part of the residue of the estate, is to be added to the residue and not distributed as income for the reason that the testator never really intended the income beneficiary to get the income earned on those assets. This is the English rule. It was then but no longer is the general rule. The court relied extensively on the fact that it was the general rule and the rule of the Restatement of Trusts which it no longer is. No one has taken this problem to the Supreme Court again so we are bound by that decision and to some extent, it affects the general question of whether or not you make periodic adjustments. It does in effect adopt the net share rule.

"### Section 5 of the Revised Uniform Principal and Income Act which was adopted by the National Conference of Commissioners in 1962... has never been considered by the Oregon State Bar Committee on Uniform Laws. It is, to my way of thinking, at least the first step in the solution to the problem. The only other way is if you draft your will with detailed instructions as to how income should be allocated. Unfortunately many attorneys today are not aware of the problems in this area and wills are drafted without these problems in mind.

"The provision...would either have to be adopted as a part of the Uniform Principal and Income Act or it would have to become a part of the general probate code. This provision still leaves it available to the testator's attorney to draw a will which will change the results of the Act. However, it does contain specific detail covering most of the problems I have just discussed and what will happen if there is no language in the will to cover the problem. It adopts the more equitable rule, the combination of the gross share and net share rule, requiring periodic adjustments. The Act also provides that income received by a trustee under this subsection should be treated as income of the trust. Subparagraph (b) you will note is contrary to the Feehely rule.

"My recommendation is that the revised Uniform Principal and Income Act makes a substantial step forward and I think it is the right step in solving this problem. I have only one suggested change and that is that some language should be inserted to make it clear that the legatee of a pecuniary bequest which is intended to take advantage of the marital deduction provisions of the Internal Revenue Code would also share in the income in the same way as a residuary legatee."

(See October 1963 issue of Trusts and Estates, page 916; also see, 2 ALR3d, p. 1061; III Scott on Trusts, Sec. 234.)

Proposed revised Oregon probate code
ALLOCATION OF INCOME
2nd Draft
December 22, 1967

Prepared by

Stanton W. Allison

Section 1. Unless the will of the decedent otherwise provides, income from the assets of the estate of a testate decedent received after the death of the decedent and before final distribution, including income from property used to discharge liabilities, claims, debts, expenses of administration and inheritance and estate taxes, shall be determined in accordance with the rules applicable to a trustee under ORS 129.010 to 129.140 and distributed as follows:

(1) To specific devisees the income received from the property devised to them respectively, less the taxes, ordinary repairs and other expenses incurred in the management and operation of the property, any interest paid during the period of administration on account of such property, and an appropriate portion of taxes imposed on income (excluding taxes on capital gains) which are paid during the period of administration.

(2) To all other devisees (except devisees of pecuniary devises not in trust which do not qualify for the marital deduction provided for in Section 2056 of the Federal Internal Revenue Code) the remaining income, in proportion to their respective interests in the assets of the estate which have not been distributed to them or expended for the payment of inheritance or estate taxes, charged against their particular share of the estate, computed at the time of each such distribution or payment, on the basis of inventory values.

As used in this subparagraph, remaining income means the total income from all property which is not specifically devised, less the taxes, ordinary repairs, and other expenses incurred in the management and operation of all such property from which the estate is entitled to income, any interest paid during the period of administration on account of such property, and the taxes imposed on income (excluding taxes on capital gains) which are paid during the period of administration, and which are not charged against the property specifically devised.

(3) Income received by a trustee under this section shall be treated as income of the trust.

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
ANCILLARY ADMINISTRATION
1st Draft
March 16, 1967

This draft is based primarily on a draft by Professor Mapp and Mr. Riddlesbarger dated March 16, 1967, and the action taken by the committees at the March 17, 18, 1967 meeting.

Section 1. Ancillary probate based upon domiciliary probate. (1) The written will of a testator who died domiciled outside this state, which upon probate may operate upon any property in this state, may be admitted to probate upon petition therefor upon proof that it stands probated or established in the jurisdiction where the testator died domiciled. Rights to take against the will are not affected by this section.

(2) A will offered for probate under this section may, however, be contested for a cause which would be grounds for rejection of a will of a testator who died domiciled in this state.

Section 2. Original probate. Original probate of the will of a testator who died domiciled outside this state, which upon probate may operate upon any property in this state, may be granted unless the will stands rejected from probate or establishment in the jurisdiction where the testator died domiciled for a cause which would be grounds for rejection of a will of a testator who died domiciled in this state.

Section 3. Effect of rejection of will at domicile after local probate. If, after a will has been admitted to probate in this state under section 1 or section 2, the will has been rejected or set aside in the jurisdiction where the testator died domiciled, for a cause which would be grounds for rejecting or setting aside a will of a testator who died domiciled

in this state, probate shall be set aside in this state upon application therefor filed within six months after the rejection or setting aside of the will in the jurisdiction where the testator died domiciled has become final.

Section 4. Granting letters to domiciliary. (1) Any domiciliary personal representat: e upon petition therefor and upon filing of copy of the domiciliary letters with the probate court, may be granted letters in this state.

(2) If the domiciliary personal representative is a foreign corporation, it need not qualify under any law of this state except those provisions of this Act generally applicable to the qualification of personal representatives, to authorize it to act as ancillary personal representative in the particular estate.

(3) If application is made for the issuance of letters, any interested person may intervene and petition for the appointment of any person who is eligible under this Act or the law of this state. The court may give preference in appointment to the domiciliary personal representative if it finds such preference to be in the best interests of the estate.

Section 5. Distribution of estate by ancillary personal representative. (1) If under the law of the jurisdiction where the testator died domiciled the probate or establishment of his will is subject to contest within a period specified after probate or establishment, no property shall be distributed to beneficiaries under the will during such period except upon order of the court. Distribution made by an ancillary personal representative in good faith and pursuant to an order under this subsection operates as a complete discharge to the ancillary

personal representative even if the probate or establishment of the will at the domicile is thereafter rejected or set aside for any cause whatever.

(2) When administration in this state has been completed and the estate is in a condition to be distributed, the court may, upon application by the ancillary personal representative, authorize the delivery of such property to the domiciliary personal representative as the court finds necessary for the payment of debts, taxes, or other charges, or for distribution to beneficiaries of the estate of the decedent.

Section 6. Proof of documents; certification; translation. (1) Proof of documents required by this Act may be made as follows:

(a) Of a will, by a certified copy thereof.

(b) That a will has been probated or established, by a certified copy of the order admitting the will to probate or evidencing its establishment.

(c) That a will has been rejected or set aside, by a certified copy of the order rejecting or setting aside the will.

(d) Of letters, by a certified copy thereof.

(2) Copies may be certified by the clerk of the court, or other official having custody of the original document.

(3) If the respective documents or any part thereof are not in the English language, verified translations may be attached thereto and shall be regarded as sufficient proof of the contents of the documents unless objection is made thereto.

If any person in good faith relies upon such proof under this Act he shall not thereafter be prejudiced because of inaccuracy of such translations, or because of proceedings based upon documents so proved.

Section 7. Application of general law. Except where special provision is made otherwise, the law of this state relating to wills and to the probate, contest and effect thereof shall apply in the case of a nondomiciliary testator and the law and procedure of this state relating generally to administration and to representatives shall apply to ancillary administration and representatives.

Comment: Based on §1613 New York Probate Code.

References: Advisory Committee Minutes:
Draft dated 4/28/66
4/15, 16/66 pp. 18 and 19
8/19, 20/66 pp. 21 to 23
Report dated October 3, 1966
10/14, 15/66 pp. 20 and 21
1/20, 21/67 pp. 7 to 11; and Appendix A
2/17, 18/67 pp. 5 to 9
3/17, 18/67 pp. 2 to 6; and Appendix

ORS 116.186

Proposed revised Oregon Probate Code
CLAIMS
2nd Draft
December 6, 1967

Prepared by
Stanton W. Allison

CLAIMS

Section 1. Presentation of claims; time limitations. (1) Claims against the estate of a decedent, other than claims of the personal representative as creditor of the decedent, shall be presented to the personal representative.

(2) Claims presented within four months after the date of the first publication of notice of appointment of the personal representative shall be paid, as provided in ORS _____, before claims presented after the four-month period.

(3) Claims not presented before the expiration of 12 months after the date of the first publication of notice of appointment of the personal representative, or before the date the personal representative files his final account, whichever occurs first, are barred from payment.

(4) If a claim is presented after the expiration of the 12-month period, but before the final account is filed, the claim is not barred if the court shall find that the late presentment was caused by excusable neglect.

Section 2. Form and verification of claims. Each claim presented shall:

(1) Be in writing.

(2) Describe the nature and the amount thereof, if ascertainable.

(3) State the names and addresses of the claimant and his attorney.

(4) Be accompanied by the affidavit of the claimant or someone on his behalf who has personal knowledge of the fact, stating that the amount claimed is justly due, or if not due, when it will or may become due; that no payments have been made which are not credited; and that there is no just offset thereto, to the knowledge of the affiant, except as stated.

Section 3. Waiver of presentment or defect of form. The presentment of a claim and any defect of form or insufficiency of a claim presented may be waived by the personal representative or by the court.

Section 4. Written evidence of claim. When it appears that there is written evidence of a claim presented to the personal representative, the personal representative may demand that the evidence be produced or its nonproduction accounted for.

Section 5. Claims on debts due. If a claim on a debt due is presented and allowed, allowance shall be in the amount of the debt remaining unpaid on the date of allowance.

Section 6. Claims on secured debts due. (1) A claim on a debt due for which the creditor holds security may be presented as a claim on an unsecured debt due, or the creditor may elect to rely entirely on the security without presentation of the claim.

(2) If the claim is presented, it shall describe the security. If the security is an encumbrance that is recorded,

it is sufficient to describe the encumbrance by reference to the volume, page, date and place of recording.

(3) If the claim is presented and allowed, allowance shall be in the amount of the debt remaining unpaid on the date of allowance.

(4) If the creditor surrenders the security, payment shall be on the basis of the amount allowed.

(5) If the creditor does not surrender the security, payment shall be on the basis of:

(a) If the creditor exhausts the security before receiving payment, the amount allowed, less the amount realized on exhausting the security; or

(b) If the creditor does not exhaust the security before receiving payment or does not have the right to exhaust the security, the amount allowed, less the value of the security determined by agreement or as the court may order.

(6) The creditor shall not exercise remedies reserved under his security until 30 days after the claim is presented and after notice to the personal representative of his intention to exercise his remedy, but the court, on cause shown, may shorten the period.

(7) The personal representative may convey the secured property to the creditor in consideration of the release of the security and satisfaction or partial satisfaction of the claim.

Section 7. Debts not due. A claim on a debt not due, whether or not the creditor holds security therefor, may be presented as a claim on a debt due. If the claim is allowed, allowance shall be in an amount equal to the value of the debt on the date of allowance. Payment on the basis of the amount allowed discharges the debt and the security, if any, held by the creditor therefor; but the creditor, after allowance of the claim, may withdraw the claim without prejudice to his other remedies.

Section 8. Contingent and unliquidated claims. (1) A claim on a contingent or unliquidated debt shall be presented as any other claim.

(2) If the debt becomes absolute or liquidated before distribution of the estate, the claim shall be paid in the same manner as absolute or liquidated claims of the same class.

(3) If the debt does not become absolute or liquidated before distribution of the estate, the court shall provide for payment of the claim by any of the following methods:

(a) The creditor and personal representative may determine, by agreement, arbitration or compromise, the value of the debt, and upon approval thereof by the court, the claim may be allowed and paid in the same manner as a claim on an absolute or liquidated debt.

(b) The court may order the personal representative to make distribution of the estate, but to retain sufficient funds to pay the claim if and when the debt becomes absolute or

liquidated. The estate may not be kept open for this purpose more than two years after distribution of the remainder of the estate. If the debt does not become absolute or liquidated within that time, the funds retained, after payment therefrom of any expenses accruing during that time, shall be distributed to the distributees.

(c) The court may order the personal representative to make distribution of the estate as though the claim did not exist. If after distribution the debt becomes absolute or liquidated, the distributees are liable to the creditor to the extent of the estate received by them. Payment of the debt may be arranged by creating a trust, giving a mortgage, securing a bond from a distributee or by such other method as the court may order.

Section 9. Compromise of claims. The personal representative may compromise a claim of or against the estate of a decedent.

Section 10. Claims of personal representative. A claim of a personal representative shall be filed with the clerk of the court within the time required by law for presentment of claims and shall be presented to the court for allowance or disallowance. Upon application by the personal representative or by any person interested in the estate the claim may be reconsidered by the court on the hearing of the final account of the personal representative.

Section 11. Payment of claims. Upon the expiration of four months from the date of the first publication of his notice of appointment, the personal representative shall, after making provision for family support, for expenses of administration, for claims already presented which have not been allowed or whose allowance has been appealed and for claims which may yet be presented, proceed to pay the claims presented within four months after the date of the first publication of notice of appointment and allowed against the estate, in the order of priority hereinafter prescribed. After payment of those claims, claims presented after the four-month period shall be paid in the same order.

Section 12. Order of payment of debts and expenses. (1) If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

(a) Family support.

(b) Expenses of administration.

(c) Expenses of a plain and decent funeral and disposition of the remains of decedent.

(d) Debts and taxes with preference under federal law.

(e) Reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him.

(f) Taxes with preference under the laws of this state

which are due and payable while possession is retained by the personal representative.

(g) Debts owed employes of the decedent for labor performed within the 90 days immediately preceding the date of death of the decedent.

(h) The claim of the State Public Welfare Commission for the net amount of public assistance, as defined in ORS 411.010, paid to or for the decedent, and the claim of the Oregon State Board of Control for care and maintenance of any decedent who was at a state institution to the extent provided in ORS 179.610 to 179.770.

(i) All other claims against the estate.

(2) If the applicable assets of the estate are insufficient to pay all claims or expenses of any one class specified above in full, each claim or expense of that class shall be paid only in proportion to the amount thereof.

Section 13. Allowance and disallowance of claims. (1) A claim presented to the personal representative shall be considered allowed as presented unless within 60 days after the date of presentment of the claim the personal representative mails or delivers a notice of disallowance of the claim in whole or in part to the claimant or to his attorney. The personal representative shall file in the estate proceeding the claim as presented and the notice of disallowance.

(2) A notice of disallowance of a claim shall inform the claimant that the claim has been disallowed in whole or

in part and, to the extent disallowed, will be barred unless the claimant proceeds as provided hereafter.

(3) Not less than 30 days prior to the filing of the final account the personal representative may rescind his previous allowance of an unpaid claim, if the claim was allowed because of error, misinformation or excusable neglect. Notice of rescission of prior allowance of the claim shall be given by mailing or delivering a notice to the claimant or his attorney stating that the prior allowance had been rescinded and the reasons therefor.

Section 14. Procedure by claimant on disallowance of claim. (1) If the personal representative disallows a claim in whole or in part, the claimant, within 60 days after the date of mailing or delivery of the notice of disallowance, may either:

(a) File in the estate proceeding a request for summary determination of the claim by the probate court, with proof of service of a copy of the request upon the personal representative or his attorney; or

(b) Commence a separate action or suit against the personal representative on the claim in any court of competent jurisdiction. The action or suit shall proceed and be tried as any other action or suit.

(2) If the claimant fails to request a summary determination or fails to commence a separate action or suit as

provided in subsection (1), the claim, to the extent disallowed by the personal representative, is barred.

Section 15. Separate action or suit required by personal representative. If the claimant files a request for summary determination of the claim as provided in ORS _____, the personal representative, within 30 days after service of a copy of the request upon the personal representative or his attorney, may notify the claimant in writing that if he desires to prove the claim he must commence a separate action or suit against the personal representative on the claim, within 60 days after receipt of such notice. If the claimant fails to commence a separate action or suit within 60 days after the date of service of the notice, the claim, to the extent disallowed by the personal representative, is barred.

Section 16. Summary determination procedure. In a proceeding for summary determination by the probate court of a claim disallowed in whole or in part by the personal representative:

(1) The personal representative shall move or plead to the claim as though the claim were a complaint filed in an action or suit.

(2) The court shall hear the matter without a jury after notice to the claimant and personal representative. Upon the hearing the court shall determine the claim in a summary manner, and shall make an order allowing or disallowing the claim in whole or in part.

(3) No appeal may be taken from the order of the court made upon the summary determination.

Section 17. Interested persons heard in summary determination or in separate action or suit. Any person interested in the estate may be heard in a proceeding for summary determination by the probate court of a claim, and may intervene in a separate action or suit against the personal representative on the claim.

Section 18. Creditor may obtain order for payment. A creditor whose claim has been allowed or established by summary determination, action or suit, and has not received payment within six months after the date of the first publication of notice of appointment of personal representative may apply to the court and secure an order directing the personal representative to pay the claim to the extent that funds of the estate are available for such payment.

Section 19. Waiver of statute of limitations. A claim barred by the statute of limitations may not be allowed by the personal representative or by any court except upon the written direction or consent of those distributees and creditors who would be adversely affected by allowance of the claim.

Section 20. Extension of statute of limitations. If a claim is not barred by the statute of limitations on the date of death of the decedent, the claim is not barred by the statute of limitations thereafter until at least one year after the date of death.

Section 21. Repeal of existing statutes. ORS 116.510, 116.515, 116.520, 116.525, 116.530, 116.535, 116.540, 116.545, 116.550, 116.555, 116.560, 116.565, 116.570, 116.575, 116.580, 116.585, 117.030, 117.110, 117.120, 117.130, 117.140, 117.150, 117.160, 117.170, 117.330, 117.340, 117.380 and 117.390 are repealed.

Proposed revised Oregon probate code
CLAIMS
2nd Draft
February 13, 1968

Prepared by

Stanton W. Allison

COMMENTS

Section 1. Presentation of claims; time limitations. This section would replace ORS 116.510 with, however, two differences. First, as noted in the comment on Section 8 of the chapter on Duties and Powers of Personal Representatives, the period for priority of claims has been shortened from six months to four months. Second, while under the present statute claims are barred if not presented before the final account is filed, subsection (3) would bar claims if they are not presented either before the expiration of 12 months from the first publication of notice to creditors, or before the filing of the final account, whichever occurs first. However, a claim presented after the 12-month period but before the final account is filed is not barred if the court finds the late filing was the result of excusable neglect. The purpose of the 12-month provision is to permit a determination of the estate indebtedness and partial distribution within a reasonable time when estates cannot be closed for an extended period.

Section 2. Form and verification of claims. This section is a rewritten version of ORS 116.515. However, subsections (2) and (3) call for necessary information which is not detailed by the present section.

Section 3. Waiver of presentment or defect of form. This section is taken from Section 302, Texas Probate Code, and does not have an exact counterpart in the present code. It

provides protection to the personal representative in making payment on a claim which does not comply with statutory requirements but represents a legal obligation of the estate.

Section 4. Written evidence of claim. This is an edited version of the last sentence of ORS 116.515.

Section 5. Claims on debts due. This section and the sections on secured debts, debts not yet due, and contingent claims would replace ORS 117.120, 117.130 and 117.170. Your committees considered it preferable to treat in separate sections the classes of claims covered by the present section. Section 5 provides, as does ORS 117.170, that the allowance of a due claim shall be in the amount of its value at the date of allowance.

Section 6. Claims on secured debts due. This section follows the general wording of Section 3-511, 1967 draft Uniform Probate Code. It expresses the option of the creditor to either file a claim as a nonsecured debt, with surrender of his security, or to rely on his security without presentation of a claim. On the other hand, if the creditor files a claim but retains his security, he is entitled to the value of the claim less the amount already realized on the security or less the agreed value of the security upon which the value of the security has not been realized.

To provide the personal representative an opportunity to deal with the secured creditor and protect the interests of the estate before a foreclosure of the security is instituted,

subsection (6) requires that foreclosure of the security cannot be commenced until a claim is filed, notice is given the personal representative, and 30 days elapse after the claim is filed, unless the court shortens the time.

Subsection (7) gives the personal representative the right to convey the secured property to the creditor in satisfaction of the claim and in consideration of the release of the security.

Section 7. Debts not due. The effect of this section is the same as ORS 117.170 which states: "A debt not due upon being presented shall, if absolute, be satisfied by the payment of such sum as the court or judge thereof may prescribe by order to be equal to its present value." Since the provision would in effect require a discount of the unmatured claim as of the present value the creditor is for his protection given the right to withdraw the claim after allowance without prejudice to his other remedies on the claim.

Section 8. Contingent and unliquidated claims. This section follows the same format as the preceding sections. The language follows closely Section 424 of the 1963 Iowa Probate Code. It meets the problem of the contingent or unliquidated claim by giving the personal representative and the creditor the option of reaching an understanding on the value of the debt and, upon approval by the court, having the claim paid in the same manner as an absolute or liquidated debt. On the other hand, the court may order the personal representative to withhold sufficient funds to pay the claim if and when the debt

becomes absolute or liquidated. However, there is a limitation of two years on the time the estate may be held open for this purpose. If distribution is made subject to the contingent or unliquidated claim, liability therefor is transferred to the distributees and broad discretion is given the court to secure the payment of the debt when and if it may become payable.

Section 9. Compromise of claims. For a similar provision, see Section 473.427 of the Missouri Probate Code and Section 859.31 of the 1967 Wisconsin Probate Code. No comparable provision is found in ORegon Revised Statutes, but the good sense of this provision to estate administration seems clear. In view of the broad discretion and the responsibility and accountability given the personal representative in the proposed code, court approval is not required when a claim by the estate or against the estate is compromised. It should be borne to mind, however, that the personal representative is authorized to seek the guidance and direction of the court whenever he so desires.

Section 10. Claims of personal representative. This section would replace ORS 116.580 and 116.585. The section requires presentation to the court for allowance or rejection as now provided. Upon application of the personal representative or other interested percon reconsideration may be had at the hearing on the final account.

Section 11. Payment of claims. This section embodies the provisions of ORS 117.030 and 117.110. The language is adapted from Section 3-508 of the 1967 draft Uniform Probate Code. The

present six months' period for priority of claims payment has been changed to four months as commented upon previously. Priority claims may be paid as soon as the four months' period has expired, and the personal representative does not have to wait for court order or account to be filed.

Section 12. Order of payment of debts and expenses. Although this section preserves the priorities as set out in ORS 117.030 and 117.110, except as noted later, the language follows Section 3-506 of the 1967 draft Uniform Probate Code. However, the priority of the expenses of last sickness has been changed to conform to the priority of federal taxes under federal law. Secured debts are covered by Section 6 and are not given priority as now provided by ORS 117.110. The provision for "expenses of last sickness" has been reworded to include not only medical and hospital expenses but expenses for compensation of persons attending the deceased. Subsection (2) is a paraphrase of ORS 117.140.

Section 13. Allowance and disallowance of claims. Subsection (1) embodies a different approach than that now provided by ORS 116.520, in that under the proposed code it is unnecessary to endorse the allowance on the claim. Under the proposed code, unless the personal representative within 60 days after the claim is presented sends a notice of disallowance to the claimant, the claim is automatically allowed. Your committees considered that the present practice of requiring an

endorsement of allowance upon each claim imposes an unnecessary duty on the personal representative. It was recognized that ordinarily the claims filed are examined and allowed and that affirmative action should be required only in the case of claims which had to be disallowed. The present provision for automatic rejection unless action is taken seemed to your committees opposed to usual practice, in that a legitimate claimant should be entitled to assume he would receive payment of his debt in the same manner as if the decedent were alive, unless notified to the contrary.

Subsection (3), however, provides protection to the personal representative by allowing him a rescission of a previous allowance of the claim by reason of error, misinformation or excusable neglect, with notice to the claimant or his attorney.

Section 14. Procedure by claimant on disallowance of claim. This and the following sections covering the procedure on disallowance of a claim would replace ORS 116.525 through 116.550. Under the proposed code the claimant is given the option of either asking a summary hearing or having the matter tried as a separate action or suit. However, the proposed code, in giving the same election as now provided by Oregon Revised Statutes, departs from present practice in that, if a summary hearing is requested, no appeal may be taken from the order on the summary hearing. The claimant is given 60 days to request summary determination or commence a separate action.

Section 15. Separate action or suit required by

personal representative. This section gives the personal representative the right to ask a separate action or suit as is now provided by ORS 116.525. Unless after such a demand a claimant files the action, the claim is considered barred. This is similar to the provision in ORS 116.545.

Section 16. Summary determination procedure. This section is similar in content to ORS 116.530 except that guidelines are provided for the procedure involved. However, as mentioned, it should be noted that no appeal may be taken from the summary determination by the probate court. This provision was put in so that the present duplicate procedure on contesting rejected claims would be eliminated under the proposed code. Please note that the requirement of ORS 116.555 of testimony other than that of the claimant has been eliminated. It was considered preferable not to bind the court in this matter.

Section 17. Interested persons heard in summary determination or in separate action or suit. It is deemed important that specific rights be given to interested persons to appear either in the summary hearing on disallowance of a claim or in the separate action or suit brought for its determination. Reference is made here to the definition of interested person, which includes heirs, devisees, creditors and others having a property right in or claim against the estate and fiduciaries representing interested persons. The general wording of this section is taken from Section 312,

Texas Probate Code. It carries out the same provision for appearance by interested parties as ORS 116.580 and 116.585.

Section 18. Creditor may obtain order for payment. The language is taken from Section 3-508 of the 1967 draft Uniform Probate Code. This useful section should enable allowed or contested claims to be paid after determination without undue delay, and will be of benefit in expediting the closing of estates.

Section 19. Waiver of statute of limitations. This section is a departure from ORS 116.555 which provides for an absolute bar whether the statute is pleaded or not. See Section 411, 1963 Iowa Probate Code, which allows the personal representative discretion whether or not to plead the Statute of Limitations on a claim he believes to be just. Your committees decided that a better approach was to give the right to waive the statute to those distributees and creditors who would be adversely affected if the statute were waived. Situations can be visualized in solvent estates where the beneficiaries would desire that an otherwise just claim be paid and the statute not be invoked.

Section 20. Extension of statute of limitations. Your committees felt the one year extension would be sufficient to allow a creditor to file his claim or to institute administration proceedings. The language is that of Section 412, 1963 Iowa Probate Code, except that the period has been changed from six months to one year. The one year period conforms to ORS 12.190 and 12.220.

Proposed revised Oregon probate code
CLAIMS
2nd Draft
February 13, 1968

Prepared by

Stanton W. Allison

COMPARATIVE SECTION TABLE

Draft Sections	ORS Sections
1	116.510
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8	116.510, 117.170
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10	116.580, 116.585
11	117.030, 117.110
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Prepared by
Legislative Counsel

Proposed revised Oregon Probate Code
CLAIMS
Ist Draft
March 30, 1967

CLAIMS

Section 1. Presentation of claims; time limitations. Except as otherwise provided (insert "by law" or references to appropriate sections):

(1) All claims against the estate of a decedent, other than claims of the personal representative as creditor of the decedent, shall be presented to the personal representative.

(2) Claims presented within four months after the date of the first publication of notice of the appointment of the personal representative shall be paid, as provided in section 12 of this Act, before claims presented after the four-month period.

(3) Claims not presented before the expiration of 12 months after the date of the first publication of notice of the appointment of the personal representative, or before the date the personal representative files his final account, whichever occurs first, are barred from payment; but the claim of a claimant entitled to equitable relief due to peculiar circumstances is not so barred.

References: Advisory Committee Minutes
4/15,16/66 pp. 20 to 24, 34
5/20,21/66 p. 11

Gooding's Draft, 4/1/66 sections 1 and 4

ORS 116.510

Section 2. Revival of action without claims presentation. An action against a decedent commenced before and pending on the date of his death may be revived as provided by law without presentation of a claim against the estate of the decedent.

References: Advisory Committee Minutes
Gooding's Draft, 4/1/66, section 1

Section 3. Form and verification of claims. (1) Each claim presented shall:

(a) Be in writing.

(b) Describe the nature and the amount thereof, if ascertainable.

(c) State the names and addresses of the claimant and his attorney.

(d) Be accompanied by the affidavit of the claimant, or someone on his behalf who has personal knowledge of the fact, to the effect that the amount claimed is justly due, or if not due, when it will or may become due; that no payments have been made thereon which are not credited; and that there is no just offset thereto, to the knowledge of the affiant, except as therein stated.

(2) Any defect of form or any insufficiency of a claim presented may be waived by the personal representative or the court.

References: Advisory Committee Minutes
4/15,16/66 pp. 21 and 22

Section 4. Written evidence of claim. When it appears or is alleged that there is any written evidence of a claim presented to the personal representative, the personal representative may demand that the evidence be produced or its nonproduction accounted for.

References: Advisory Committee Minutes
4/15,16/66 p. 21

Gooding's Draft, 4/1/66, section 2

ORS 116.515 and 126.321

Section 5. Claims not due. A claim on a debt not due, whether or not the creditor holds security therefor, may be presented as a claim on a debt due. If the claim is presented and allowed, allowance shall be in an amount equal to the value of the debt on the date of allowance. Payment on the basis of the amount finally allowed discharges the debt and the security, if any, held by the creditor therefor; but the creditor, after allowance of the claim, may withdraw the claim without prejudice to other remedies.

References: Advisory Committee Minutes
4/15,16/66 pp. 25 to 28, 31 and 32
5/20,21/66 pp. 3 to 8

Gooding's Draft, 4/1/66, sections 6 and 7
Gooding's Draft, 5/20/66, sections 6 and 7

ORS 116.510 and 117.170

Section 6. Secured claims due. (1) A claim on a debt due for which the creditor holds security may be presented as a claim on an unsecured debt due, or the creditor may elect to rely entirely on the security without presentation of the

claim.

(2) If the claim is presented, it shall describe the security. If the security is an encumbrance that is recorded, it is sufficient to describe the encumbrance by date and refer to the volume, page and place of recording.

(3) If the claim is presented and allowed, allowance shall be in the amount of the debt remaining unpaid on the date of allowance.

(4) If the claim is presented and allowed and if the creditor surrenders the security, payment shall be on the basis of the amount finally allowed.

(5) If the claim is presented and allowed, but the creditor does not surrender the security, payment shall be on the basis of:

(a) If the creditor exhausts the security before receiving payment, the amount finally allowed, less the amount realized on exhausting the security; or

(b) If the creditor does not exhaust the security before receiving payment or does not have the right to exhaust the security, the amount finally allowed, less the value of the security determined by agreement or as the court may order.

References: Advisory Committee Minutes
4/15,16/66 pp. 31 to 33
5/20,21/66 pp. 8 and 9

Gooding's Draft, 4/1/66, section 7
Gooding's Draft, 5/20/66, section 7a

Section 7. Contingent and unliquidated claims. (1) A claim on a contingent or unliquidated debt shall be presented as any other claim.

(2) If the debt becomes absolute or liquidated before distribution of the estate, the claim shall be paid in the same manner as absolute or liquidated claims of the same class.

(3) If the debt does not become absolute or liquidated before distribution of the estate, the court shall provide for payment of the claim by any of the following methods:

(a) The creditor and personal representative may determine, by agreement, arbitration or compromise, the value of the debt, and upon approval thereof by the court, the claim may be allowed and paid in the same manner as a claim on an absolute or liquidated debt.

(b) The court may order the personal representative to make distribution of the estate, but to retain sufficient funds to pay the claim if and when the debt becomes absolute or liquidated. The estate proceeding may not be kept open for this purpose more than two years after distribution of the remainder of the estate. If the debt does not become absolute or liquidated within that time, the funds retained, after payment therefrom of any expenses accruing during that time, shall be distributed to the distributees. If the debt thereafter becomes absolute or liquidated, the distributees are liable to the creditor to the extent of the estate

received by them. The court may require the distributees to give bond approved by the court and executed by a surety company qualified to transact surety business in this state, for the satisfaction of their liability to the creditor.

(c) The court may order the personal representative to make distribution of the estate as though the claim did not exist. If the debt thereafter becomes absolute or liquidated, the distributees are liable to the creditor to the extent of the estate received by them. The court may require the distributees to give bond approved by the court and executed by a surety company qualified to transact surety business in this state, for the satisfaction of their liability to the creditor.

(d) Such other method as the court may order.

References: Advisory Committee Minutes
4/15,16/66 pp. 28 to 31
5/20,21/66 pp. 9 and 10

Gooding's Draft, 4/1/66, section 8
Gooding's Draft, 5/20/66, section 8

ORS 116.510 and 117.170

Section 8. Claims of personal representative. If the personal representative is a creditor of the decedent, his claim against the estate of the decedent shall be filed with the clerk of the court within the time required by law for presentment of claims to a personal representatve, and shall be presented to the court for allowance or disallowance. Upon application by the personal representative or any person interested in the estate, the allowance or disallowance of the

claim may be reconsidered by the court on the hearing of the final account of the personal representative.

References: Advisory Committee Minutes
4/15,16/66 pp. 33 to 38
5/20,21/66 pp. 11 to 15

Gooding's Draft, 4/1/66, section 9
Gooding's Draft, 5/20/66, section 9

ORS 116.580 and 116.585

Section 9. Classification of debts and expenses. If the estate of a decedent is or appears to be insufficient to satisfy all debts and expenses, the personal representative shall classify debts and expenses as follows:

(1) Expenses of administration.

(2) Reasonable expenses for the disposition of the remains of the decedent.

(3) Debts and taxes having preference under the laws of the United States.

(4) Expenses of last sickness of the decedent.

(5) Taxes having preference under the laws of this state.

(6) Debts owed employes of the decedent for labor performed within the 90 days immediately preceding the date of death of the decedent.

(7) The claim of the State Public Welfare Commission for the net amount of public assistance, as defined in ORS 411.010, paid to or for the decedent, and the claim of the Oregon State Board of Control for care and maintenance of any decedent who was at a state institution to the extent provided in ORS 179.610 to 179.770.

(8) All other claims against the estate.

References: Advisory Committee Minutes
5/20,21/66 pp. 17 and 18
6/17,18/66 p. 5

Gooding's Draft, 4/1/66, section 11

ORS 117.110, 117.120 and 117.160

Section 10. Funeral and burial expenses. The funeral and disposition of the remains of a decedent may be in a manner and at an expense according to the circumstances and condition of the decedent in life; but only the expense necessary to effect a plain and decent funeral and burial of the decedent may be allowed and paid from the estate of the decedent if the estate is insufficient to satisfy in full all other debts and expenses and any devises and bequests.

References: Advisory Committee Minutes
4/15/66 pp. 24 and 25
6/17,18/66 pp. 4 and 5

Gooding's Draft, 4/1/66, section 5

ORS 117.150

Section 11. Compromise of claims. The personal representative and creditor, with prior or subsequent approval by the court, may compromise a claim against the estate of a decedent, whether the debt is due or not due, absolute or contingent, liquidated or unliquidated.

References: Advisory Committee Minutes
4/15,16/66 pp. 29 and 30
5/20,21/66 pp. 10 and 11

Gooding's Draft, 5/20/66, section 8a

Section 12. Payment of claims and expenses. (1) Claims

against the estate of a decedent presented by action or suit within four months after the date of the first publication of notice of the appointment of the personal representative shall be paid in the order specified in section 9 of this Act. After payment of those claims, claims presented and allowed or establsihed after the four-month period shall be paid in the same order and manner.

(2) If, after the expiration of four months after the date of the first publication of notice of the appointment of the personal representative, the estate is sufficient to satisfy in full all claims, including expenses of administration, funeral and burial of the decedent, the personal representative may pay the claims so allowed or established. If the estate is insufficient to satisfy in full those claims, the personal representative shall report to the court the financial situation of the estate, and the court shall determine the percentage of the claims the estate is sufficient to pay and shall order payment accordingly. If the estate is insufficient to satisfy all claims or expenses of any one class specified in section 9, each claim or expense of that class shall be paid only in proportion to the amount thereof.

References: Advisory Committee Minutes
5/20,21/66 pp. 18 to 20
6/17,18/66 p. 3

Gooding's Draft, 4/1/66, section 12

ORS 117.030

Section 13. Creditor may obtain order for payment. A creditor whose claim against the estate of a decedent is allowed or established by action or suit may apply to the court, not less than six months after the date of first publication of notice of the appointment of the personal representative, for an order directing that payment be made. Upon that application, the court shall order the issuance of a citation to the personal representative requiring him to appear and show cause why the order for payment should not be made. If it appears to the court that the estate has sufficient available funds for payment of the claim, the court shall order payment. If it appears to the court that the estate does not have sufficient available funds and that to await the receipt of funds from other sources would unreasonably delay payment, the court may order the sale of property of the estate sufficient to pay the claim.

References: Advisory Committee Minutes
5/20,21/66 pp. 23 to 25

Gooding's Draft, 4/1/66, section 15

Section 14. Payment of contingent and unliquidated claims by distributees. (1) If a claim on a contingent or unliquidated debt is presented and allowed as provided in section 7, all the estate is distributed and the debt thereafter becomes absolute or liquidated, the creditor has the right to recover on the debt against the distributees whose shares were increased by reason of the fact that the amount

of the claim as finally allowed was not paid before final distribution if an action therefor is commenced within one year after the date the debt becomes absolute or liquidated.

(2) Those distributees are jointly and severally liable, but no distributee is liable for an amount exceeding the amount of the estate received by him.

(3) If more than one distributee is liable to the creditor, the creditor shall make parties to the action all distributees who can be reached by process.

(4) By its judgment in the action, the court shall determine the amount of the liability of each of the defendants as among themselves, but if any distributee is insolvent, unable to pay his proportion or beyond the reach of process, the others, to the extent of their respective liabilities, are liable to the creditor for the full amount of the debt.

(5) If any person liable for the debt fails to pay his just proportion to the creditor, he is liable to indemnify all others who, by reason of that failure, have paid more than their just proportion of the debt. The indemnity may be recovered in the same action or in separate actions.

References: Advisory Committee Minutes
5/20,21/66 pp. 20 to 23

Gooding's Draft, 4/1/66, section 13

Section 15. Claims considered allowed if not disallowed. A claim presented to the personal representative is considered

considered allowed as presented unless the personal representative disallows the claim in whole or in part as provided in section 16 of this Act.

References: Advisory Committee Minutes
7/15,16/66 p. 11

Lundy's Draft, 7/14/66, section 1

ORS 116.520 and 126.136

Section 16. Disallowance of claims by personal representative. (1) If the personal representative disallows a claim in whole or in part, he shall do so within 60 days after the date of presentment of the claim, and, within that 60-day period, shall cause a notice of disallowance to be mailed or delivered to the claimant or his attorney. The personal representative shall file in the estate proceeding the claim as presented and a copy of the notice of disallowance.

(2) A notice of disallowance of a claim shall inform the claimant that the claim has been disallowed in whole or in part and, to the extent disallowed, will be barred unless the claimant proceeds as provided in section 17 of this Act.

References: Advisory Committee Minutes
7/15,16/66 p. 11

Lundy's Draft, 7/14/66, section 2

ORS 116.520

Section 17. Procedure by claimant on disallowance of claim. (1) If the personal representative disallows a claim in whole or in part, the claimant, within 60 days after the date of mailing or delivery of the notice of disallowance

may either:

(a) File in the estate proceedings a request for summary determination of the claim by the probate court, with proof of service of a copy of the request upon the personal representative or his attorney; or

(b) Commence a separate action or suit against the personal representative on the claim in any court of competent jurisdiction. The action or suit shall proceed and be tried as any other action or suit.

(2) If the claimant fails to request a summary determination or commence a separate action or suit as provided in subsection (1) of this section, the claim, to the extent disallowed by the personal representative is barred.

References: Advisory Committee Minutes
7/15,16/66 p. 11

Lundy's Draft, 7/14/66, section 3

ORS 116.525

Section 18. Separate action or suit required by personal representative. If the claimant files a request for summary determination of the claim as provided in section 17 of this Act, the personal representative, within 30 days after the date of service of a copy of the request upon the personal representative or his attorney, may require that the claimant commence a separate action or suit against the personal representative on the claim, which action or suit shall proceed and be tried as any other action or suit. The personal

representative shall serve a notice of that requirement upon the claimant or his attorney. If the claimant fails to commence a separate action or suit within 60 days after the date of service of the notice, the claim, to the extent disallowed by the personal representative is barred.

References: Advisory Committee Minutes
7/15,16/66 p. 11

Lundy's Draft, 7/14/66, section 4

ORS 116.525 and 116.140

Section 19. Summary determination procedure. In a proceeding for summary determination by the probate court of a claim disallowed in whole or in part by the personal representative:

(1) The personal representative shall move or plead to the claim in the same manner as though the claim were a complaint filed in an action or suit.

(2) The court shall hear the matter after notice to the claimant and personal representative. Upon the hearing the court shall determine the claim in a summary manner without a jury, and shall make an order allowing or disallowing the claim in whole or in part.

(3) No appeal may be taken from the order of the court made upon the summary determination.

References: Advisory Committee Minutes
7/15,16/66 pp. 12 and 13

Lundy's Draft, 7/14/66, section 5

ORS 116.530, 116.535, 116.540, 116.545, 116.550, see also 126.331 (2)

Section 20. Interested persons heard in summary determination or separate action or suit. In a proceeding for summary determination by the probate court of a claim disallowed in whole or in part by the personal representative or in a separate action or suit against the personal representative on the claim, any person interested in the estate may be heard on the matter of allowance or disallowance of the claim.

References: Advisory Committee Minutes
7/15,16/66 p. 13

Lundy's Draft, 7/14/66, section 6

Section 21. Proof of claim for court allowance. A claim disallowed in whole or in part by the personal representative may not be allowed by any court except upon some competent and satisfactory evidence other than the testimony of the claimant.

References: Advisory Committee Minutes
7/15,16/66 p. 13

Lundy's Draft, 7/14/66, section 7

ORS 116.555

Section 22. Waiver of statute of limitations. A claim barred by the statute of limitations may not be allowed by the personal representative or any court except upon the written direction of distributees and creditors who would be adversely affected by allowance of the claim.

References: Advisory Committee Minutes
7/15,16/66 p. 13

Lundy's Draft, 7/14/66, section 8

ORS 116.555

Section 23. ORS 12.190 is amended to read:

12.190. Effect of death on limitations. (1) If a person entitled to bring an action dies before the expiration of the time limited for its commencement, and the cause of action survives, an action may be commenced by his personal representative [s] after the expiration of [the] that time, and within one year [from] after his death.

(2) If a person against whom an action may be brought dies before the expiration of the time limited for its commencement [, and the cause of action survives,] an action may be commenced against his personal representative [s] after the expiration of that time, and within one year after his death. [the issuing of letters testamentary or of administration; but no suit or action for collection of any claim against the estate of a decedent may be maintained, when no letters testamentary or of administration shall have been issued before the expiration of six years after the death of the decedent.]

References: Advisory Committee Minutes
7/15,16/66 p. 13

Lundy's Draft, 7/14/66, section 9

ORS 12.190

Section 24. Extension of statute of limitations. If a claim is not barred by the statute of limitations on the date

of death of the decedent, the claim is not barred by the statute of limitations thereafter until at least one year after the date of death.

References: Advisory Committee Minutes
7/15,16/66 p. 14

Lundy's Draft, 7/14/66, section 10

Iowa Code (1963), section 412

Section 25. Claim barred when personal representative appointed. A claim against the estate of a decedent is barred, and an action or suit on the claim may not be commenced, after the expiration of six years after the date of death of the decedent if a personal representative is appointed and qualifies within the six-year period.

References: Advisory Committee Minutes
7/15,16/66 p. 14

Lundy's Draft, 7/14/66, section 11

Section 26. ORS 13.080 is amended to read:

13.080. Nonabatement of action or suit by death, disability or transfer; continuing proceedings. (1) No action or suit shall abate by the death or disability of a party, or by the transfer of any interest therein, if the cause of action survives or continues.

(2) In case of the [death or] disability of a party, the court may, at any time within one year thereafter, on motion, allow the action or suit to be continued by or against his

[personal] legal representative [s] or successors in interest.

(3) In case of the death of a party, the court shall, on motion, allow the action or suit to be continued:

(a) By his personal representative or successors in interest at any time within one year after his death.

(b) Against his personal representative or successors in interest at any time within four months after the date of the first publication of notice of the appointment of the personal representative, but not more than one year after his death.

References: Advisory Committee Minutes
7/15,16/66 pp. 19 to 21

Lundy's Draft, 7/14/66, section 12

ORS 13.080

Section 27. Continuation of action or suit without claim presentation. An action or suit against a decedent commenced before and pending on the date of his death may be continued as provided in paragraph (b) of subsection (3) of ORS 13.080 without presentation of a claim against the estate of the decedent.

References: Advisory Committee Minutes
7/15,16/66 p. 21

Lundy's Draft, 7/14/66, section 13

Section 28. Enforcement of encumbrances. Sections (insert references to appropriate sections) do not affect or prevent any action, suit or proceeding to enforce any encumbrance upon property of the estate.

References: Advisory Committee Minutes
7/15,16/66 p. 21
Lundy's Draft, 7/14/66, section 14

Section 29. Repeal of existing statutes. ORS 116.175, 116.505, 116.510, 116.515, 116.520, 116.525, 116.530, 116.535, 116.540, 116.545, 116.550, 116.555, 116.560, 116.565, 116.570, 116.575, 116.580, 116.585, 116.590, 116.595, 117.110, 117.120, 117.130, 117.140, 117.150, 117.160, 117.170, 117.310, 117.315, 117.320, 117.330, 117.340, 117.350, 117.361, 117.370, 117.380 and 117.390 are repealed.

Proposed revised Oregon probate code
DOWER AND CURTESY ABOLISHED
3rd Draft
October 18, 1967

Prepared by

Stanton Allison

DOWER AND CURTESY ABOLISHED

Section 1. Dower and curtesy abolished. 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 code shall continue and be governed by the law in effect immediately before that date.

Section 2. ORS 91.020 is amended to read:

91.020. Tenancies classified. 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 3. ORS 91.030 is amended to read:

91.030. Tenancy by entirety or for life. 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 4. ORS 93.240 is amended to read:

93.240. Rights of sellers to deferred or unpaid balance of purchase price where two or more persons join as sellers in contract of sale of real property. (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 real property.]

[(3)] (2) 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] the 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.]

(3) 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)] (2) of this section.

Section 5. ORS 94.330 is amended to read:

94.330. Registration of transfer or mortgage when interests are outstanding. 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 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 6. ORS 105.050 is amended to read:

105.050. Cotenant shall prove ouster. 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 7. ORS 105.340 is amended to read:

105.340. Provision for future rights or interests. 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] in any of the property sold, 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 8. ORS 107.100 is amended to read:

107.100. Provisions of decree of divorce or annulment. (1) Whenever a marriage is declared void or dissolved, the court has power further to decree as follows:

(Paragraphs (a) to (g), inclusive, omitted here)

[(h) for the extinguishment and barring of dower and curtesy.]

(Remainder of ORS 107.100 omitted here)

Section 9. ORS 107.280 is amended to read:

107.280. Decreeing disposition of property. 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 in 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,] the rights of the surviving spouse and children as provided in ORS _____ are extinguished and barred.

Section 10. Statute of limitation for recovery of dower or curtesy. 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.

Section 11. ORS 118.010 is amended to read:

118.010. Property, transfers and interests subject to tax. (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 or non-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.

(Remainder of ORS 118.010 omitted here)

Section 12. 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.

Proposed revised Oregon probate code
ABOLISHMENT OF DOWER AND CURTESY
3rd Draft
November 7, 1967

Prepared by
Stanton W. Allison

COMMENTS

The proposed section would abolish dower and curtesy, including inchoate dower and curtesy, except with respect to the surviving spouse of a person who may have died prior to the effective date of this code. With respect to the rights of dower and curtesy of the surviving spouses of those landowners who may have predeceased the effective date of this code, all the provisions of the present law will continue in effect.

The proposed code would substitute for present rights of dower and curtesy the right of a spouse of a intestate who died leaving children to inherit not only an undivided one-half of the personalty, as at present, but also an undivided one-half of the real property. If the decedent died testate the proposed code would give an election against the will to the surviving spouse for an undivided one-quarter of the real estate as well as of the personal property of the estate. Thus, in either situation, the proposed code would give the surviving spouse a fee interest in real property in lieu of the present dower or curtesy interest.

The common law right of dower and curtesy has been modified or abolished in many states. In the opinion of your committees, present dower and curtesy laws have in practice become of less and less utility and value. Property

acquired by a married couple is usually taken as a tenancy by the entirety, except when title of valuable property is taken as a tenancy in common for tax purposes. Proceedings for admeasurement and assignment of consummate dower and curtesy are becoming rarities in our practice. Yet, in the absence of a proceeding for admeasurement and assignment of the consummate dower or curtesy interest, the value of this interest to the spouse is illusory. I quote Section 111 of Volume I of Oregon Probate Law and Practice, Jaureguy and Love:

> Upon the death of the husband what was theretofore dower inchoate is called dower consummate, but it is not yet an estate in land. It is only a chose in action, a right to have dower as assigned. . .
>
> A dictum in McDermid v. Bourhill, that the right of dower is "an estate which vests in the wife immediately on the death of her husband" is accordingly not a correct statement of Oregon law. (Citations omitted)
>
> At this stage, and prior to assignment or admeasurement, the widow has no right to any particular tract, nor to any portion of any particular tract, nor is she a tenant in common with the heirs.

The proposed code does not in any respect modify the law with respect to dower or curtesy consummate. Inchoate interests are mere expectancies or possibilities and legislation affecting or abolishing them does not impair any property right or obligation of any contract. This is

well established in other jurisdictions and it is the holding of our own Supreme Court in United States National Bank vs. Daniels (1947), 188 Or. 356, 177 P. (2d) 246.

The comment in the 1967 draft of the Uniform Probate Code states:

> Dower encumbers titles and provides inadequate protection for widows in a society which classifies most wealth as personal property. Hence, the states have tended to substitute a forced share in the whole estate for dower and the widower's comparable common law right of curtesy.

Your committees have taken cognizance of the trend toward the abolition of common law estates of dower and curtesy and consider that the proposed new code is in keeping with the trend away from an agrarian economy. The proposed change would repeal 41 sections of the present code.

In your committees' opinion, by giving the surviving spouse an undivided fee title to the real property of the estate the new code makes a more appropriate and useful provision for the surviving spouse than is given under present law.

The sections following amend existing ORS sections to eliminate reference to dower and curtesy.

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 10. Statute of limitation for recovery of dower or curtesy. 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.

Section 11. ORS 118.010 is amended to read:

118.010. Property, transfers and interests subject to tax. (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 or nonexercise 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

Proposed revised Oregon probate code
EFFECT OF HOMICIDE ON INTESTATE SUCCESSION, WILLS, JOINT ASSETS, LIFE INSURANCE AND BENEFICIARY DESIGNATIONS
2nd Draft
August 25, 1967

Prepared by
Stanton W. Allison

EFFECT OF HOMICIDE ON INTESTATE SUCCESSION, WILLS, JOINT ASSETS, LIFE INSURANCE AND BENEFICIARY DESIGNATIONS

Section 1. Definitions. As used in this chapter:

(1) Slayer is a person who with felonious intent takes or procures the taking of the life of another.

(2) Decedent is the person whose life is taken by the slayer.

Section 2. Slayer deemed to predecease decendent. Property which would have passed from the decedent or his estate to the slayer under the statutes od descent and distribution, by will, or by trust shall pass and be vested as if the slayer had predeceased the decedent.

Section 3. Tenancy by the entirety. If the slayer and the decedent held property as tenants by the entirety or with a right of survivorship, upon the death of decedent an undivided one-half interest shall remain in the slayer for his lifetime and, subject thereto, the property shall vest in the heirs or devisees of the decedent.

Section 4. Vesting of property held jointly with slayer. If the slayer, the decedent and another or others were joint owners of property with a right of survivorship the slayer shall not take as a survivor as against the other surviving owner or owners.

Section 5. Reversions, vested remainders, contingent remainders, and future interests.

(1) Property in which the slayer holds a reversion or vested remainder subject to an estate for the lifetime of decedent shall pass to the heirs or devisees of the decedent for a period of time equal to the normal life expectancy of a person of the sex and age of the decedent at the time of his death; if the particular estate is held by a third person for the lifetime of the decedent it shall continue in such person for a period of time equal to the normal life expectancy of a person of the sex and age of the decedent at the time of his death.

(2) As to a contingent remainder or executory or other future interest held by the slayer subject to become vested in him or increased in any way for him upon the condition of the death of the decedent;

(a) If the interest would not have become vested or increased if he had predeceased the decedent, he shall be deemed to have so predeceased the decedent;

(b) In any case, the interest shall not be so vested or increased during a period of time equal to the normal life expectancy of a person of the sex and age of the decedent at the time of his death.

Section 6. Property appointed -- powers of revocation or appointment.

(1) Property appointed by the will of the decedent to or for

the benefit of the slayer shall be distributed as if the slayer had predeceased the decedent.

(2) Property held either presently or in remainder by the slayer, subject to be divested by the exercise by the decedent of a power of revocation or a general power of appointment, shall pass to the heirs or devisees of the decedent; and property so held by the slayer, subject to be divested by the exercise by the decedent of a power of appointment to a particular person or persons, or to a class of persons, shall pass to such person or persons or in equal shares to the members of such class of persons to the exclusion of the slayer.

Section 7. Proceeds of insurance on the life of decedent.

(1) Proceeds payable to or for the benefit of the slayer as beneficiary or assignee of the decedent of the following interests pass to the secondary beneficiary, or if there is no secondary beneficiary, to the personal representative of the decedent:

(a) Policy or certificate of insurance.

(b) Certificate of membership in any benevolent association or organization on the life of decedent.

(c) Rights of decedent as survivor of a joint life policy.

(d) Proceeds under any pension, profit-sharing or other plan.

Section 8. Proceeds of insurance on the life of the slayer. If the decedent is beneficiary or assignee of any policy or

certificate of insurance on the life of the slayer, the proceeds shall be paid to the personal representative of the decedent unless:

(1) The policy or certificate names some person other than the slayer or his personal representative as secondary beneficiary.

(2) The slayer, by naming a new beneficiary, or assignee, performs an act which would have deprived the decedent of his interest if the decedent had been living.

Section 9. Payment by insurance company, bank, etc., no additional liability. Any insurance company making payment according to the terms of its policy, or any bank, trustee, or other person performing an obligation to the slayer shall not be subjected to additional liability because of the provisions of this chapter if the payment or performance is made without written notice by a claimant of a claim arising from the provisions of this chapter. Upon receipt of written notice the person to whom it is directed may withhold any disposition of the property pending determination of his duties.

Section 10. Rights of persons without notice dealing with slayer. The provisions of this chapter shall not affect the rights of any persons, who for value and without notice purchase or agree to purchase property that the slayer would have acquired except for the provisions of this chapter, but all proceeds received by the slayer from the sale shall be held by him in trust

Effect of Homicide on Intestate Succession,
Wills, Joint Assets, Life Insurance and
Beneficiary Designations
2nd Draft, 8/17/67
Page 5 CORRECTION SHEET 3 8/95 as found by researcher

Please note the following:

Under References: Advisory Committee Minutes: 11/17, 18/65 pp. 1-5 & app.

SHOULD BE

11/19, 20/65 pp. 1-5 & app (pro. #7)

for the persons entitled to the property as provided in this chapter. The slayer shall be liable for any portion of the proceeds of the sale that he may have expended and for the difference, if any, between the amount received from the sale and the actual value of the property.

Section 11. Record of conviction as evidence. The record of the conviction of a slayer for having participated in the death of decedent shall be admissible in evidence in any action arising under the provisions of this chapter.

Section 12. Repeal of existing statutes. ORS 111.060 is repealed.

References: Advisory Committee Minutes:
8/13,14/65, pp. 13 and 14
9/18/65, pp. 2 to 5
11/17,18/65, pp. 1 to 5 and Appendix (Proposal #7)
5/19,20/67 pp. 12 to 14

ORS 111.060

Proposed revised Oregon probate code
EFFECT OF HOMICIDE ON INTESTATE SUCCESSION, WILLS, JOINT ASSETS, LIFE INSURANCE AND BENEFICIARY DESIGNATIONS
2nd Draft
August 17, 1967

Prepared by
Stanton W. Allison

COMMENTS

The section title used above is taken from Section 2-803 of the 1967 draft, Uniform Probate Code. For comparable legislation, see the 1965 Washington Probate Code, Chapter 11.84, and the 1963 Iowa Probate Code, Sections 535, 536 and 537.

This section would replace and supersede ORS 111.060.

Oregon badly needs a revision of the law in this area. See I Jaureguy and Love, Oregon Probate Law and Practice, Section 23, p. 36, for some of the problems arising under Oregon statutes. In light of this inadequate statute, and in view of the fact that the common law doctrines of the restatement, restitution, have not yet been generally accepted by the Oregon court, a complete statutory solution would seem to be desirable. As will be noted in the additional separate comments, the general language and format of the following is taken from the 1965 Washington Probate Code.

Section 1. Definitions. The general wording of this section is taken from Section 11.84.010 of the 1965 Washington Probate Code. However, the language has been changed to read: "a person who with felonious intent takes or procures the taking of the life of another." The present language of ORS 111.060 is: "Person who feloniously takes or causes or procures another so to take the life of another." Although "feloniously" is used

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in both the 1967 draft of the Uniform Probate Code and the Iowa Probate Code referred to, this word is criticized in the section of Oregon Probate Law and Practice above referred to. Your committees considered it preferable to use the phrase "with felonious intent." since this would exclude killing by involuntary manslaughter or gross negligence.

(Draftsman's Note: Your draftsman, after experiencing difficulty in rephrasing Section 2 of the first draft, has decided to omit this section entirely. It is far beyond the scope or content of the proposed section to prescribe a general rule that "no slayer shall acquire any property or receive any benefit as the result of the death of the decedent." The subject matter of this chapter must be limited to the provisions thereof. Your draftsman has concluded that the omitted section actually adds nothing to the content of this chapter. No such general provision in either the Uniform Code or the Iowa Code.)

Section 2. Slayer deemed to predecease decedent. Section 2 achieves the result spelled out in ORS 111.060, subsection (1). The determination of these rights is more easily arrived at by the language of the proposed new section. Also note that the proposed new section includes property passing by trust agreement.

Section 3. Tenancy by the entirety. The problem and the background on the proposed solution contained in this section is discussed in the scholarly memorandum by Otto J. Frohnmayer, the principal drafter of this chapter, as follows:

We note the problems which have arisen with tenancies by the entirety which have been held to be not within the intent of the statute, since it was held to deal only with interests which are deemed to pass upon death. In Wenker v. Landon, 161 Or. 265, 88 P 2d 971 (1939) it was held that an estate passing by right of survivorship does not in strict legal theory pass through the estate of the decedent. Hargrove v. Taylor, 236 Or. 451, 389 P. 2d 36 (1964) overruled Wenker v. Landon, but a majority of the court still held that tenancies by the entirety were not within the meaning of the present Oregon statute on felonious killing, ORS 111.060. A constructive trust solution was utilized in the latter case, since Justice O'Connell held that the failure of the legislature to extend the statute to cases where property is held by the entirety was not to be regarded as an indication of a legislative intent to permit a spouse to profit by his own felonious conduct.

Reference must be had, in any legislation on this subject, to Article I, section 25 of the Oregon Constitution, which states that "no conviction shall work corruption of blood, or forfeiture of estate." The desirable policy would seem to be that heirs should be precluded from taking through a murder, but that they should not be prohibited from taking in their own right as next of kin.

The draft submitted for consideration follows very closely the suggested statute presented in Wade "Acquisition of property by willfully killing another -- a statutory solution", 49 Harv. L. Rev. 715 (1936). The new Washington probate code chapter 11.84 also follows this statutory solution practically verbatim.

Section 4. Vesting of property held jointly with slayer. Section 4 suggests a solution to the problem of a joint interest held by three or more persons including the slayer and the decedent victim under joint tenancy or survivorship. If there are other survivorship tenants who survive the decedent victim beside

the slayer, the survivorship title will be vested in the other surviving joint tenants to the exclusion of the slayer. This is a provision and solution which does not appear in the present ORS section.

Section 5. Reversions, vested remainders, contingent remainders, and future interests. The general outline of Section 5 is taken from the 1965 Washington Probate Code referred to. These provisions covering an area which is not touched by the present ORS section. The general content and effect of the section would be to provide that where the slayer has a reversion or vested remainder, contingent remainder, or other executory future interest, the enjoyment of this interest will be postponed for a period equal to the normal life expectancy of the decedent if he hadn't been killed by the slayer.

Section 6. Property appointed - powers of revocation or appointment. This section is taken from Section 11.84.090 of the 1965 Washington Probate Code. It covers material not touched upon in ORS 111.060. The general content of the section is clear in preventing the slayer from benefiting from a power of appointment by the death of the decedent victim.

Section 7. Proceeds of insurance on the life of decedent. This section is a general paraphrase of paragraph 2 of ORS 111.060. It should be noted, however, that the proposed chapter

does not have any provisions similar to the present ORS language covering disability policies. This particular area was seriously considered by the joint committees, who decided first that problems of profiting by a disablement of a person did not properly belong in a felonious death statute. It was then reported by the vice-chairman that he had questioned insurance people and had been told that none of those questioned had ever heard of disability insurance being payable to a beneficiary other than the disabled, and therefore reference to such insurance is omitted from the proposed chapter. It should be also noted, however, that reference to profit-sharing, pension plans, and employe benefit provisions have been included within the coverage of the proposed chapter.

Section 8. Proceeds of insurance on the life of the slayer. This is an area not touched upon by the present ORS legislation. The language is taken from Section 11.84.100 of the 1965 Washington Probate Code. The effect is to prevent the slayer from benefitting by the death of the decedent where decedent was the beneficiary of insurance on the life of the slayer.

Section 9. Payment by insurance company, bank, etc., no additional liability. Section 9 makes provision for the protection of people making payment in areas covered by the proposed chapter where payment is made without written notice of claim

by someone who would be otherwise entitled under the terms of this chapter. The provision is similar to the second sentence of ORS 111.060(2).

Section 10. Rights of persons without notice dealing with slayer. Section 10 is taken verbatim from Section 11.84.120 of the 1965 Washington Probate Code.

Section 11. Record of conviction as evidence. This section is similar in content to Section 11.84.130 of the 1965 Washington Code. The joint committees engaged in extended discussion on the approach to this problem of requiring a criminal conviction. It was brought out that there are situations where after a criminal conviction of a felony death the slayer sues an insurance company and convinces the jury that he did not feloniously slay the other party. Another reason for not requiring a criminal felony conviction is that determination of rights under this chapter which might otherwise be arrived at without contest might be delayed for years if the determination were made contingent on a felony conviction: (e.g. first degree murder conviction being appealed to the U.S. Supreme Court.) The consensus was that it was proper to use the conviction record as admissible evidence.

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
CONSEQUENCES TO SLAYER FOR FELONIOUSLY
CAUSING DEATH OF ANOTHER
1st Draft
March 23, 1967

CONSEQUENCES TO SLAYER FOR FELONIOUSLY CAUSING DEATH OF ANOTHER

Section 1. Definitions. As used in this chapter:

(1) Slayer is a person who with felonious intent takes or procures the taking of the life of another.

Note: Would it be better to set out, by section number, the crimes included in those with "felonious intent?" e.g. Any person convicted under ORS _____ is a slayer.

(2) Decedent is any person whose life is taken by a slayer.

Section 2. Slayer not to benefit from death of decedent, generally. No slayer shall acquire any property or receive any benefit as the result of the death of the decedent and the property passes as provided in this chapter.

Section 3. Slayer regarded as having predeceased decedent. The slayer is regarded as having predeceased decedent as to property that would have passed from the decedent or his estate to slayer because of:

(1) Statutes of descent and distribution.

(2) Statutory right as the surviving spouse of the decedent.

(3) The will of the decedent or by trust.

(4) Property appointed by the will of the decedent.

(5) A contingent remainder or executory or other future interest held by the slayer, subject to become vested in him or increased in any way for him upon condition of the death of the decedent;

(a) If the interest would not have become vested or increased if the slayer had predeceased the decedent.

(b) In any case, the interest does not vest or increase during the period of time equal to the normal life expectancy of a person of the sex and age of the decedent at the time of his death.

Section 4. Other property. (1) Proceeds payable to or for the benefit of the slayer as beneficiary or assignee of the decedent of the following interests pass to the secondary beneficiary, or if there is no secondary beneficiary, to the personal representative of the decedent:

(a) Policy or certificate of insurance.

(b) Certificate of membership ir any benevolent association or organization on the life of decedent.

(c) Rights of decedent as survivor of a joint life policy.

(d) Proceeds under any pension, profit-sharing or other plan.

(2) The slayer is entitled to an undivided one-half interest for his lifetime in property held by the slayer and decedent as tenants by the entirety or with a right of survivorship, and subject thereto the property so held passes to the heirs, devisees and legatees of the decedent.

(3) The slayer, if one of joint owners with decedent, decedent and another or others with the right of survivorship, takes nothing as survivor among the owners because of the death of the decedent.

(4) Property in which the slayer holds a reversion or vested remainder subject to an estate in the decedent for

his lifetime passes to the heirs, devisees and legatees of the decedent for a period of time equal to the normal life expectancy of a person of the decedent's sex and age at the time of his death.

(5) Property held by a third person for the lifetime of the decedent continues in that person for a period of time equal to the normal life expectancy of a person of the sex and age of the decedent at the time of death.

(6) Property held either presently or in remainder by the slayer, subject to divestment by a power exercisable by decedent passes:

(a) To the heirs, devisees or legatees of the decedent if it was property subject to a power of revocation or a general power of appointment.

(b) To the person or persons or to a class of persons if the power of appointment was limited or only exercisable in that manner.

(c) In any case the property or any benefit therein does not pass to the slayer.

(7) If the decedent is beneficiary or assignee of any policy or certificate of insurance on the life of the slayer, the proceeds shall be paid to the personal representative of the decedent unless:

(a) The policy or certificate names some person other than the slayer or his personal representative as secondary beneficiary.

(b) The slayer, by naming a new beneficiary, or assignee, performs an act which would have deprived the decedent of his interest if the decedent had been living.

Section 5. Payment by insurance company, bank, etc., no additional liability. Any insurance company making payment according to the terms of its policy, or any bank, trustee, or other person performing an obligation to the slayer shall not be subjected to additional liability because of the provisions of this chapter if the payment or performance is made without written notice by a claimant of a claim arising from the provisions of this chapter. Upon receipt of written notice the person to whom it is directed may withhold any disposition of the property pending determination of his duties.

Section 6. Rights of persons without notice dealing with slayer. The provisions of this chapter shall not affect the rights of any persons, who for value and without notice, purchase or agree to purchase property that the slayer would have acquired except for the provisions of this chapter. All proceeds received by the slayer from the sale shall be held by him in trust for the persons entitled to the property as provided in this chapter. The slayer shall be liable for any portion of the proceeds of the sale that he may have expended and for the difference, if any, between the amount received from the sale and the actual value of the property.

Section 7. Record of conviction as evidence against claimant of property. The record of the conviction of a slayer for having participated in the death of decedent shall be admitted in evidence in any action arising under the provisions of this chapter.

Section 8. Repeal of existing statutes. ORS 111.060 is repealed.

References:

Minutes

8/13, 14/65, pp. 13 and 14

9/18/65, pp. 2 to 5

11/19, 20/65, pp. 1 to 5;

and appendix (Proposal # 7)

ORS 111.060

Proposed revised Oregon probate code
ELECTIVE SHARE OF SURVIVING SPOUSE
Revised 3rd Draft
December 1, 1967

Prepared by
Stanton Allison and
C. Richardson

Section 1. Surviving spouse's election to take against will. (1) If decedent dies testate, the surviving spouse of a decedent domiciled in this state at the time of his death has a right to elect to take the share provided by this section. The elective share consists of one-fourth of the value of the net estate of the decedent, reduced by the value of the following property given to the spouse under the decedent's will:

(a) Property given outright;

(b) The present value of any legal life estates if capable of valuation with reasonable certainty;

(c) The present value of the spouse's right to income or an annuity, or a right of withdrawal, from any property transferred in trust by the will which is capable of valuation with reasonable certainty without regard to the powers which are forfeited under subsection (2).

(2) Except as to property applied under subsection (1) to reduce the elective share, an election to take under this section forfeits any other right to take under the will and under the law of intestate succession. If the will would otherwise create a power of appointment in the surviving spouse, such spouse by electing to take under this section retains the power only if it is not a general power of appointment as defined in ORS 118.010(5) and the testator has

not provided otherwise, but the spouse forfeits any general power of appointment. A power to pay more than the income or annuity or withdrawals, the value of which reduced the elective share under paragraph (c) of subsection (1) of this section, or to apply additional principal or income in behalf of the electing spouse, cannot be exercised in favor of the electing spouse.

(3) The right to elect may be barred under ORS_____ or may be denied or the share reduced under ORS_____.

Section 2. How elective share barred. (1) The right of the surviving spouse to elect is subject to bar by the terms of a written agreement signed by both spouses. Such an agreement may be entered into before or after marriage.

(2) The surviving spouse is barred if he receives at least one-half of the total of the following property, such property to be reduced by the amount of the federal estate tax payable by reason of such property: the net estate, joint annuities furnished by the decedent, proceeds of insurance on decedent's life, whether or not he had any of the incidents of ownership at his death, transfers within three years of death to the extent to which decedent did not receive consideration in money or money's worth, transfers by decedent during lifetime as to which he had retained power, alone or in conjunction with any person, to alter, amend, revoke or terminate such transfer or to designate the beneficiary, payments from decedent's employer or from a plan created by the employer or under a contract between the decedent and his employer (but

excluding workmen's compensation and social security payments), property appointed by the decedent by will or by deed executed within three years of his death (whether the power is general or special) but only if the property is effectively appointed in favor of the surviving spouse, and property in the joint names of the decedent and one or more other persons except such proportion as is attributable to consideration furnished by persons other than the decedent. For this purpose the surviving spouse is deemed to receive any property as to which he is given all the income and a general power to appoint the principal; the spouse is deemed to receive life insurance proceeds settled by decedent on option if the spouse is entitled to the interest and has a general power to appoint the proceeds or to withdraw proceeds, or if the spouse is entitled to an annuity for life or instalments of the entire principal and interest for any period equal to or less than normal life expectancy of the spouse. As used in this section, "property in joint names" means all property held or owned under any form of ownership with right of survivorship, including cotenancy with remainder to the survivor, stocks, bonds or bank accounts in the name of two or more persons payable to the survivor, U. S. government bonds either in co-ownership form or payable on death to a designated person, and shares in credit unions or building and loan associations payable on death to a designated person or in joint form.

Section 3. 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 elective 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 of the marriage, whether the marriage was a first or subsequent 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, length and cause of the separation, and any other relevant circumstances.

Section 4. What constitutes election under ORS _____. The surviving spouse is deemed to have elected to take under the will unless, within ninety days after the admission of the will to probate, he serves on the personal representative or his attorney and files a statement that he elects to take the interest mentioned in ORS _____ instead of under the will. The spouse may bar any right to take under this chapter by filing a writing, signed by the spouse, electing to take under the will.

Section 5. Election by guardian of spouse. An election

may be filed on behalf of the spouse by a guardian of an incompetent spouse. A guardian may elect against the will only if additional assets are needed for the reasonable support of the spouse, taking into account the probable needs of the spouse, the provisions of the will, any nonprobate property arrangements made by the decedent for the support of the spouse, and any other assets (whether or not owned by the spouse) available for such support. Such election shall be subject to the approval of the court, with or without notice to other interested parties.

Section 6. Payment of elective share. Estate property shall be applied in satisfaction of the elective share in the following order, unless the will directs otherwise:

(1) Any intestate property;

(2) After the intestate property is exhausted, each devisee must contribute ratably to the elective share out of the portion of the estate passing to him under the will, except that in abating the interests of the devisees the character of the testamentary plan adopted by the testator shall be preserved so far as possible. However, persons to whom the will gives tangible personal property not used in trade, agriculture or other business are not required to contribute from such property unless the particular gift forms a substantial part of the total estate and the court specifically orders contribution because of such gift.

Section 7. Repeal of existing statutes. ORS 113.050, 113.060 and 126.300 are repealed.

Proposed revised Oregon probate code
ELECTIVE SHARE OF SURVIVING SPOUSE
Revised 3rd Draft
December 22, 1967

Prepared by
Stanton Allison and
Campbell Richardson

COMMENTS

Introductory. The fundamental change in the proposed chapter from ORS 113.050 and 113.060 is that, to accord with the proposed abolition of dower and curtesy and the policy of the proposed code to make no distinction between realty and personalty, the election is not limited to personalty, as now provided, but is granted as to an undivided one-quarter interest in both realty and personalty. Secondly, provision is made for consideration of nonprobate assets and income, and the elective share is barred if the spouse receives at least one-half the total of the estate property and nonprobate assets. The proposed chapter also indicates the manner in which the estate property should be applied to the elective share and the method of contribution by the beneficiaries. The language of the proposed chapter follows very closely Section 861 of the 1967 Wisconsin Probate Code. Detailed comments follow.

Section 1. Surviving spouse's election to take against will. Section 1 gives the right to elect an undivided one-quarter interest in the reduced net estate. It will correct present inequities by allowing the spouse to accept property given by will but reduces the undivided one-quarter interest by the amount so given by the will. This provision will therefore preserve the testamentary disposition in favor of the spouse without any increase in the net cost to the estate. On the other hand, the section spells out that by election the

spouse forfeits benefits not specifically enumerated as reducing the elective share, and forfeits general powers of appointment and rights to invasion of trust principal.

Net estate is elsewhere defined as the real and personal property of a decedent, except property used for the support of his surviving spouse and children and for the payment of obligations of the estate. Thus, the electing spouse would be entitled to provision made by the court for support, in addition to the elective share.

We quote the comment on the comparable Wisconsin Code Section 861.05. We have made the indicated changes and deletions to make the comment applicable to our situation.

> "An election against a will by a widow under existing law often results in distortion of the estate plan; dower gives her a <u>one-half</u> interest in each parcel of realty; the elective share in personalty passes to her outright free of any trust set up by the will. This section preserves the testamentary scheme to a large degree by reducing the elective share of one-quarter by interests passing to the spouse under the will if those interests are capable of valuation. Thus if she is given a life interest under a trust, and that interest can be valued on the basis of life expectancy tables, an election would not destroy the trust; but the wife could elect only the difference between the value of her interest under the trust and her <u>one-quarter</u> elective share.
>
> "An election to take against the will forfeits all rights in the estate (except those preserved in reducing the elective share); this includes a right to share in intestate property....It should, however, be noted that where the spouse takes under the will,...the Intestate Succession chapter will give the spouse a share in intestate property;....In the latter situation a testator would normally want the spouse to share in intestate property. Where the spouse elects against the will, however, the spouse is already taking a share of

intestate property since that is included in the net probate estate on which the share is computed; moreover, under Section 6 the intestate property is used to satisfy the elective share.

"The impact of election on powers of appointment and on powers of a trustee deserves special treatment. Sub. (2) sets forth the rules. The existing law is that an electing spouse retains powers of appointment created by the will, on the basis of the concept of a power as not an interest in property....This subsection provides for forfeiture of general and unclassified powers of appointment created in the spouse by the will. If the will creates a special power...such as a 'power to appoint among our issue,' the spouse may retain such a power unless the will itself provides for forfeiture by an election; the reason is that such a power is primarily intended to benefit the class among whom appointment may be made, to allow for flexibility, rather than to benefit the donee. Powers in a trustee which may confer direct benefits on the spouse, such as a power to invade principal to meet the needs of the spouse, will likewise normally be nullified by an election against the will. The theory underlying this section is that the spouse may not elect against the will and still derive benefits under it, except as those benefits are used to reduce the elective share.

"Sub. (3) ties this section with the ensuing sections, which may in appropriate cases operate to restrict or nullify the right to elect."

Section 2. How elective share barred. Subsection (1) permits the right to elect to be barred by written agreement entered into either before or after marriage. ORS 108.140 provides that pre-nuptial agreements are effective as to property rights between the spouses. It is intended that the proposed subsection would change Oregon law by making the right of election subject to bar not only by a pre-nuptial but by a post-nuptial agreement.

Subsection (2), which would bar election if the spouse

receives at least one-half of the total of probate and non-probate property, would correct what has in some instances caused serious inequities or distortion of careful estate plans. Frequently, a substantial part of a decedent's estate passes "outside" probate. Under our present law, a widow can accept substantial provisions made for her by life insurance or inter vivos trusts and inter vivos transfers of property and still have the unimpaired election to receive an undivided one-quarter of the estate personal property. We quote from the comment to the Wisconsin Section 861.07.

> "This section replaces obsolete concepts of jointure... and is generally new. It is designed to facilitate advance family planning. Sub. (1) provides for barring the surviving spouse by simple written agreement. In order to prevent overreaching by a dominant spouse, consideration would still be necessary;....It applies to both antenuptial and postnuptial agreements. Such an agreement could, of course, be set aside by the court if the surviving spouse lacked capacity or was subject to undue influence or if the agreement was the product of overreaching or misrepresentation. No attempt has been made to embody such tests in the statute, but they are left to court determination as is true of a challenge on such grounds to any voluntary transfer or agreement. The statute reflects the present judicial policy of favorable treatment of agreements settling property rights between husband and wife, particularly in cases involving second marriages.
>
> "Sub. (2) is a completely new approach. The existing law allows a surviving widow to elect against a will and receive her statutory rights in the probate estate even though the deceased husband gave her the majority of his assets through nonprobate arrangements, such as life insurance payable to her or joint ownership passing to her by survivorship. This is obviously unfair, and this statutory provision bars the surviving spouse where he or she has received a majority of both probate and nonprobate assets considered together. In addition, the statute recognizes that such property may be tied up in an arrangement which would qualify for the martial

deduction, rather than passing outright, and still constitute a bar."

Section 3. Denial of election or reduction of share when decedent and surviving spouse are living apart. The last sentence of ORS 107.280 which covers a decree of permanent or unlimited separation from bed and board, now reads:

> "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."

The proposed chapter on abolishment of dower and curtesy amends ORS 107.280 to delete this sentence. The deleted material permitting the court in a separation decree to bar the spouse's election is replaced by the proposed section. This section gives the court the right to either deny, reduce, or grant the elective right, both in a voluntary separation and in a judicial separation. The comment from the Wisconsin Section 861.09 follows:

> "This section is new and changes existing law. The inequity of allowing election where the surviving spouse has deserted the decedent during lifetime should be obvious. The existing law allows even an adulterous widow to claim dower....The difficulty, however, of providing a fixed rule for separated couples has led to the proposed section which would vest discretion in the court to deal with individual cases on the basis of all available facts. In some cases of separation no right to elect should be given; in others a full elective share is proper; in still others a reduced share would be consistent with the facts. The judicial burden should not be great since the number of cases will be few, and the issues are no more troublesome than a property division in a contested divorce. The presence of this section should operate to deter election in many instances where the surviving spouse might otherwise elect.

> "The phrase 'living apart' is designed to mean more than physical separation. Thus the section would not apply merely because an elderly husband or wife was in a nursing home while the other spouse resided elsewhere."

Section 4. What constitutes election under ORS_____.

Section 4 is similar in language to the present ORS 113.060. There are, however, two differences. The time is shortened from six months to 90 days after the admission of the will to probate, and the spouse is given the right to file a writing electing to take under the will. Because the proposed code shortens the period for preferred treatment of claims and the time for filing will contest from six months to four months, your committees considered 90 days after admission of the will to probate sufficient time to decide whether or not to elect against the will. The last sentence is taken from Section 861.11 of the 1967 Wisconsin Code. The usefulness of this provision to estate administration is apparent.

Section 5. Election by guardian of spouse. This section will replace the present ORS 126.300. In explanation of the language restricting the right of the guardian to elect, which is taken from Section 861.11 of the 1967 Wisconsin Code, we quote the comment by the Wisconsin editors.

> "Although 233.14 allows election by a guardian, no criterion for such election is stated; whereas this section allows election in such a case only if additional assets are needed for the reasonable support of the spouse; election merely to swell the estate subject to guardianship is undesirable for the entire family."

Section 6. Payment of elective share. There is no equivalent section in the Oregon Revised Statutes indicating the manner in which the elective share is to be selected and paid from the estate. The impact of election on distribution of the estate to other beneficiaries under the will is presently left to judicial determination. The language specifically exempting from contribution to the elective share heirlooms, pictures, home furniture and other specific bequests will be useful in an area which has caused problems in the past.

Proposed revised Oregon probate code
ELECTIVE SHARE OF SURVIVING SPOUSE
3rd Draft
September 7, 1967

Prepared by
Stanton Allison and
Campbell Richardson

Section 1. Surviving spouse's election to take against will. (1) If decedent dies testate, the surviving spouse of a decedent domiciled in this state at the time of his death has a right to elect to take the share provided by this section. The elective share consists of one fourth of the value of the net estate of the decedent, reduced by the value of the following property given to the spouse under the decedent's will:

(a) Property given outright;

(b) The present value of any legal life estates if capable of valuation with reasonable certainty;

(c) The present value of the spouse's right to income or an annuity, or a right of withdrawal, from any property transferred in trust by the will which is capable of valuation with reasonable certainty without regard to the powers which are forfeited under subsection (2).

(2) Except as to property applied under subsection (1) to reduce the elective share, an election to take under this section forfeits any other right to take under the will and under the law of intestate succession. If the will would otherwise create a power of appointment in the surviving spouse, such spouse by electing to take under this section retains the power unless it is a general power of appointment as defined in ORS 118.010 (5) and the testator has not provided otherwise, but forfeits any general power of appointment. A power to pay more than the

income or annuity or withdrawals, the value of which reduced the elective share under paragraph (c) of subsection (1) of this section, or to apply additional principal or income in behalf of the electing spouse, cannot be exercised in favor of the electing spouse.

(3) The right to elect may be barred under ORS_____ or may be denied or the share reduced under ORS_____.

Section 2. How elective share barred. (1) The right of the surviving spouse to elect is subject to bar by the terms of a written agreement signed by both spouses. Such an agreement may be entered into before or after marriage.

(2) The surviving spouse is barred if he receives at least one-half of the total of the following property, such property to be reduced by the amount of the federal estate tax payable by reason of such property: the net estate, joint annuities furnished by the decedent, proceeds of life insurance as to which decedent had any of the incidents of ownership at his death, transfers within two years of death to the extent to which decedent did not receive consideration in money or money's worth, transfers by decedent during lifetime as to which he has retained power, alone or in conjunction with any person, to alter, amend, revoke or terminate such transfer or to designate the beneficiary, payments from decedent's employer or from a plan created by the employer or under a contract between the decedent and his employer (but excluding workmen's compensation and social security payments),

property appointed by the decedent by will or by deed executed within two years of his death (whether the power is general or special) but only if the property is effectively appointed in favor of the surviving spouse, and property in the joint names of the decedent and one or more other persons except such proportion as is attributable to consideration furnished by the persons other than the decedent. For this purpose the surviving spouse is deemed to receive any property as to which he is given all the income and a general power to appoint the principal; the spouse is deemed to receive life insurance proceeds settled by decedent on option if the spouse is entitled to the interest and has a general power to appoint the proceeds or to withdraw proceeds, or if the spouse is entitled to an annuity for life or instalments of the entire principal and interest for any period equal to or less than normal life expectancy of the spouse. As used in this section, "property in joint names" means all property held or owned under any form of ownership with right of survivorship, including cotenancy with remainder to the survivor, stocks, bonds or bank accounts in the name of two or more persons payable to the survivor, U. S. government bonds either in co-ownership form or payable on death to a designated person, and shares in credit unions or building and loan associations payable on death to a designated person or in joint form.

Section 3. 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 elective 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 of the marriage, whether the marriage was a first or subsequent 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, length and cause of the separation, and any other relevant circumstances.

Section 4. What constitutes election under ORS _____. The surviving spouse is deemed to have elected to take under the will unless, within ninety days after the admission of the will to probate, he serves on the personal representative or his attorney and files a statement that he elects to take the interest mentioned in ORS _____ instead of under the will. The spouse may bar any right to take under this chapter by filing a writing, signed by the spouse, electing to take under the will.

Section 5. Election by guardian or guardian ad litem. An election may be filed on behalf of the spouse by a guardian of an incompetent spouse or a guardian ad litem. Either a guardian or guardian ad litem may elect against the will only if additional assets are needed for the reasonable support of the

spouse, taking into account the probable needs of the spouse, the provisions of the will, any nonprobate property arrangements made by the decedent for the support of the spouse, and any other assets (whether or not owned by the spouse) available for such support. Such election shall be subject to the approval of the court, with or without notice to other interested parties.

Section 6. Assignment of elective share. Property shall be applied in satisfaction of the elective share in the following order unless the will directs otherwise:

(1) Any intestate property;

(2) The residue under the will;

(3) After the residue is exhausted, each person receiving a non-residuary gift under the will must contribute, in proportion to the value of his gift, to the remaining balance of the elective share, except that persons to whom the will gives tangible personal property not used in trade, agriculture or other business are not required to contribute unless the particular gift forms a substantial part of the total estate and the court specifically orders contribution because of such gift.

Section 7. Repeal of existing statutes. ORS 113.050 and 113.060 are repealed.

Prepared by
Mr. Allison

Proposed revised Oregon probate code
ELECTION OF WIDOW - DOWER, CURTESY
2nd Draft
June 12, 1967

This draft is proposal #6.

Section 1. 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 dies seised 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] the estate of the decedent. 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 2. 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 3. 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 4. 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 5. ORS 91.030 is amended to read:

91.030. A [tenancy by curtesy,] 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 6. 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 real property.]

[(3)] (2) 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] the 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.] (3) 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)] (2) of this section.

Section 7. 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 been released or extinquished 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 8. 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 9. 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 10. ORS 107.100 is amended to read:

107.100. (1) Whenever a marriage is declared void or dissolved, the court has power further to decree as follows:

(Paragraphs (a) to (g), inclusive, omitted here)

[(h) for the extinguishment and barring of dower and curtesy.]

(Remainder of ORS 107.100 omitted here)

Section 11. 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.

Section 12. This Act takes effect on January 1, 1970.

References: Advisory Committee Minutes:
6/19/65, pp. 5 and 6
9/18/65, pp. 6 and 7

Prepared by
Mr. Allison

Proposed revised Oregon probate code
ELECTION OF WIDOW - DOWER, CURTESY
1st DRAFT
APRIL 28, 1967

This draft is proposal #6.

Section 1. ORS 113.050 is amended to read:

113.050. (1) The surviving spouse of a decedent 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 dies seised and, if the decedent was domiciled in this state at the time of death, to take upon distribution an undivided one-fourth interest in all the personal property of the estate of the decedent. Such interest shall be in addition to, and not in lieu of, any other statutory right.

(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.

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 2. 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 3. 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 or curtesy of the surviving spouse of any person who died before the effective date of this 1967 Act.

Section 4. 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 entirety and tenancy for life. The times and conditions of the holdings shall determine the nature and character of the tenancy.

Section 5. ORS 91.030 is amended to read:

91.030. 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 6. 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 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 the property shall likewise be subject to like rights of survivorship.

(3) 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 7. 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.

Section 8. ORS 105.340 is amended to read:

105.340. In all cases of sales in partition when it appears that any person has a vested or contingent future right or estate therein, the court shall ascertain and settle the proportional value of the 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 9. 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 the decree was granted shall be awarded in 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 the decree, as may be just and proper in all circumstances, in addition to the decree of maintenance. The court may, in making the award, decree that homestead rights under ORS 116.010 and the election provided in ORS 113.050 are extinguished and barred.

Section 10. ORS 111.130 is amended to read:

111.130. If the intestate leaves a surviving spouse and issue, and any of the issue has received an advancement from the intestate in his lifetime, the advancement shall not be taken into consideration in computing the share to which the surviving spouse is entitled.

Section 11. ORS 114.020 is amended to read:

114.020. Any person who has attained the age of majority and is of sound mind may make his will.

Section 12. 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.

Section 13. This Act takes effect on January 1, 1970.

References: Advisory Committee Minutes
9/18/65 pp. 6 and 7

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
ESCHEAT
1st Draft
April 12, 1967

ESCHEAT

Section 1. Property in this state of a decedent in respect of which the decedent dies intestate escheats to the State of Oregon if the decedent leaves no heirs of him surviving.

Section 2. If property escheats to the State of Oregon there shall be the following consequences:

(1) The state shall be considered as though it were the sole heir at law; (or natural heir).

(2) The state shall be given all notices and shall be served with all process, required to be given to, or served on heirs generally;

(3) In addition to the other requirements of this section, the state shall be notified by registered or certified mail of any proposed sale of property at least 10 days before sale of the property;

(4) The state shall have the right to pay claims, expenses of administration and encumbrances, and if the state exercises that right, upon completion of the administration, the state shall have the right to receive distribution of the property in kind.

Section 3. For the purpose of mailing any notice to the state, or the service of any process, as provided in this section, the post office of the Clerk of the State Land Board,

Salem, Oregon, shall be considered the postoffice address of the state, and the Clerk or any of his deputies shall be considered the agent of the state for receiving service of any notice or process.

Section 4. If at the time of the filing the petition for letters of administration there are no known heirs, the petition shall state that fact and shall state that the State of Oregon is the sole heir at law. If, at any time after the petition is filed, but during the administration, it appears that there are no known heirs, the State of Oregon shall be considered the sole heir at law as of that time.

Section 5. ORS 120.130 is amended to read:

120.130. (1) Within 10 years after judgment in any proceeding in the [circuit] court escheating [real] property to the state, or after the order of the court [having probate jurisdiction] directing the conveyance of escheated [real] property to the state [, and in all other cases within 10 years after payment of the proceeds of escheated personal property to the State Land Board,] a claim may be made for the property escheated [, or the proceeds thereof,] by or on behalf of a person not a party or privy to such proceeding, nor having actual knowledge of the making of such judgment or order. [or of such payment to the State Land Board.]

(2) The claim shall be made by a petition filed with the Clerk of the State Land Board. The claim shall be considered

a contested case as provided in ORS 183.310 and there shall be the right of judicial review as provided in ORS 183.480. [in the court in which the escheat proceedings were held.] The petition shall be verified in the same manner as a complaint and shall state:

(a) The age and place of residence of the claimant by whom or on whose behalf the petition is filed;

(b) That the claimant lawfully is entitled to such property or proceeds, briefly describing the same;

(c) That at the time the property escheated to the state the claimant had no knowledge or notice thereof;

(d) That the claimant claims the property or proceeds as an heir or next of kin, or as [executor, administrator] personal representative, guardian or conservator of either, setting forth the relationship of the decedent, who at the time of his death was the owner of same;

(e) That 10 years have not elapsed since the making of the judgment or order escheating the property to the state [, or since the payment of the proceeds of the escheated estate by the administrator thereof to the State Land Board pursuant to the order of the court having probate jurisdiction]; and

(f) If the petition is not filed by the claimant himself, the status of the petitioner, whether [executor, administrator,] personal representative, conservator or guardian.

[(3) The State Land Board shall be made a defendant in the proceeding, and a copy of the petition must be served upon the clerk of the board at least 20 days before the hearing of the petition. The court must try the issue, as issues are tried in civil actions, with the aid of a jury, if requested by either party.]

[(4)](3) If it is determined that the claimant is entitled to [such] the property [or the proceeds thereof, the court must order the same to be delivered] the Clerk of of the State Land Board shall deliver the property to the petitioner, subject to and charged with the inheritance tax thereon, if any, and the costs and expenses of the state in connection therewith. [The order for delivery shall be an order upon the State Land Board to draw its warrant on the State Treasurer for the payment of the same, but without interest or cost to the state, a certified copy of which order shall be sufficient voucher for drawing such warrants.]

[(5)] (4) If the person whose property or funds escheated or reverted to the state was at any time an inmate of a state institution in Oregon for the insame or feeble-minded, the reasonable unpaid cost, as determined by the State Board of Control, of the care and maintenance of the person while a ward of such institution, regardless of when the cost was incurred, may be deducted from, or, if necessary, be offset in full against, the amount of the escheated property. [or funds, and, for the purpose of collecting the charge, the

State Board of Control shall have the right to intervene and file an account in any proceeding, whether in the circuit court or before the State Land Board for the recovery of such property or funds.]

Section 6. ORS 120.210 Escheat of money or property deposited with institution on death, escape or parole of inmate; notice and publication. All money, certificates of deposit, securities, assets or other personal property which have been or shall be taken charge of by the officials of the state institutions listed in ORS 179.320, belonging to patients or inmates committed to any of such institutions and who die inmates thereof or escape or who are paroled therefrom, and which is not claimed by such person, or by the heirs or personal representative of such person within one year after such death, escape or parole, escheats to the state for the benefit of the Common School Fund, and without other or further proceeding shall be paid or turned over by the officials of the above institutions to the State Land Board, who shall issue therefor receipts in duplicate. One of the receipts shall be filed in the office of the Secretary of State. However, if such escheated money, certificates of deposit, securities or other personal property exceeds the sum of $50, a notice of such escheated property shall be published under direction of the State Land Board in a newspaper of general circulation within the county in which such institution paying or turning over the same is situated,

Proposed revised Oregon probate code
ESCHEAT
2nd Draft
February 27, 1968

Prepared by

Stanton W. Allison

Section 1. ORS 120.130 is amended to read:

120.130. Recovery of escheated property. (1) Within 10 years after [judgment in any proceeding in the circuit court escheating real property to the state, or after the order of the court having probate jurisdiction directing the conveyance of escheated real property to the state, and in all other cases within 10 years after payment of the proceeds of escheated personal property to the State Land Board,] entry of a decree of distribution designating title to the estate available for distribution in the Division of State Lands, a claim may be made for the property escheated, or the proceeds thereof, by or on behalf of a person not [a party or privy to such proceeding, nor] having actual knowledge of the making of such [judgment or order or of such payment to the State Land Board.] decree.

(2) The claim shall be made by a petition filed [in the court in which the escheat proceedings were held] with the Director of the Division of State Lands. The claim shall be considered a contested case as provided in ORS 183.310 and there shall be the right of judicial review as provided in ORS 183.480. The petition shall be verified in the same manner as a complaint and shall state:

(a) The age and place of residence of the claimant by whom or on whose behalf the petition is filed;

(b) That the claimant lawfully is entitled to such property or proceeds, briefly describing the same;

(c) That at the time the property escheated to the state the claimant had no knowledge or notice thereof;

(d) That the claimant claims the property or proceeds as an heir [or next of kin,] or as [executor, administrator, guardian or conservator of either,] personal representative, setting forth the relationship of the decedent, who at the time of his death was the owner of same;

(e) That 10 years have not elapsed since the [making of the judgment or order] entry of the decree escheating the property to the state [,or since the payment of the proceeds of the escheated estate by the administrator thereof to the State Land Board pursuant to the order of the court having probate jurisdiction]; and

(f) If the petition is not filed by the claimant himself, the status of the petitioner [, whether executor, administrator, conservator or guardian].

[(3) The State Land Board shall be made a defendant in the proceeding, and a copy of the petition must be served upon the clerk of the board at least 20 days before the hearing of the petition. The court must try the issue, as issues are tried in civil actions, with the aid of a jury, if requested by either party.]

[(4)] (3) If it is determined that the claimant is entitled to [such] the property or the proceeds thereof, [the

court must order the same to be delivered] the Director of the Division of State Lands shall deliver the property to the petitioner, subject to and charged with the inheritance tax thereon, if any, and the costs and expenses of the state in connection therewith. [The order for delivery shall be an order upon the State Land Board to draw its warrant on the State Treasurer for the payment of the same, but without interest or cost to the state, a certified copy of which order shall be sufficient voucher for drawing such warrants.]

[(5)] (4) If the person whose property or funds escheated or reverted to the state was at any time an inmate of a state institution in Oregon for the [insane or feeble-minded] mentally ill, the reasonable unpaid cost, as determined by the State Board of Control, of the care and maintenance of the person while a ward of such institution, regardless of when the cost was incurred, may be deducted from, or, if necessary, be offset in full against, the amount of the escheated property [or funds, and, for the purpose of collecting the charge, the State Board of Control shall have the right to intervene and file an account in any proceeding, whether in the circuit court or before the State Land Board for the recovery of such property or funds].

Section 2. ORS 120.210 is amended to read:

ORS 120.210. Escheat of money or property deposited with institution on death, escape or parole of inmate; notice and publication. All money, certificates of deposit, securities, assets or other personal property which have been or shall be

taken charge of by the officials of the state institutions listed in ORS 179.320, belonging to patients or inmates committed to any of such institutions and who die inmates thereof or escape or who are paroled therefrom, and which is not claimed by such person, or by the heirs or personal representative of such person within one year after such death, escape or parole, escheats to the state [for the benefit of the Common School Fund], and without other or further proceeding shall be paid or turned over by the officials of the above institutions to the [State Land Board, who] Division of State Lands which shall isssue therefor receipts in duplicate. One of the receipts shall be filed in the office of the Secretary of State. However, if such escheated money, certificates of deposit, securities or other personal property exceeds the sum of $50, a notice of such escheated property shall be published under direction of the [State Land Board] Division of State Lands in a newspaper of general circulation within the county in which such institution paying or turning over the same is situated, and also in a newspaper in the county from which the inmate was committed, once each week for not less than three consecutive weeks. The expense of such publication shall be paid out of the proceeds of the escheated property.

Section 3. ORS 120.220 is amended to read:

ORS 120.220. Collection and disposition by Division of

State Lands. The money, certificates of deposit, securities or other personal property mentioned in ORS 120.210 shall be collected or liquidated by the [State Land Board] Division of State Lands, and the board may sell, indorse and collect all such money, certificates of deposit, securities or other personal property and place the proceeds thereof in the State Treasury [to the credit of the Common School Fund].

Section 4. ORS 120.230. Owners' and representatives' rights to reclaim property; limitation. The money or the proceeds of such certificates of deposit, securities or other personal property which has escheated to the state under the provisions of ORS 120.210, may be reclaimed by the original owner or his or her heirs, or personal representatives, at any time within 10 years after such escheat, in the same manner as property belonging to estates of deceased persons which have escheated to the state.

Section 5. ORS 178.080 is amended to read:

178.080. Collection of fines, penalties, forfeitures and escheates. (1) The State Treasurer, in his discretion, may appoint a collector to collect the amounts of fines, penalties, and forfeitures [and escheats] due or owing the State of Oregon, and, in connection therewith, to make examinations of the dockets of all courts other than of the Supreme Court. The

collector may examine all public records for gift tax and inheritance tax determinations and evasions.

(2) The cost of all examinations, investigations and searches, and of all traveling and other expenses in connection therewith, are to be apportioned among the departments principally concerned therewith, pursuant to agreements made between the State Treasurer and the departments; but the entire cost so apportioned, exclusive of expenses involved in litigated cases, shall not average more than $300 per month for the state fiscal year.

(3) The State Treasurer may institute legal proceedings in the name of the State of Oregon, upon his relation or otherwise without joinder of any other party, to effect collection of any fine, penalty, or forfeiture [or escheat] due the state and may charge the net cost of the proceedings to the department in whose behalf suit or action was instituted.

(4) All judicial, municipal and county officers shall cooperate with the State Treasurer with respect to the collections, searches and investigations and shall furnish the State Treasurer with any information contained in any of the records under their respective custodies relating thereto.

(5) The State Police Department shall cooperate in the investigation of fines, penalties and forfeitures.

[(6) All county clerks, upon request, shall furnish the State Treasurer with the titles of estates of deceased persons which have remained open for more than three years and in

which no heirs, or only parties whose right to inherit the proceeds thereof is being contested, have appeared to claim the estates.]

Section 6. Reports by County Clerks to Division of State Lands. County Clerks, upon request, shall furnish the Director of the Division of State Lands the titles of estates of deceased persons which have remained open for more than three years and in which no heirs, or other parties whose right to inherit the proceeds thereof is being contested, have appeared to claim the estate.

Section 7. Repeal of existing statutes. ORS 120.010, 120.020, 120.030, 120.040, 120.050, 120.060, 120.070, 120.080, 120.090, 120.100, 120.110, 120.120, 120.140 and 120.150.

Proposed revised Oregon probate code
ESCHEAT
2nd Draft
March 4, 1968

Prepared by
Stanton W. Allison

COMMENTS

The involved and difficult chapter 120 of the present code provides three forms of procedure for the state to assert its right to escheated property. ORS 120.030 and related sections provide for administration by the probate court. ORS 120.050 provides that the state may maintain "any action, suit or proceeding necessary to recover the possession of any such property". ORS 120.060 provides for bringing an information on behalf of the state.

With reference to the proceeding by information, Oregon Probate Law and Procedure, Jaureguy and Love, states, in Section 204:

> "In view of this section, it seems that the special provision for an information of escheat is entirely unnecessary. While procedure by information is the traditional common law form of complaint by the state, in either civil or criminal proceedings, it seems that by providing that the state may maintain any proceeding to protect its rights that a private person could it was unnecessary duplication to provide that the state could proceed by the traditional method of information."

The authors state in Section 203: "The recent trend has been toward the trial of escheat proceedings in the probate court rather than by information....Under the present statute governing procedure, the great majority of escheats are conducted in connection with administration proceedings."

Your committees are convinced that the confusion incident

to the three procedures now authorized should be eliminated by limiting the state to an administration proceeding.

Subsection (6) of Section 5 of the proposed chapter of Intestate Succession provides: "If no person takes under the preceding subsections, the net intestate estate shall escheat to the State of Oregon." By the chapter on Jurisdiction of the Probate Court probate jurisdiction is vested in the Circuit Court, which is given full power to make declaratory judgments pertaining to the title of real estate, determination of heirship, and distribution of the estate.

Section 7 of the chapter on Duties and Powers of the Personal Representative provides: "If it appears from the petition for appointment of the personal representative that there is no known person to take by descent the net intestate estate, the personal representative shall mail to the Director of State Lands copy of the petition and the information required by subsection (1)." Thus the information given to the Director of the Division of State Lands is the same as that given to heirs in an intestate estate or to devisees in a testate estate. Upon the filing of the final account and petition for distribution the same notice is given the Director of the Division of State Lands as is given the heirs or devisees.

The proposed code conforms to present Oregon law in vesting both real and personal property, in the absence of

known heirs, in the state of Oregon.

The action of the committees has been to recommend repeal of all of chapter 122 except those portions which provide for the recovery of escheated property, and some technical amendments to the sections covering property of persons confined in state institutions. However, one important change in the procedure for recovery of escheated property should be noted. The proposed amendment provides that instead of processing the claim in the court "in which the escheat proceedings were held," (ORS 120.130(2) the claim should be processed pursuant to the Administrative Procedures Act in the same manner as other claims against state agencies.

Your committees felt there was every advantage in having the escheat administered under the proposed code as an estate proceeding. In an escheat situation the State of Oregon is legally in the status of an heir at law. The proposed code provides the same notice and the same procedures as where there are known heirs. Rights of creditors are protected. The required time for filing claims gives an opportunity to unknown heirs to come forward. The broad power given by the proposed code to the personal representative to sell real and personal property of the estate for distribution purposes provides a simple procedure for liquidating estate assets and turning them into cash which can be turned over to the Division of State Lands. Under the proposed code

the Circuit Court in probate is given full power to make proper determination of heirship and enter final decrees escheating the real and personal property of the estate to the State of Oregon.

and also in a newspaper in the county from which the inmate was committed, once each week for not less than three consecutive weeks. The expense of such publication shall be paid out of the proceeds of the escheated property.

Section 7. ORS 120.220 Collection and disposition by State Land Board. The money, certificates of deposit, securities or other personal property mentioned in ORS 120.210 shall be collected or liquidated by the State Land Board, and the board may sell, indorse and collect all such money certificates of deposit, securities or other personal property and place the proceeds thereof in the State Treasury to the credit of the Common School Fund.

Section 8. ORS 120.230 is amended to read:

120.230 Owners' and representatives' rights to reclaim property; limitation. The money or the proceeds of such certificates of deposit, securities or other personal property which has escheated to the state under the provisions of [ORS 120.210,] _____ may be reclaimed by the original owner or his or her heirs, or personal representatives, at any time within 10 years after such escheat, in the same manner as property belonging to estates of deceased persons which have escheated to the state.

Section 8. ORS 178.080 is amended to read:

178.080. Collection of fines, penalties, forfeitures and escheats. (1) The State Treasurer, in his discretion,

may appoint a collector to collect the amounts of fines, penalties, forfeitures [and escheats] due or owing the State of Oregon, and, in connection therewith, to make examinations of the dockets of all courts other than of the Supreme Court. The collector may examine all public records for gift tax and inheritance tax determinations and evasions.

(2) The cost of all examinations, investigations and searches, and of all traveling and other expenses in connection therewith, are to be apportioned among the departments principally concerned therewith, pursuant to agreements made between the State Treasurer and the departments; but the entire cost so apportioned, exclusive of expenses involved in litigated cases, shall not average more than $300 per month for the state fiscal year.

(3) The State Treasurer may institute legal proceedings in the name of the State of Oregon, upon his relation or otherwise without joinder of any other party, to effect collection of any fine, penalty, forfeiture [or escheat] due the state and may charge the net cost of the proceedings to the department in whose behalf suit or action was instituted.

(4) All judicial, municipal and county officers shall cooperate with the State Treasurer with respect to the collections, searches and investigations and shall furnish the State Treasurer with any information contained in any of the records under their respective custodies relating thereto.

(5) The State Police Department shall cooperate in the investigation of fines, penalties and forfeitures.

(6) All county clerks, upon request, shall furnish the [State Treasurer] Clerk of the State Land Board with the titles of estates of deceased persons which have remained open for more than three years and in which no heirs, or only parties whose right to inherit the proceeds thereof is being contested, have appeared to claim the estates.

Section 9. Repeal of existing statutes. ORS 120.010, 120.020, 120.030, 120.040, 120.050, 120.060, 120.070, 120.090, 120.100, 120.110, 120.120, and 120.140.

References: Advisory Committee Minutes:
6/19,20/65 p. 6
8/13,14/65 p. 9
12/17,18/65 p.2
2/18,19/67 pp. 1 to 10.

ORS chapter 120

Prepared by
Mr. Allison

Proposed revised Oregon probate code
INHERITANCE BY NONRESIDENT ALIENS
1st Draft
May 4, 1967

Section 1. Deposits for nonresident alien distributees. (1) If, at the time of distribution of an estate, the court finds that a distributee is an alien not residing within the United States who would not receive the benefit, use or control of property due him, the court shall order the personal representative to convert the property into cash and deposit the money due the alien distributee to the credit of the alien distributee at interest in a savings account in a bank or banks in this state. Sale of the property shall be in the manner provided by law for the sale of property of decedent's estates.

(2) Before money is deposited as provided in subsection (1) of this section, there shall be deducted therefrom the expenses of any sale of the property and amounts the court may allow for the services of the personal representative, his attorney and the attorney or attorney in fact representing the alien distributee in the proceeding.

(3) The pass book or other evidence of the deposit shall be delivered to the clerk of the court, who shall be custodian thereof until it is needed for withdrawal of the money deposited as provided in section 2 or 3.

(4) The money deposited and interest accrued thereon may

be withdrawn and paid or disposed of only as provided in section 2 or 3. The deposit and interest are not subject to the Uniform Disposition of Unclaimed Property Act (ORS 98.302 to 98.436 and 98.991).

Section 2. Payment of deposits to nonresident alien distributees. (1) At any time within 10 years after the date of the court order to deposit money due an alien distributee as provided in section 1, the alien distributee or, if he is deceased, the personal representative of his estate appointed by a court of this state may file with the court that ordered the deposit a petition requesting withdrawal of the money deposited and interest accrued thereon and payment thereof to the petitioner or his attorney in fact.

(2) The court, upon the filing of the petition, shall fix a time and date certain for a hearing on the petition, and shall order that written notice of the hearing be given not less than 30 days before the date thereof to the clerk of the State Land Board, the bank or banks in which the money is deposited and the consular representative of the country of which the alien distributee is or, if deceased, was a citizen.

(3) If it appears to the court at the hearing that the alien distributee or, if deceased, his heirs or beneficiaries would receive the benefit, use or control of the money deposited, the court shall order that the money deposited

and interest accrued thereon be withdrawn and paid to petitioner or his attorney in fact, after deduction therefrom of the costs and expenses of the withdrawal proceeding allowed by the court.

(4) If a petition filed as provided in subsection (1) of this section is denied by the court, a subsequent petition so filed requesting withdrawal of the same money deposited and interest shall allege the particulars of new or changed circumstances occurring after that denial that justify withdrawal and payment.

Section 3. Payment of nonresident alien distributee deposits to other distributees; escheat. (1) If the money due an alien distributee deposited as provided in section 1 and interest accrued thereon is not withdrawn and paid as provided in section 2, the court that ordered the deposit shall order that the money deposited and interest be withdrawn and paid to any distributee of the estate, other than the alien distributee, who is found by the court to be entitled to receive the money and who has filed with the court within one year after the expiration of the 10-year period specified in section 2 a petition requesting the withdrawal and payment.

(2) If the money deposited and interest accrued thereon is not withdrawn and paid as provided in section 2 or subsection (1) of this section, the money and interest shall be disposed of as escheated property.

Section 4. Register number of proceedings. All proceedings hereunder shall be had under the register number of the estate in which the court order to deposit was made and no order reopening the estate shall be required.

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
RIGHTS OF NONRESIDENT ALIEN TO TAKE PROPERTY
BY SUCCESSION OR TESTAMENTARY DISPOSITION
1st Draft
October 3, 1966

This draft is based primarily on a draft of a subcommittee consisting of Mr. Allison, Miss Lisbakken, Mr. Lovett, Mr. Barrie and Mr. Schwabe.

Section 1. Deposits for nonresident alien distributees. (1) If, at the time of distribution of an estate, the court finds that a distributee is an alien not residing within the United States who would not receive the benefit, use or control of property due him, the court shall order the personal representative to convert the property into cash and deposit the money due the alien distributee to the credit of the alien distributee at interest in a savings account in a bank or banks in this state. Sale of the property shall be in the manner provided by law for the sale of other property of the estate.

(2) Before money is deposited as provided in subsection (1) of this section, there shall be deducted therefrom the expenses of any sale of the property and amounts the court may allow for the services of the personal representative, his attorney and the attorney in fact representing the alien distributee in the conversion and deposit proceeding.

(3) The pass book or other evidence of the deposit shall be delivered to the clerk of the court, who shall be custodian thereof until it is needed for withdrawal of the money deposited as provided in section 2 or 3.

(4) The money deposited and interest accrued thereon may be withdrawn and paid or disposed of only as provided in section 2 or 3. The deposit and interest are not subject to the Uniform Disposition of Unclaimed Property Act (ORS 98.302 to 98.436 and 98.991).

Section 2. Payment of deposits to nonresident alien distributees. (1) At any time within 10 years after the date of the court order to deposit money due an alien distributee as provided in section 1, the alien distributee or, if he is deceased, the personal representative of his estate appointed by a court of this state may file with the court that ordered the deposit a petition requesting withdrawal of the money deposited and interest accrued thereon and payment thereof to the petitioner or his attorney in fact. The petition shall be filed and all proceedings thereon shall be had under the register number of the estate proceeding in which the court order to deposit was made, but the estate need not be reopened for the purpose of the withdrawal proceeding.

(2) If a petition filed as provided in subsection (1) of this section is denied by the court, a subsequent petition so filed requesting withdrawal of the same money deposited and interest shall allege the particulars of new or changed circumstances occurring after that denial that justify withdrawal and payment.

(3) The court, upon the filing of the petition, shall fix a time and date certain for a hearing on the petition, and shall

order that written notice of the hearing be given not less than 30 days before the date thereof to the clerk of the State Land Board, the bank or banks in which the money is deposited and the consular representative of the country of which the alien distributee is or, if deceased, was a citizen.

(4) If it appears to the court at the hearing that the alien distributee or, if deceased, his heirs or beneficiaries would receive the benefit, use or control of the money deposited, the court shall order that the money deposited and interest accrued thereon be withdrawn and paid to petitioner or his attorney in fact, after deduction therefrom of the costs and expenses of the withdrawal proceeding allowed by the court.

Section 3. Payment of nonresident alien distributee deposits to other distributees; escheat. (1) If the money due an alien distributee deposited as provided in section 1 and interest accrued thereon is not withdrawn and paid as provided in section 2, the court that ordered the deposit shall order that the money deposited and interest be withdrawn and paid to any distributee of the estate, other than the alien distributee, who files with the court a petition requesting the withdrawal and payment within one year after the expiration of the 10-year period specified in section 2 and who is found by the court to be eligible to receive the money. The petition shall be filed and all proceedings thereon shall be had under the register number of the estate proceeding in which the court order to deposit was made, but the estate need

not be reopened for the purpose of the withdrawal proceeding.

(2) If the money deposited and interest accrued thereon is not withdrawn and paid as provided in section 2 or subsection (1) of this section, the money and interest shall be disposed of as escheated property.

References: Advisory Committee Minutes:
12/17, 18/65 pp. 1 to 4
2/18, 19/66 pp. 3 to 9

Lundy's memorandum dated February 7, 1966
3/18, 19/66 pp. 3 to 6
4/15, 16/66 pp. 3 to 6

ORS 111.070

Section 4. Repeal of existing statute. ORS 111.070 is repealed.

Proposed revised Oregon probate code
INVENTORY AND APPRAISEMENT
2nd Draft
August 25, 1967

Prepared by
Stanton W. Allison

Section 1. Inventory and appraisement, when and how made. Within 60 days after the date of his appointment, unless a longer time shall be granted by the court, the personal representative shall file an inventory of all of the property of the decedent which has come into his possession or knowledge. The inventory shall show the estimates of the personal representative of the respective true cash values of the properties described in the inventory as of the date of the decedent's death.

Section 2. Property discovered after inventory filed. Whenever any property not included in the inventory comes to the possession or knowledge of the personal representative, he shall either file a supplemental inventory within 30 days of receiving possession or knowledge, or include the property in his next accounting.

Section 3. Appraisement; employment and appointment of appraisers. The personal representative may employ a qualified and disinterested appraiser to assist him in the appraisal of any asset the value of which may be subject to reasonable doubt. Different persons may be employed to appraise different kinds of assets included in the estate. The court also in its discretion may direct that all or any part of the property be appraised by one or more appraisers appointed by the court.

Section 4. Appraisal to be at true cash value at date of death. Property for which appraisement is required shall be

appraised at its true cash value as of the date of the decedent's death. Each appraisement shall be in writing and shall be signed by the appraiser or appraisers making it.

Section 5. Fees of appraisers. Each appraiser shall be entitled to be paid from the estate a reasonable fee and necessary expenses.

Section 6. Naming of personal representative does not discharge claim against him. The naming or appointment of any one as personal representative shall not operate to discharge the person from any claim which the decedent had against him, and the claim shall be included in the inventory. If he agrees to act as personal representative he shall be liable for such claim as for so much money in his hands at the time the claim became due and payable; otherwise he is liable for such claim as any other debtor of the deceased.

Section 7. Discharge or bequest in will of claim of testator. The discharge or devise in a will of a claim of the testator against a personal representative or against any other person shall be of no effect as against creditors of the decedent. The claim shall be included in the inventory and for purposes of administration shall be regarded and treated as a specific legacy in that amount.

References: Advisory Committee Minutes:
10/14, 15/66 pp. 7 to 16; and Appendix B and C (Drafts by Carson and Butler)
8/18, 19/67 (Draft by Butler, 4/8/67)

ORS 116.405 to 116.465

Section 8. Repeal of existing statutes.

ORS 116.405, 116.410, 116.415, 116.420, 116.425, 116.430, 116.435, 116.440, 116.445, 116.450, 116.455, 116.460 and 116.465 are repealed.

Proposed revised Oregon probate code
INVENTORY AND APPRAISEMENT
2nd Draft
August 25, 1967

Prepared by
Stanton W. Allison

COMMENTS

The proposed section under the above title would supersede and replace ORS 116.405 and 116.465 inclusive. The background for these sections is taken principally from Sections 361 to 365 of the 1963 Iowa Probate Code. For other comparable sections see Chapter 11.44, 1965 Washington Code, Chapter 858 of the State of Wisconsin 1967 Probate Code, and Sections 3-406, 3-407, and 3-408 of the 1967 draft of the Uniform Probate Code.

Section 1. Inventory and Appraisement, when and how made. This section includes much of the language of ORS 116.405, with the following differences. The initial period is changed from one month to 60 days which your committee felt was a more realistic period. The requirement of the oath was eliminated as is done in all the other provisions of the proposed code. It also has the basic change that the inventory shall include the personal representative's estimate of the true cash value of the items he lists in his inventory. This would permit the personal representative to include his own appraisal of such items as bank accounts, cash items, securities whose quotations are listed on the major stock exchanges and shown in the daily paper, and other items where an appraisal is not necessary to arrive at the actual true cash value.

Section 2. Property discovered after inventory filed. This section would replace ORS 116.415. However, it allows 30 days for the preparation and filing of a supplemental

inventory and further gives the personal representative the option of including the after-discovered property in his next accounting.

Section 3. Appraisement; employment and appointment of appraisers. The proposed section embodies a fundamental change in the appraisement procedure. The suggested language would place the power to employ the services of "qualified and disinterested appraisers" in the hands of the personal representative, in much the same manner as the other professional helper, namely, the attorney for the estate, is retained by the interested party. The section, rather than setting out fixed fees now contained in ORS 116.425, provides in Section 5 that the appraiser shall be paid "a reasonable fee and necessary expenses." Your committees have not only had many criticisms from their clients and the general public of the appraiser fee in certain instances, but have also had serious criticism from realtor and professional appraiser bodies. They feel, and in the opinion of your committees justly so, that relationship of the appraiser to the personal representative should be somewhat similar to the present attorney relationship.

So far as appraising real estate is concerned, we quote the following from the report of Mr. Robert Lundy, then Deputy Legislative Counsel of Oregon.

> Lundy commented that he had received correspondence from real estate appraisers who indicated the scale was in conflict with their code of ethics. He had, he said, received a letter from Oregon Chapter 14, American Institute of Real Estate Appraisers, in which they set forth the following four specific recommendations:

> "1. That some form of qualification as evidenced by membership in a properly recognized professional organization or by examination or by demonstration, be a requirement of eligibility to appraise an estate or a portion of an estate and that appointment be made only for such portion of an estate for which proper qualification is so evidenced.
>
> "2. That appraisal fees be agreed upon in advance (prior to assignment) and that they be based on the investigation and analysis necessary for a proper appraisal rather than on the amount of value found. A procedure somewhat similar to that which is in current use by the State Highway Commission is suggested.
>
> "3. That any appraiser for an estate or a portion of an estate should sign and attest to his opinion of value only on types of assets for which his qualifications are in evidence.
>
> "4. That the over-all value of an estate be submitted to the court by the attorney conducting probate thereof, and that such be a composite of values found on various types of assets; each by persons qualified to appraise the specific types involved."

In general, we believe that the suggested provisions meet many of the criticisms and suggestions referred to. The proposed section requires a qualified and disinterested appraiser. Different appraisers may be employed to appraise different kinds of assets. The employment would be on a reasonable fee and expenses basis which would take into account the difficulty and expertise required in individual appraisals.

Also note that power is retained in the probate court to direct that all or any part of the property be appraised by one

or more appraisers appointed by the court. It may well be that the personal representative in certain cases has failed or neglected to arrange for the appraisal, or that he would prefer to have the court take direction and appointment of the appraisal and the appraisers.

Section 4. Appraisal to be at true cash value at date of death. Section 4 replaces ORS 116.435 and substitutes the requirement that each article shall be appraised "at its true cash value as of the date of the decedent's death." This language has been adopted in preference to the term "full and true value" which now appears in the inheritance tax code (ORS 118.640).

Section 5. Fees of appraisers. This has been covered already in the preceding comment.

Section 6. Naming of personal representative does not discharge claim against him. This section replaces and incorporates most of the language of ORS 116.440. The language of the present ORS statute, however, has been changed to expressly include not only executors but personal representatives of intestate estates. The necessity of this statute and the reason for the special language incorporated from our present ORS section is explained in Section 626 to Jaureguy & Love, Oregon Probate Law and Practice, as follows: (Notes to citations omitted).

> At common law, if testator appointed as executor of his estate a person who was his debtor and the latter accepted the appointment, the debt

was thereby discharged unless there were not sufficient other assets to satisfy creditors. This rule of law has been expressly changed by statute which provides that such a claim is not discharged and must be included in the inventory. Furthermore, if the person so named accepts the appointment and administers the estate, the amount of the indebtedness is treated as "so much money in his hands" for which he must account. The same rule apparently applies in the case of an administrator.

This particular wording of our statute becomes important in case of the insolvency of the executor or administrator. In some states a similar statute provides that the debt of the personal representative "shall be assets", instead of "so much money", in his hands. Under such a statute "a debt due from an executor is placed on the same footing with debts due the estate from other sources, and he and his sureties are only required to account for the actual value thereof." In those states, accordingly, in case of the personal representative's insolvency, his sureties need only pay a portion of the indebtedness. But under our statute providing that the debt of the personal representative is deemed "so much money" it is held that the estate is entitled to recover the full amount of the representative's debt.

Section 7. Discharge or bequest in will of claim of testator.

Section 7 is identical with ORS 116.445 except for minor editorial changes.

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
INVENTORY AND APPRAISEMENT
1st Draft
April 8, 1967

Section 1. Inventory and appraisement, when and how made. Within 60 days after the date of his appointment, the personal representative of the estate of a decedent shall make and file with the clerk of court in the probate proceedings an inventory of all of the property of the decedent which has come into his possession or knowledge. The inventory shall show the estimates of the personal representative of the respective true cash value of the properties described in the inventory.

Section 2. Extension of time. Whenever because of the complicated nature of the estate or because of other circumstances it is impracticable to file a complete and accurate inventory of the assets belonging to the estate within 60 days of appointment of a personal representative, the court may, upon application of the personal representative, extend the time for such period as the court determines necessary.

Section 3. Property discovered after inventory filed. Whenever any property not mentioned in the inventory comes to the possession or knowledge of the personal representative, he shall either make and file a supplemental inventory within 30 days of receiving possession or knowledge, or include the property in his next accounting.

Section 4. No appraisement required except for tax purposes. The personal representative is not required to have property in an estate appraised unless the court requires appraisement for inheritance tax purposes. The court may direct that specific property or any part of the property may be appraised by one or more appraisers appointed by the court. Different appraisers may be appointed to appraise different parts of the property.

Section 5. Appraisal to be at true cash value at date of death. Property for which appraisement is required shall be appraised at its true cash value as of the date of death of the decedent. Each appraisement shall be in writing and shall be subscribed by the appraiser or appraisers.

Section 6. Fees of appraisers. Each appraiser shall be paid the reasonable fees and necessary expenses allowed by the court.

Section 7. Naming of personal representative does not discharge claim against him. The naming of any one as personal representative shall not operate to discharge that person from any claim which the decedent had against him, and the claim shall be included in the inventory whether or not he agrees to act in the capacity of personal representative.

Section 8. Discharge or bequest in will of claim of testator. The discharge or bequest in a will of any claim of the testator against a person named as personal representative or against any other person shall, as against

the creditors of the decedent, be ineffective. The claim shall be included in the inventory, and for the purposes of administration shall be regarded and treated as a specific legacy in that amount.

References: Advisory Committee Minutes:
10/14,15/66 pp. 7 to 16; and Appendix B and C (Drafts by Carson and Butler)

ORS 116.405 to 116.465

Section 9. Personal representative continue business. When the will provides the authority or direction to continue the business of the decedent, the personal representative may, without court order, continue the business. However, the court may, on its own motion or that of any other interested party, and upon good cause being shown, order the discontinuance of the business. The order of the court may also provide:

(1) For the conduct of the business solely by the personal representative, or jointly with one or more persons; or

(2) For the formation of a partnership for the conduct of the business; or

(3) For the formation of, or for the personal representative to join in the formation of a corporation for the conduct of the business; and

(4) The extent of the liability of the estate, or any part thereof, or of the personal representative, for

obligations incurred in the continuation of the business; and

(5) Whether or not liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate set aside for use in the business or to the estate as a whole; and

(6) The period of time for which the business may be conducted; and

(7) Any other conditions, restrictions, regulations and requirements the court requires.

References: Advisory Committee Minutes:
6/17,18/66 Appendix
7/15,16/66 pp. 2 to 4

ORS 116.170
116.175
116.180

Comment: Under subsections (2) and (3) would the personal representative be able to purchase shares in an existing business? The language "for the formation" is ambiguous.

Section 10. Compromise of debt; compounding debt; redemption. If it appears in the best interests of the estate the court may authorize the personal representative to:

(1) Compromise a claim of the estate against a debtor or other obligor; or,

(2) Extend or renew or otherwise modify the terms of an obligation owing to the estate; or,

(3) Accept a conveyance or transfer of property which was subject to a mortgage, pledge, lien or other security agreement held by decedent; or,

(4) Compound a debt of the debtor provided:

(a) The debtor appears to be insolvent; and

(b) The personal representative receives a fair and just proportion of the assets of the debtor.

If the personal representative agrees to a compound and his consent was induced or procured by false or fraudulent representations or conduct of the debtor the payment of the debtor shall only operate to discharge the amount of the payment on the debt that existed before the debt was compounded.

References: Advisory Committee Minutes:
6/17,18/66 pp. 20 and 21; and Appendix

ORS 116.130

Comment: This section is an integration of ORS 116.130 into Iowa section 114.

Subsections (1) and (4) are in conflict. Should subsection (4) be deleted, or subsection (1) be deleted? Is there any reason to limit a compromise to situations where it appears the debtor is insolvent? It would seem that there would be many situations, e.g. expense of litigation and attorney fees, where it would be desirable to compromise even though the debtor was financially responsible and solvent and liability was clear.

Is the last paragraph of the section necessary, and if so, wouldn't "fraud" suffice for "induced by false or fraudulent representations or conduct"?

The common law, and apparently the Oregon law, is that a personal representative may liquidate an otherwise unliquidated claim for damages and compromise the claim without court approval. Should this be included in this section? There would seem more chance of fraud in such a compromise than in a liquidated claim, so perhaps the common law should be changed.

Proposed revised Oregon probate code
ILLEGITIMACY
2nd Draft
August 16, 1967

Prepared by

Stanton Allison

EFFECT OF ILLEGITIMACY ON INTESTATE SUCCESSION

Section 1. Rights of illegitimate child. For all purposes of intestate succession an illegitimate child, unless he has been adopted:

(1) Shall be treated as the legitimate child of his mother.

(2) Shall be treated as the legitimate child of the father if, during the lifetime of the child:

(a) The paternity of the child is established under ORS 109.080; or

(b) The father has acknowledged himself to be the father in writing signed by him.

Section 2. Repeal of existing statutes. ORS 111.231 is repealed.

References: Proposal #4

Advisory Committee Minutes
8/13,14/65, pp. 12 to 15
9/18/65, p. 7
5/19/67, p. 9 and 10

ORS 111.231, 109.060, 109.070 and 109.080

[Draftman's Note: Included in Definitions Section will be the following: The phrase "all purposes of intestate succession" as used in this chapter means succession by, through or from a person, both lineal and collateral.]

COMMENTS

This section would replace ORS 111.231. The proposed section, unlike ORS 111.231, requires that the paternity of the child must be determined during the child's lifetime. The proposed section would answer the criticism of ORS 111.231 in Jaureguy and Love, Oregon Probate Law and Practice, section 18.

The requirement that paternity be established during the child's lifetime would tend to eliminate fraudulent claims of the father where the child's estate is substantial.

The phrase "all purposes of intestate succession" is defined in the general definition section to mean succession by, through, or from a person, both lineal and collateral. This language is taken from the 1967 Uniform Probate Code (section 2-110).

The proposed section, in your committees' opinion, does not change present Oregon law, except as noted above. Reference is made to ORS 109.060, 109.070, 109.080 and 109.090. These sections, together with ORS 111.231, made up chapter 411 of the 1957 Session Laws which substantially rewrote the former law respecting inheritance rights and other legal relationships of illegitimate children. For this reason the proposed section refers to and incorporates ORS 109.070, which prescribes how paternity shall be established. The language of reference is that used in the following section ORS 109.080.

In addition to the means of establishing paternity set out in ORS 109.070, paternity may be established if "The father has acknowledged himself to be the father in writing signed by him." This language is taken from the Proposed Uniform Probate Code (section 2-111). We refer to similar provisions of the 1965 Washington Code (section 11.04.081); the 1963 Iowa Code, (section 221.222); the Proposed Wisconsin Probate Code (section 852.05). Your committees agreed that provision should be made for an acknowledgment by the father of his parenthood during the child's lifetime, as contained in all the new codes cited. This would be for the obvious benefit of the child.

Since most illegitimate children are ultimately adopted it should be noted that for inheritance purposes the adopted illegitimate child is treated as the child of the adopting parents and not as the child of its natural parents. Thus his right to inherit from his natural parent is cut off, unless the spouse of the natural parent is the adopting parent. The proposed section therefore makes it clear that it would not be operative if the child had been adopted.

Prepared by
Mr. Frohnmayer

Proposed revised Oregon probate code
ILLEGITIMACY
1st Draft
May 7, 1967

Final Revised Draft of Proposal #4

Section 1. Inheritance to, through and from an illegitimate child. For the purpose of inheritance to, through and from an illegitimate child:

(1) The child shall be treated as the legitimate child of his mother; and

(2) The child shall also be treated as the legitimate child of the father if, during the lifetime of the child

(a) The father marries the mother;

(b) The father acknowledges in writing that the child is his own; or

(c) A court determines the paternity of the child during the lifetime of the father in a proceeding brought for that purpose.

Section 2. Repeal of existing sections. ORS 111.231 is repealed.

References: Advisory Committee Minutes

8/13,14/65, pp. 12 to 15
9/18/65 p. 7

ORS 111.231, 109.070 and 109.080

Comments: This is the wording of proposal #4 except for minor revisions of section 1 (2) (c).

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
ILLEGITIMACY
1st Draft
January 11, 1967

This draft is based primarily on Proposal #4 and the action taken by the committee at the August and September meetings in 1965.

Section 1. Inheritance by, through and from an illegitimate child. For the purpose of inheritance by, through and from an illegitimate child:

(1) The child is considered the legitimate child of his mother.

(2) The child is considered the legitimate child of his father if, during the lifetime of the child:

(a) The father marries the mother;

(b) The father acknowledges in writing that the child is his own; or

(c) A court determines the paternity of the child during the lifetime of the father in a proceeding brought for that purpose.

References: Proposal #4

Advisory Committee Minutes:
8/13,14/65, pp. 12 to 15
9/18/65, p. 7

ORS 111.231, 109.070 and 109.080

Comment: Compare the sections to ORS 109.070, where the child is considered the child of both parents if they are married, cohabiting, and the husband is not impotent; the parents marry after birth; filiation proceeding as provided in ORS 109.110 to 109.230 and paternity being established by law.

Section 2. Repeal of existing section. ORS 111.231 is repealed.

FOR DISCUSSION ONLY
UNIFORM PROBATE CODE

Third Working Draft
Uniform Probate Code
With Comments

National Conference of
Commissioners on
Uniform State Laws

1155 East 60th Street
Chicago, Illinois 60637

November, 1967

A grant from the American Bar Endowment and the American Bar Foundation made possible the preparation and distribution of this draft of the Uniform Probate Code. Distribution is made for the purpose of soliciting comments and suggestions prior to consideration by the National Conference of Commissioners on Uniform State Laws in July, 1968. The ideas and conclusions in the comments and draft legislation have not been passed upon by the Commissioners on Uniform Laws; they do not necessarily reflect the views of the staff, advisors or the Commissioners.

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Prefatory Note

This draft, as the title page indicates, is a working draft. It was prepared for preliminary consideration by the Commissioners on Uniform State Laws at their 1967 meeting in Honolulu. The introductory remarks of the Reporters for that meeting are reprinted as an Introduction to this draft to help the reader understand the structure of the Code. Also printed as part of the Introduction is a description prepared by the Chief Reporter showing the flexible nature of the system proposed in this draft and the choices available to the claimants under a will, creditors, the personal representative and to the lawyer advising a client concerning an estate.

The Table of Contents of the draft legislation appears at page . The membership of the drafting committee of the Conference, the list of reporters and the advisors from the Real Property, Probate and Trust Law Section of the American Bar Association and from the Trust Division of the American Bankers Association follows this preface.

The Commissioners on Uniform State Laws are soliciting your help in refining and improving this Code, prior to its consideration by the Conference in July 1968. Please send written comments to the National Office of the Conference, 1155 East 60th Street, Chicago, Illinois, 60637 and, if you wish, to the Bar and Bankers Association representatives with whom we are working.

Allison Dunham
Executive Director
National Conference of Commissioners
on Uniform State Laws

Remarks by Richard V. Wellman, Project Director, Uniform Probate Code Project, Before Committee of the Whole, National Conference of Commissioners on Uniform State Laws, Honolulu, Hawaii, on Friday, August 4, 1967. (With notes pointing up certain changes in the draft Code made in October, 1967)

Members of the National Conference -

After more than five years of preliminary work, the Reporters for the Uniform Probate Code project are pleased to introduce a comprehensive draft of a complete code dealing with estates of deceased and disabled persons and with transfers effective at death.

Let me retrace some of the history of the project.

The work began in 1962 when it was jointly agreed by representatives of the National Conference and members of a special subcommittee of the Real Property, Probate and Trust Law Section of the American Bar Association that effort should be made to update and revise the Model Probate Code. The Model Probate Code, as many of you know, was the product of work extending from 1940 to 1946 by a subcommittee of the American Bar Association working in cooperation with research facilities of the University of Michigan Law School. The Model Probate Code was never considered by this Conference. Indeed, it was not designed as a uniform Act. Possibly as a consequence, it has not been adopted in total by any state, although several states have made very considerable use of its ideas and provisions.

By 1964, a committee of Reporters for this project had been assembled. Portions of preliminary drafts were presented at your meetings in 1964, 1965 and 1966. Last year at Montreal, I reported to you that a preliminary draft of new provisions covering all of the subject matter of the Model Probate Code had been written by two of the Reporters. A limited supply of this preliminary draft was circulated to the

Special Committee there at and after the Montreal meetings.

In the spring of 1967, following several meetings of all Reporters, at which intensive discussion was had about portions of the preliminary draft, redrafts were prepared for the books on your desks. Finally, all Reporters recently met for a continuous five-week session extending from June 10, at Boulder, Colorado. The Code which is being distributed to you at this meeting is the product of that meeting.

The recent draft contains six articles. Articles, II, III and IV cover all facets of the substantive and procedural rules relating to decedents' estates. These provisions were fully considered by all Reporters at Boulder and you will notice that we label each of these Articles "Reporters' Boulder Drafts". Article I deals with definitions, organizations of the court assigned to handle estate matters and certain procedural matters. Article V deals with protective proceedings concerning the persons and estates of persons under disabilities. Article VI is an umbrella article in which various provisions concerning non-probate transfers may be accumulated. At the moment, its single part deals with multiple-party accounts.

Time at Boulder ran out before all Reporters could fully consider and approve Articles, I, V and VI. Hence, these portions of the draft are labeled "Boulder Subcommittee Drafts" rather than "Reporters' Boulder Drafts". In each case, however, these articles were extensively rewritten at Boulder, and represent the work of three or more of the Reporters. [1]

Last year at Montreal, we announced to you that the Special Committee had approved the Reporters' proposal to broaden the project to include some coverage of the law of trusts. One specific objective is to provide a common pattern of procedures for inter vivos and testamentary trusts. While we have not abandoned

this undertaking, we have not yet prepared any drafts dealing with this subject.

Perhaps it is evident from the history of the project that a very determined attempt has been made to get as broad a base as possible for the drafts being distributed here. We started with the benefit of the very careful research and excellent thinking that went into the 1946 Model Probate Code. The Reporters for this project, whose names appear on one of the preliminary sheets of the package you have received, were selected with an eye toward obtaining geographic diversity, as well as experience in the teaching and practice of estates law. In the person of Reporter Paul Basye, we secured the expertise of a practitioner familiar with California procedures and community property problems, as well as of a scholar-author who worked closely with Professor Simes on the Model Probate Code. The seven other Reporters represent many decades of teaching and practical experience with the law of estates.

Moreover, we have had the benefit of a good deal of contact with state and other efforts to improve probate law. Professors Effland and MacDonald are the principal draftsmen of a new probate code recently proposed in Wisconsin. Professor Vestal has had a close relationship with Iowa's new probate code. Professor Scoles has worked closely with Illinois Bar Association committees on probate legislation there. Professor Fratcher worked with the New York Commission on Estates. Moreover, he was supported by a Ford Foundation Fellowship in a year's study of modern English probate law and practice and has written extensively of his observations. Incident to a proposed revision of the Michigan Probate Code, I have worked for about a year with a group of Michigan lawyers and judges in an intensive study of the draft which the national project spawned last summer. As a result of all of these contacts, many of the ideas that have found their way into the

draft you are receiving today were first suggested by practicing lawyers, experienced trustmen, and probate judges.

Moreover, copies of last summer's draft were distributed to more than a hundred ABA committee members. Two very active subcommittees of the Real Property, Probate and Trust Law Section of the ABA have made projects of study of portions of last summer's preliminary draft. Another group of ABA advisors have commented to us on the entire draft. Thus, literally hundreds of interested persons have contributed very significantly to this new draft by their oral and written reactions to some of the major ideas as well as the detail of what you are receiving today. We have sought the broadest possible base for this draft and I believe we may have achieved it.

I want to comment briefly on the need for probate reform and the overall philosophy and approach of the draft you have received. Then we'll take a closer look at the document and begin the process of becoming acquainted with its general content and specific provisions.

During the early years of this project, many questioned the practicality of effort to produce a uniform probate code. Knowledgeable lawyers conceded the obsolescence of much of existing probate law, but expressed doubt that legislatures could be interested in the heavy work involved in recasting so formidably large an area of law. In many states, well-entrenched political establishments have grown about the existing probate structure and it seemed unlikely that the public or the bar could be sufficiently interested in probate innovation to mount the drive needed for new legislation.

But, in 1966, Mr. Dacey's controversial book, How To Avoid Probate, became a best seller. At about the same time, a Reader's Digest article "The Mess in our

Probate Courts" attracted wide attention. Newspaper and magazine articles about the archaic and irrelevant character of probate law and procedure have proliferated. Those of us like Messrs. Dunham, Pierce and myself, whose names have been publicly associated with the possibility of probate reform, can attest to the fact of widespread public interest in the subject. Clearly the public will now support and encourage legislators in considering a different approach to many ancient probate problems. Indeed, I would hazard the guess that there is no area of private law that is more concerning to the public. This is not surprising. Relatively fewer people are involved in divorce or auto accidents or commercial swindles than are concerned with inheritance at some time or another. Moreover, it's the reading and thinking part of our affluent public who are concerned with probate matters.

Practicing lawyers have many, completely professional, reasons for being interested in probate reform. Under present assumptions, clients are under pressure to turn to bankers, trust companies, life insurance salesmen, and a variety of other kinds of sellers of services for assistance in estate planning, and they are doing so in thousands and thousands of cases. Lawyers, whose stock in trade has been the will, cannot, in good conscience, describe the will as competitive from the standpoint of post-death expense and delay, with the host of will substitutes that are available. But, there is no totally satisfactory substitute for the will. The revocable trust comes closest, perhaps, and may be recommended to some as a satisfactory will substitute, but the trust device is, at best, awkwardly applied to situations where the parties in interest want to retain full ownership until death. Moreover, the trust is unsuited to modest estates ranging up to say $50,000 in value. Various forms of joint ownership supply useful answers for some small estate situations, but joint ownership does not offer the flexibility of testamentary schemes. In sum, modern emphasis on total estate planning has made lawyers increasingly

aware that the will is of unique utility, but that it is also uniquely encumbered by post-death costs. They are also aware that the public associates the will with lawyers and compares them unfavorably with other sellers of services whose specialties are more effecient. Lawyers would like to make the will as efficient a device in estate planning as possible and reform of probate codes is necessary to that end.

Moreover, of course, the day when we can afford to have different probate laws in fifty states has passed. People no longer live and die in one location of the country with the frequency of former times. Estates are more likely than not to involve assets or survivors located in several states. Lawyers need to be able to predict the state laws and procedures of other states and clients need to be relieved of the necessity to recast estate plans with every change of domicile or new acquisition of out-of-state land. The present variance in state laws which requires replanning of wills with each inter-state move or acquisition is not only a nuisance; it's probably a positive hindrance to the free mobility of capital among the several states.

The overall approach of the draft you are receiving is to shift probate and estate laws away from their present historical orientation toward what people want and need. We have attempted to implement this purpose on all fronts. For instance, the law's plan for persons who die intestate should be rational and as uncomplicated in respect to administrative detail as a statute can make it. We should not make intestacy a chamber of horrors so that people will be driven to write wills. Lawyers cannot afford the public irritation with the law that retention of obsolete patterns and practices respecting intestate estates generates. The formality required for wills must be rational, rather than ritualistic. The settlement of estates should be stream-

lined so that if there are no problems, there will be no need for involved court procedures. Procedures relating to settlement of estates should start from the assumption that estates belong to the survivors, and that the office of the law and rules is to assist, rather than impede the natural desire to accelerate the transfer from dead to living. Guardianship also should be moved away from cumbersome historic assumptions. The law should cease to terrorize persons approaching old age and possible senility with the prospect that they may need to be adjudicated incompetent simply because assets may need to be sold to secure their support. Transfers serving as will substitutes should not be condemned nor discouraged. Rather, the office of the law should be to define transactions with a view to implementing, rather than discouraging, what people want.

We offer this draft as responsive to these purposes.

Let's get down to specifics. I want to take you through the organization of the entire Code and explain briefly what I'll call the high spots of the several articles. When we've done this, we propose to concentrate today on Article III dealing with probate procedures.

As can be seen from the Summary Table of Contents, and as previously mentioned, the draft is divided into six Articles. Sections are numbered, with four digits, with the first signifying the Article, the second the Part, or Article subdivision, and the last two signifying the location of the Section in the Part. A similar system was used in the Commercial Code.

Article I, entitled General Provisions, is devoted to the subjects indicated by the titles on its three Parts; e.g., Definitions, the Organization and Status of the Probate Court and Provisions Relating to Appeals. Perhaps the most important section in this Article is Section 1-201 which expresses the fundamental assumption

(on which the entire Code rests) that the court, whatever its name might be, that is assigned jurisdiction to handle the judicial matters arising under the Code is to be a court having the full power of a court of general jurisdiction. We are aware, of course, that the probate courts in many states lack this kind of power, but we are convinced, and all of our advisors are clear on this, that an estates court needs to be provided which can deal fully with any question that may come before it.

Elsewhere in the Code, particularly in Article III, some non-judicial functions are assigned to a non-judicial officer of the probate court, who may be called Registrar, or clerk, or whatever. If any particular state finds constitutional amendment is necessary to increase the power of the judicial side of the probate court, it might sidestep the difficulty by assigning the judicial functions described to a division of the general trial bench, and the non-judicial functions to existing, inferior probate officers. The important point, however, is that the judicial assignments contemplated by the draft call for a fully equipped court with appeals therefrom being handled just like appeals from other equity causes.

Article I also contains an important Section, #1-214, dealing with proof of death which improves, very substantially, the solution to the problem of proving death by long absence. It, with other provisions of the draft dealing with simultaneous and successive deaths, make the Uniform Absence as Evidence of Death Act obsolete.

Article I, as is true of other relevant portions of the Code, contains bracketed provisions which are designed to accommodate community property states. One of these is Section 1-104 ee,[2] in the definitions on page I-7, which deals with property moved from a common law state to a community state. Its counterpart, designed for eanctment in common law states, is 1-105 which deals with property which, when acquired, is community, and which is later moved to a new common law domicile.

Finally, Section 1-218[3] is very important. It expresses the idea that the various time limitations and other regulations relating to administration contained in the Code are inapplicable when fraud has been used to circumvent the provisions of the Act. Rather, a special time limit of two years from discovery of the fraud is stated.

Article II covers much of the substantive law of intestate succession and wills. The highspots of Part I on Intestate Succession include the following:

(1) The historic distinction between real and personal property for purposes of succession is abolished. Dower and curtesy are also abolished.

(2) The common pattern of intestate devolution that causes estates to be split in halves or other fractions between surviving spouse and issue of the decedent is altered in ways that we believe make the law's plan under this draft far closer to the wishes of the average property owner. Under Section 2-102, a surviving spouse takes all when there is no child or issue, unless he or she has been married less than a year to the decedent in which case the estate is equally divided between the spouse and the immediate family of the decedent. If there are issue who are also issue of the spouse, the spouse takes all of the first $50,000 and one-half of the balance. Thus, in what may be the normal situation, the Code moves toward the common desire of spouses who routinely write wills leaving everything to the other but also reflects the split estate notion for large estates. If there are issue of another marriage who survive, the surviving spouse and issue divide the intestate estate.

(3) Section 2-104 states that an heir must survive the ancestor by five days in order to take. This short, required period of survival means that persons need not write wills simply to hedge against the possibility that they and their heirs may be killed in a common disaster. The other provisions respecting intestacy are fairly standard, except that no relative who is of more remote kinship than descendant of a grandparent is included as an heir.

(4) In Sections 2-109 and 2-110, we have tried to box in all facets of the meaning of adoption in respect to heirship. Adoption terminates the relationship for purposes of inheritance with the adopted person's blood relatives, and makes the adopted person a member of the family of the adopting parents for all purposes of intestate succession. Section 2-111 is the other important section dealing with family definition. It deals with the inheritance rights of illegitimates and contains needed, liberal provisions relating to the issue of void marriages and with the subject of legitimation.

Let's move on to Part 2 of Article II. It deals with the elective share of a surviving spouse -- the subject of a spouse's right to take against a will. The highspots here are these: a) Both male and female surviving spouses are protected. We saw no reason in this age of equal opportunity and female capitalists to perpetuate ancient discriminations against spouses who are males. Secondly, the elective right relates to what we call an augmented estate which is the probate estate plus property transferred during or in contemplation of marriage as a gift to take effect at death, or so that the decedent retained a right of survivorship, power to revoke or consume, or general power to appoint to others, and certain

gifts in contemplation of death. A spouse's rights are defined by, and may affect these transactions. Though possibly appearing to enlarge the threat of disruptive election by spouses, our drafts are really intended to reduce the prospect. Thus, a spouse cannot gain anything by election if, after taking account of life insurance he or she has received, the value of annuity and pension rights, and the value received in testamentary, or testamentary-in-effect transfers, she has received as much as a third of the estate. That is to say, the fraction protected is only a third and the spouse must take credit for all properties which have come to her from the decedent as a result of his death in order to disrupt any of his planning.

The draft does not attempt to block all means by which a determined and well-advised husband or wife might seek to dispose of personal wealth so that the surviving spouse will take little or nothing. It seems impractical to attempt to do so, for the resulting complexity impedes understanding, and likely will not gain much. Thus, life insurance payable to third persons is not touched. With some exceptions, our scheme is like legislation recently enacted in New York on the subject.

Part 3 is a short part dealing with the problem of children who are not provided for in wills. There is no forced share here; rather the provisions seek only to accomplish what a testator presumably would want done in respect to a child who was not in mind when the will was prepared.

Part 4 deals with family succession rights which are preferred over creditors' claims. We have provided for what we call a "homestead allowance" for surviving spouse and minor children, if any. We suggest that it be $10,000 or some such arbitrary amount, or one-half of the estate, whichever is the smaller.[4] This sum, and certain exempt property, comes "off the top" of an estate, ahead of creditors'

claims, for the benefit of spouse and children. By shifting to a dollar allowance, we move away from the age-old meaning of homestead as a right in a decedent's real estate which was used as a home. We felt that survivors of apartment dwellers or other renters also should be given some preference to creditors of the decedent in respect to some portion of estates. Exempt property consists of one automobile and up to $2,000 of household goods. The practical effect of these provisions for homestead and exempt property is to create a right in a surviving spouse which comes ahead of the terms of any will and of creditors. The values involved may range up to as much as $10,000 to $15,000. Provisions in Article III provide very simple procedures by which such rights can be implemented without full administration.

The highspots of Part 5, on Wills, are these:

(2) We have stuck with the idea that two witnesses are required for execution, though a bracketed section for use by states wishing to continue a holographic will tradition is provided. But interest by witnesses is irrelevant to mere execution unless someone seeks to prove undue influence, or intimidation, and witnesses do not need to know they are acting with respect to a will or sign in each other's presence. Hence, we have reduced existing formal requirements very considerably.

(b) A form of pre-proved will executed with the assistance of a notary is provided, and, in Part 9 dealing with Custody, Deposit and Verification of Wills, we provide a procedure for securing an adjudication before a testator's death that a given will is validly executed and is good subject only to revocation.

Part 6 expresses many several rules of construction and related ideas that we think need to be provided for wills. In parallel with the provision in intestacy, a person named in a will must survive five days in order to take, unless, of course,

the will provides otherwise. Section 2-609 is especially important for it imports the standards for intestate transfer applicable to adoption and illegitimacy into the construction of various class gifts by will or other instrument.

Part 7 is only half a page long. It requires that contracts to make, or to refrain from revoking, wills be in writing. It also validates contracts which provide for benefits payable on death.

Part 8, called "General Provisions" deals with renunciation, effect of divorce and the effect of homocide on various transfers effective at death.

Before considering Article III, which we would like to describe in somewhat greater detail, I'll ask fellow Reporters Vestal and Fratcher to tell you a little about Articles IV and V of the Code. [Summaries of remarks by Vestal and Fratcher describing Article IV (Foreign Personal Representatives; Ancillary Administration) and Article V (Protection of Persons Under Disability and Their Property) precede Articles IV and V.][5]

Article VI should be briefly introduced. It deals with joint accounts and Totten or bank deposit trusts. It proceeds from these assumptions:

(1) These common transactions, whether or not testamentary, should be validated and made reliable.

(2) As between living depositors, funds in joint accounts and Totten Trusts belong to those who provided the funds to the account. That is, no real change of ownership occurs on deposit in joint name.

(3) The bank must be protected in following the terms of the account, irrespective of the rights between the parties.

(4) Every joint deposit should be deemed to involve survivorship rights unless it's a business account, or is stated to be without survivorship feature.

We have postponed comment about Article III because we wanted to suggest the philosophy and breadth of the entire draft before turning to the portion we have chosen for particular concentration today.

We want especially to emphasize Article III because we believe that its provisions relating to probate of wills and administration of decedents' estates may represent the most important steps in the effort to move probate matters closer to the needs of the people. It represents our effort to modernize probate procedures; e.g., the way estates are handled after death. Many of the other antiquities applicable to probate matters can be neutralized by well drawn wills. Thus, it is quite possible today for a well advised person to obtain a will which moves his affairs away from archaic rules concerning intestacy and from ancient traps that highlight such subjects as lapse, ademption and abatement of legacies, and exoneration, to mention a few. But, a will draftsman is virtually helpless when it comes to his ability to free an estate from unnecessary and expensive involvement by the probate court. Whatever the will may say, it must be proved after death. In a large number of states, proof of the will may be obtained only by commencing a court proceeding, after full notice to all possibly interested persons. Attesting witnesses must trudge to the courthouse to testify on matters that no one questions. Worst, perhaps, the court proceedings thus commenced may tend to entangle the estate for some time, for out of it comes the appointment of one who is technically an officer of the court and who is charged by law with pursuing a formidable number of steps, most of which must be culminated by an order of the court approving what the representative proposes to do. The result has been called the "probate deep-freeze" for assets are rather effectively frozen for a year or more after death while the archaic machinery of another era cranks through its process. There are, of

course, exceptions to this dreary situation in the multitude of procedural patterns available in the several states. But, it remains true of a very great part of modern probate procedure that the process of proving a will after death, securing the appointment of a personal representative and administering the estate is characterized by required court proceedings which have tended to become more and more cumbersome and complex as we lawyers have sought to make the system provide meaningful protections and also to reshape statutes and procedures to meet the modern demands of procedural due process.

The major change we propose is not novel or dramatic. We simply propose that the relationship of probate courts to estates be made more like the normal relationship that courts bear toward persons in respect to civil matters. Thus, we have designed a system under which the judge occupies a passive, supportive relationship to every estate. We have sought to give every interested person easy access to a judge capable of fully handling any kind of question relating to an estate. But, we have sought to have the ultimate question of whether and when a judge will be involved determined by the interested persons, rather than by a system which denies survivors their assets until they have paid their homage to the probate court. We have sought also to keep the scope of necessary judicial matters to the dimensions dictated by questions raised in pleadings. Hence, unless someone with an interest in an estate wants a judicial order for the resolution of a question, or the elimination of a risk, no judicial order will be required by the state code.

It might be thought that we are making it difficult for persons interested in estates to gain the protection presently available or supposedly available, in probate proceedings. But this is not the case. We assume the continuation of a special

court to handle estate problems. We continue the present ease with which persons interested in estates may be bound after fair notice in respect to their interests in a decedent's property. And, as suggested earlier, we provide easy access to the judge for those with problems.

Nor are we recommending a complete switch from common law assumptions about probate of wills and designation of representatives of decedents, to the civil law assumptions where succession may be a completely private, non-court affair centered around the heir who takes assets and liabilities of the decedent. We have retained the idea that a will is unavailable for proof of succession until it is officially validated, e. g., probated, after death. Also, a personal representative still derives authority from appointment by a public agency, rather than from will or relationship.

The key to our drafts is this: where there is no dispute, or wish for total protection, a will may be probated, and a personal representative may be appointed in what we call "informal proceedings". Informal proceedings may be handled by non-judicial persons who are employees of the estates court. Perhaps they will be called Registrars, which is the bracketed term suggested in our draft. The name is unimportant. The important thing is that they can probate a will without adjudicating rights by making an administrative determination concerning certain necessary matters that are clearly defined by the Code. At the same time we do not make any set of survivors take the risks implicit in informal probate. The Code does not impose informal probate on survivors or attorneys who fear the risks involved. As indicated earlier, any interested party can get the judge to pass on the issue of will or no will, or to resolve disputes concerning who may be appointed. The important change is that he does not have to do so. Thus, the Code gives him a legitimate way to take risks.

So far I've only suggested how estates may be started informally -- how are they handled thereafter? An equally important additional concept involved in our drafts is that a personal representative, though appointed by a public agency, acquires the status of trustee for the interested persons from appointment. Whether he is an executor under a will, or an administrator in intestacy makes no difference. The Code gives him a very broad set of powers which are designed to permit him to handle any problem of administration without recourse to the judge. But, consistently with our purpose to offer a completely flexible pattern of procedures, a personal representative has easy access to the judge if problems require solution or judicial approval of his accounts is desired. Also, a procedure is provided which will permit interested persons to secure supervision by a court of a personal representative which, in a sense, gives them the option of administering estates much as they are handled today. This feature will permit the Code to descend gently onto existing practice in any given state or community. Thus, if a community's lawyers are either unfamiliar with, or suspicious of, the new provisions, they may advise use of present procedures rather than make use of the new options. We believe also that this approach will permit uniformity of law in dissimilar communities or states.

The bulk of Article III is concerned with providing means for protecting all kinds of persons with interests, or potential interests, in an estate and with spelling out how executors and administrators should discharge the duties they owe survivors. Perhaps some new perspectives can be gained if we approach the Code from the viewpoint of various kinds of persons whom we'll invent for the purpose.

Take the case of the surviving widow whose husband left a will leaving his estate to her and to one adult son by a prior marriage. Let's suppose that other adult

children are disinherited by the will. The widow, of course, is interested in speedy settlement with as little publicity as possible. Under the draft, she may present the will to the probate clerk along with her verified application in which she must state that she believes the will is valid, that she knows of no other testamentary instrument, and describing the decedent's survivors known to her. She is not required to estimate values or otherwise describe estate so that some privacy is possible. In a similar, or possibly combined application, she may seek appointment as executrix. If five days from death have passed, the clerk can enter a statement probating the will. No notices need to be given in advance unless someone has demanded notice. No bond is required unless the will requires it or some person with an apparent interest in the estate demands it. Immediately upon appointment, the executrix has full power to sell, exchange, or otherwise deal in and with the assets of the estate, including any land. She must send information of her appointment to the persons apparently entitled to the estate -- in this case, the requirement would be to inform the son with whom she divides the estate of her appointment. She runs a publication for creditors if she is interested in gaining protection for herself and her son against unknown claims. She is under a duty to prepare an inventory of the estate but she may select any appraisers who may be necessary where values are not obvious without reference to the court or judge. She may send a copy of the inventory to the son as the other known interested party, and so prevent any public record indicating the nature or value of the estate from being created. If she has advertised for claims, unfiled claims are barred in four months and the devisees are fully entitled to receive the property. If the executrix is interested in protection against the son's later complaints about the way she handled the estate and cannot, or does not, get a release from the son,

she can file a closing statement with the court. Six months thereafter, a statute of limitation bars the son from starting litigation on account of her administration. The Code lets her collect assets as soon as five days from death. It tells her what her duties as executrix are. Whether she carries them out is a matter for her concern and that of creditors and interested persons. The probate court has no responsibility in the matter unless and until some person with an interest requests it to make an order.

What about the disinherited children of the testator? Let's look at the situation from their perspective. Presumably, they will know of the death of their father. If they are apprehensive that something may occur without their knowledge, they may file a demand for notice of any probate proceeding with the probate clerk at their father's domicile. This will not block the widow from securing informal probate, but it will hold up informal probate until the widow has given them at least a week's notice of her application. This enables them to bring proceedings to block any informal moves. Or, the disinherited children can do more. Without waiting for any other move, they can initiate a lawsuit in the probate court to have it declared that their father left no will. They may also wait and see if any will is probated informally and bring their contest against it. Allowing informal probate to occur in no way prejudices their contest, for the Code is clear that informal probate does not establish any new presumptions against later contestants.

Whether or not the children learn about their father's death in time to demand notice or take some early step to block the widow, they are not helpless by any means, nor particularly prejudiced by informal probate. Unless they are made parties by good notice complying with the requirements of due process to some formal proceedings in which it is adjudicated that they are disinherited, they have

three years from the date of the decedent's death to contest an informal probate. If the estate has been distributed under the informal probate, they are entitled to have the property or its value re-collected from the distributees and properly divided, assuming, of course, that they succeed in establishing that the will was invalid. If they learn of an informal probate before the estate is distributed, they can tie up the executrix so that she will be guilty of a contempt if she distributes without a court order. This may be done quickly and on preliminary hearing if the tie-up is sought in conjunction with their effort to knock out the will.

Let's try another perspective. Is the adult son who shares the estate with the widow adequately protected against her possible dishonesty, or bad management? He can demand notice of probate proceedings and assure himself of an opportunity to oppose her appointment in the first instance. If he allows this opportunity to go by, he will receive information of her appointment if she follows the law. If she does not, he is no worse off than the disinherited children in respect to finding out what's going on. That is to say, if the will has been probated, and letters have been issued, the probate court at the decedent's domicile will have the file for his information. Using it, or the information he receives from the executrix, he can demand that the widow be bonded. Or he has the assurance that a restraining order is quickly available to tie up the widow if developments cause him concern. Also, he is assured that the executrix cannot dodge the sting of contempt proceedings if she tries to avoid court proceedings by hiding from process servers or skipping from the state, for, by accepting appointment, the executrix has consented that she may be sued on mailed notice in respect to estate matters. If he does nothing until the estate is distributed because he does not learn until then of bad management, he has six months after he receives an account and a copy of the closing statement

before he is barred from surcharging the executrix for bad management. If she moves to the judge for an order that might cut his rights down sooner, he is assured of notice of the particular proceeding and an opportunity to be heard.

What about the decedent's creditors? Their claims are not barred until four months from first publication, and not then if they are secured, or seek to sue the decedent's personal representative for the sole purpose of establishing liability of an insurer of the decedent. In the meantime, the widow as executrix may properly pay them even though no valid claim is filed, subject, of course, to surcharge by the other distributee if he can show that an invalid claim has been recognized. If assets are distributed by the widow without advertising for claims, or if claims are ignored though filed, the creditors can sue the widow for breach of fiduciary duty owed to them, or assert their rights against the widow and son as distributees.

What about title to real estate? If an informal probate is subject to contest for three years, can an executrix create good title in purchasers? Can the widow and son convey a good title as distributees when it is possible that the estate may have to be divided with other heirs in the event of successful contest? The answer in both cases is yes. The draft contains elaborate provisions protecting purchasers from personal representatives and distributees. The market place is protected if the personal representative was acting under a valid appointment when he sold or distributed. Sworn applications and appearances support letters and the prospect, or fact, that letters are later terminated because a will is successfully contested does not serve to invalidate what was good in the meantime.

Is the draft fine for widows, but impractical or dangerous for professional fiduciaries handling estates? We don't think so. A fiduciary who believes the

chance of will contest is significant, can precipitate the matter by seeking formal judicial consideration of the will in the first instance. Or, he may administer the estate under informal probate and appointment and then before distributing assets, initiate a judicial proceeding to have the will adjudicated and to secure approval of his management and proposed distribution. If no formal proceedings are pursued, the draft nonetheless protects the fiduciary by relieving him for surcharge for authorized acts or distributions. Hence, if an executor distributes an estate to A because the informally probated will under which he was appointed so directs, he is not liable even if the will is subsequently contested successfully. Rather, the heir's remedy is to get the property or its value back from the distributee.

We have done nothing for tax collectors. We think they can take pretty good care of themselves.

What about probate judges? Are they being put out of business? The Code confers authority on the estates court to handle any kind of question that may involve an estate. We think that the increased power in probate will mean that much litigation concerning estates that is presently handled in superior courts will shift to probate. We think also probate judges will welcome relief from senseless requirements of existing law that cause public resentment, as well as the opportunity to become true specialist jurists.

What will the Code do to fees and costs of probate? In a nutshell, it eliminates much of the make-work aspects of probate administration. In time, as lawyers become acquainted with its potential, there will be a move toward charges based on the time spent on the estate, rather than a set percentage fee. The Code does nothing of a direct sort about this, however. Its only mention of fees relates to those of personal representatives who are stated to be entitled to "reasonable compensation".

We believe, however, that the professional interest on the part of good lawyers to give service as needed and wanted by clients will lead the way toward a new approach to probate fees.

Overall, the procedural philosophy and techniques expressed in Article III are not novel or original with us. In a sense, what we have done is to pick the features of existing probate codes and practices which appear useful to provide needed protection to legitimate interests and offer them in combination. Probate by a clerk or registrar without notice is well-known in some of our states as is informal appointment. But, the familiar "probate after notice" may well serve a purpose and should be available, though not required. Perhaps in a particular estate a personal representative should not pay debts or distribute assets without court approval. If so, this familiar pattern is available under the option of supervised administration. On the other hand, the circumstances may make it obvious that no disputes will arise or that the family will do what's right if there are disputes, so that a minimum of formal protections are in order. The Texas and Washington pattern of independent administration (non-intervention probate) is available to meet the need. It's applicable in those states only if wills so direct. But we think it should be available to heirs in intestacy as well. Creditors are protected as is presently the case in Ohio by a short period after publication to file, after which it's too late. Rather than innovate with new terms and ideas, we have sought to rearrange the familiar. In short, we simply have provided means by which our existing basic approach to probate administration can be made to work efficiently and flexibly.

Perhaps we can now look at the details of Article III and read some of its key provisions.

First, let me comment on the organization of Article III. We call Part 1 "General Provisions". It introduces the procedural side of probate matters, gives the probate court subject-matter jurisdiction and expresses the idea that probate litigation is like any other litigation in that it occurs only when initiated by some interested person. Also it expresses the option to appoint supervised fiduciaries as is done today.

Part 2, called "Probate of Wills and Appointment Proceedings" sets forth details concerning the proceedings leading to formal and informal probate or appointment. It also contains the important statute of limitation of three years from death for probate or contest.

Part 3, called "Personal Representative; Appointment, Control and Termination" covers the issuance of testate and intestate letters, and includes provisions about bond, removal, resignation and successor representatives.

Part 4 is the important part which gives every personal representative the status of a trustee and expresses the idea that he is to proceed without further order where feasible. The part also expresses the duties of such fiduciaries in respect to giving information to those they represent, inventory and appraisement and their obligation in respect to a decedent's assets. The critically important sections protecting members of the commercial community who deal with personal representatives is here.

Part 5 covers creditors' claims. Part 6 is a statutory charter enabling the personal reprsentative to distribute without court order. Part 7 provides judicial and non-judicial methods for ending an administration and expresses periods of limitation in respect to possible liability of distributees to creditors and others. Part 8 outlines procedures for informal and formal compromise of controversies. Part

9 relates to collection of small estates by affidavit, and gives some rules for use by personal representatives of estates which do not exceed sums needed for expenses, exemptions and allowances.

END

Notes

1. The Reporters gave full consideration to Articles I and VI at a meeting in Chicago held October 20-22, 1967. The Boulder subcommittee drafts of these Articles were amended somewhat and approved as changed. Article V was discussed and changed. However, all Reporters have not yet approved the exact content of Article V as it appears in this Third Working Draft.

2. Section 1-104 (ee) of the Boulder draft now appears as 1-106 of the Third Working Draft.

3. Section 1-218 of the Boulder draft now appears as 1-214 of the Third Working Draft.

4. The Reporters reconsidered the homestead allowance provision at the October, 1967, meeting in light of a recommendation that some set minimum amount be provided so that a certain, small estate exemption would be provided. As redrafted, 2-401 provides for a flat $5,000 homestead allowance.

5. It was agreed at the October meeting of the Reporters that the provisions relating to court-appointed guardians of the person of minors and adult incompetents would be dropped. Provisions on appointment by will of a surviving parent or a guardian of the person of minor children will be retained, however, The feeling was that the subject of court-appointed guardians to control minors was more appropriate to comprehensive juvenile court legislation. Similarly, it was concluded that provisions permitting personal restraints for adult incompetents should be part of comprehensive legislation dealing with problems of persons who are mentally ill or deficient.

Those portions of Professor Fratcher's comments which related to provisions not appearing in the Third Working Draft have been deleted.

A Flexible System for Administering Decedents' Estates

American probate procedures rest on assumptions inherited from the English that wills must be proved after death in order to be effective, and that personal property of a decedent passes to a state appointed personal representative who is to collect it and use it to satisfy the decedent's creditors before distributing to successors. Jurisdiction to handle these essential steps has been concentrated, in the main, in a probate court. Over the years procedures in probate have become more and more formal because lawyers and judges have sought to build meaningful protective features into the inherited requirements. Thus, notice requirements have proliferated. Also, the idea that a formal court proceeding, once initiated, should continue to assure valid accomplishment of the purpose of the proceeding has flourished in probate matters. And probate judges and the draftsmen of probate codes have accepted instances of careful practice, in respect to particular estates, as models of procedure from which mandatory statutory routines have evolved.

As a result, in many states, the local code recognizes only one way of handling the various steps or problems relating to settlement of decedents' estates. It is that all facets of administration are part of one continuous court proceeding of which the probate judge has ultimate control. Attorneys conselling executors must take each estate through essentially the same routine without regard for whether the parties are contentious or friendly, or whether the estate is worth $15,000 or $150,000. The necessity for the routine is hard to explain; and fees, possibly justified by the required work, are not understood nor accepted by clients.

The "Flexible System for Administering Decedents' Estates" that the attached charts, lists and examples describe was designed by the draftsmen of

the Uniform Probate Code to meet the problem of inflexibility of present procedures. It seeks to provide most of the advantages of existing methods of handling decedents' estates. At the same time, by leaving the various procedures available as options, the system is designed to permit great variety in the way particular estates may be handled.

It also proceeds on the assumption that the state code should not attempt to supervise successors in an attempt to prevent persons from taking risks or to protect others who may be injured thereby. Rather, control of these private matters should be like that applicable to other private matters. That is, control should lie in the ability of other interested persons to use clearly stated rights and remedies that they may have to check the risk-taker, or to charge him with the consequences of his conduct.

But, the proposed system does not leave persons, including fiduciaries, who would like assurance defining or eliminating risk, from gaining the protection they want and are entitled to. All that is required is that they make a request to the judge and give notice to interested persons concerning the relief they seek.

In studying these materials, try to put present assumptions about probate procedures to one side. Table I illustrates what might be called the tools which are provided for use by the Uniform Probate Code. Formal proceedings, as you'll see, are lawsuits. But, the methods for securing jurisdiction over interested persons under the Code reduce the problems of initiating a proceeding to the point where it should not be much more difficult than that presently involved in matters which are brought before a probate judge on motion. Estates may be administered and settled without a formal proceeding, because the other tools availabe are designed to permit the job to be done without any adjudication. But, the Code

offers more than an option between formal and informal methods of settling estates. Rather, it offers an option between formal and informal methods at just about every step from first application for approval of a will to final settlement. Hence, there are a very great number of routes through estate settlement under the Code.

The system also offers, in the form of supervised administration, a remedy permitting persons interested in a particular estate to secure control by the judge over a personal representative. Supervised administration is a special kind of formal proceeding. Once it is granted, the options otherwise available as to the need for future judicial orders concerning the activities of a personal representative are substantially reduced.

Tables I and II are considerably expanded by the appendices. Some may prefer to work with the appendices at the same time first study is being given to the Tables. Others will prefer to work through all five Tables before getting into the detail offered by the appendices.

Flexible System for Administering Decedents' Estates

Table I

Major Procedural Techniques

FORMAL PROCEEDINGS

- Notice, hearing, order by judge, final subject to vacation and appeal
- Initiated by petition
- Interested persons determined by question raised

INFORMAL PROCEEDINGS

- Involves statement under penalty of perjury to non-judicial official
- Statement and easily proved facts support admin. order of probate and app't. of rep.
- No notice; no delay; no adjudication

FILINGS

- Statement under penalty of perjury
- No official response except receipt and filing
- Starts statute of limitations only

TRUSTEE STATUS OF REPRESENTATIVE

- Follows app't of executor or administrator
- Confers power over assets like that of an inter vivos trustee
- Statute prescribes duties

STATUTES OF LIMITATION

- May run from death, publication or filing
- Short periods
- Integral part of state's system of succession

SUPERVISED ADMINISTRATION

- Like bankruptcy or today's probate system
- Rep. is officer of court
- Required reports and closing

As drafted, the Uniform Probate Code contemplates a probate court which will be a court of general jurisdiction, with appeals going to an appellate court for reconsideration on the record. The court will include a clerk or registrar of probate who need not be a judge or lawyer. "Formal proceedings" are proceedings before the judge after notice which result in adjudications. "Informal proceedings," handled by the registrar, are subject to contradiction in formal proceedings and do not involve adjudication. States having constitutional limitations on the power of existing probate courts could use the Code by reorganizing the various provisions so that existing probate judges would handle matters allocated by the draft to the non-judicial official, including maintaining the office where necessary and permitted non-judicial filings occur. The formal proceedings would be routed to the court of general civil jurisdiction in such a state.

Flexible System for Administering Decedents' Estates

Table II

Proceedings Available; Keyed to Steps in Typical Estates

INITIATION

Informal Probate (1)
(Will or No Will?)

- Makes will effective without delay or notice

Informal Appointment (2)

- Initial Step in intestacy
- Second step, or combined with 1 if there is a will
- But, separate from 1 so that may probate will and not appt. a rep.

Formal Testacy (3)

- Adjudicates question of will or no will and determines heirs if intestacy
- Can corroborate informal probate, be original proceeding, or be a contest

Formal Appointment (3a)

- Same as 3, if intestate, except that an order appointing rep. is also involved
- Appropriate if no contest over will, but fight over appointment
- May involve a request for supervised administration

ADMINISTRATION
(Only after 2 or 3a)

Duties and Powers of Rep.

- Enables full admin. without further order
- Purchasers protected though breach of duty involved
- Distributees protected through ability to demand bond, quick restraining order, special admin.

Statute of Limitations on Claims

- Runs from advertising by rep.
- Rejected claims are barred unless proceeding between creditor and rep. started

Misc. Formal Proceedings

- Include dispute with claimant
- Interpret will re whether land should be sold, or as to burden of taxes, for example
- Covers any dispute that might arise

CLOSING
(Only after 2 or 3a)

Formal Accounting & Closing

- May be started by rep. or distributee
- May be combined with other requests for judicial ruling; e.g., with formal testacy proceeding, or proceeding to construe will

Closing Via Filing and Statute of Limitations

- Filing statement must be complete and true
- If so, questions as to propriety of rep.'s actions must be sued within 6 mos.
- Requirements include copy of acct. to each distributee
- Relates only to rights and duties between rep. and persons receiving estate via his administration

Supervised Administration

- Court assumes control through continuing jurisdiction of personal rep.
- Supervised rep. has same powers of collection and management as non-supervised rep., but may not pay claims or distribute without court order
- Relates only to control of rep. Hence, may follow informal probate, or may be combined with formal testacy proceeding

Flexible System for Administering Decedents' Estates

Table III

Some Proposed Time Limitations

From death:

1. Three years is time limit for informal or formal probate proceedings to establish will. (3-233)
2. Three years is time limit for assertion of unsecured claim. (3-504(a) 2)

Comment:

a. A will probated informally becomes indisputable after the later of three years from death or one year from probate (3-233).
b. If no will probated within period, then claim of heirs is perfect. Proceeding to determine heirs possible, however. (3-233)
c. No need for administration after three years except to facilitate collection and division of property.

From advertisement for claims after appointment:

1. Four months from first published notice to creditors is time limit for proof of claim. (3-504 (a))

Comment:

a. Appointment and advertising required. (3-202; 3-502; 3-504)
b. Expenses of administration subject to special non-claim (3-504 (b)) and secured claims excepted (3-504 (c)).

From filing of complete closing statement:

1. Six months is time limit for complaint against personal representative by distributees. (3-705)

Comment:

a. If will probated informally, and three years for contest has not run, heirs not precluded by six months' limit, but heirs' rights are against distributees (3-403; 3-609; 3-706)
b. Similarly, if estate distributed as intestate after informal appointment, a later-discovered will probated within three years from death would give takers under will rights against heirs. (3-403; 3-609; 3-706)
c. In any case like a. or b., purchaser from duly appointed personal representative, or from distributee, protected. (3-412; 3-415; 3-610)

Fraud?

The Code would provide that regular time limits would not bar an action in tort or for constructive trust against one who intentionally misrepresented, or concealed, a material fact to the detriment of another. Rather, two years from discovery of fraud is the limit. (1-218)

Table IV

Major Protective Devices and Provisions

Kind of Risk	Protection Available
1. Fraud in form of misrepresentation in statement required for informal proceeding or filing.	a. Person guilty of fraud and persons enriched via fraud liable to persons damaged in tort or restitution for two years from discovery, irrespective of other limits. (1-218)
2. Omission of relevant information in statement relating to informal proceeding, or filing.	a. In "Informal proceedings", clerk to check content of statement against statutory list before issuing letters or statement of informal probate (3-208; 3-209; 3-210) b. Intentional omission of required statement is fraud. c. Normal duty of fiduciary and to fully inform provides additional remedy.
3. Disinheritance of real heir via informal probate of will.	a. Cannot happen until at least three years have run from death. This period, plus the natural notice provided by death of relative, plus the probability that wills meeting checklist are okay, should make risk tolerable. (3-233)
4. Omission to identify proper heirs in distribution of intestate estate.	a. True heirs not barred of right to recover value wrongfully received by distributees, unless there has been a formal proceeding after full notice or until the later of three years from death, or one year from distribution. (3-233; 3-609; 3-706)
5. Appointment of person lacking needed business skills in no-notice proceedings	a. Caveat proceeding permits any interested person to have special notice before appointment. (3-207) b. No appointment possible for five [5] days after death. (3-216) c. Appointment made informally may be attacked in formal proceedings. Incident to such proceedings, prior appointee loses all but emergency powers. Also, court may appoint a special administrator. (3-221; 3-234; 3-314)

6. After appointment, protection against bad judgment or other default of personal representative.	a. Any person with substantial interest in estate as creditor or probable distributee can compel bond at any time. (3-306) b. Also, any such person may move to court for a restraining order which subjects personal representative to penalty of contempt if disregarded. (3-308) c. Clear remedy to surcharge for breach of duty. (3-403) d. Person interested in specific property may restrain sale, request court order that asset be sold to him or secure other relief. (3-308)
7. Protection for children and other persons under disability.	a. As now, through guardian ad litem, in respect to interests affected by litigation. (1-201) b. By three year period after death providing chance for questions to be raised if there are no formal proceedings. (3-233) c. Fiduciary obligation of personal representative remains open in respect to misrepresentation or non-disclosure in accounts furnished to persons who should recover estate. (1-218; 3-403; 3-705) d. Erroneous distribution leaves distributees liable in restitution until the later of one year from distribution or three years from death, except where the distribution is approved by court after hearing featuring guardians ad litem for incompetents. (3-609; 3-706) e. Personal representative authorized to distribute to person under disability only by distributing to one able to give valid discharge; e.g., a conservator-trustee, or one described by 5-103 (3-613)

In General

a. By eliminating much of the need for routine court orders, the matters which are brought before a judge after full notice should be better considered, with attendant increase in the likelihood of ultimate accuracy and fairness, than is true at the present.

b. Interests cut short by a statute of limitations may be seen as not warranting full protection. Persons who do nothing by way of inquiry about the affairs of a relative for more than three years after his death will usually not be the close kindred to whom such decedent's property should pass. A will that is discovered more than three years after death should be suspect, per se.

c. Acceptance of the concept that a personal representative is a fiduciary with clear lines of responsibility to the interested persons will more surely bring protection cut to fit the interests and inclinations of the property owners involved, than the system of making the court some sort of watchdog to see that total propriety attends each estate.

Table V

Illustrations

Case 1

Hypothetical facts : Testator's estate consists of personal and intangible property estimated to be worth $50,000. His survivors are his widow and two adult sons. He left an apparently well executed will of recent date which leaves his entire estate to his widow. His sons want nothing and are willing to cooperate in every way.

A Possible Approach
(Cheap and risky)

- Informal probate of will
  [Available five days after death; no notice; no hearing; original will, death certificate and detailed sworn statement are required.]
- Informal appointment
  [Named executor may be appointed as soon as will probated; no bond unless requested; application may be combined with application for probate.]

At this point, the executor has accepted responsibility and is liable to all persons interested in estate to complete administration via powers conferred. But, unless a creditor or devisee complains, or unless someone challenges the will, or the executor wants protection, there is no compulsion from the court to do more. Assuming the executor pays all known bills and taxes, and causes estate to be transferred from decedent's name to devisee's name, the matters left open are as follows:

a. Other possible creditors not barred without advertising. Three years from death is statute of limitation on risk of executor and devisee.
b. Because will probate was informal only, basic period of three years from death is risk period for will contest, later-discovered will, claim by persons who may turn up as prior spouse, forgotten children, or with various claims for service and the like.
c. Executor takes risk of change of mind by family. Devisee may blame executor for failing to pursue salary claim, etc.

Case 2

Hypothetical facts : [Same as Case 1]

A Better Approach
(One hearing at beginning)

- Informal probate
  [To permit early appointment]
- Informal appointment
  [Takes the place of special administrator; quick sale of assets possible.]
- Formal probate
  [Executor starts formal proceeding to get adjudication on will. Shortens time for question to time for vacation of order or appeal. Notice to known and unknown heirs bars later claim.]

At this point estate is just like first example, except that risk of later will or contest is limited very substantially.

- Advertisement for claims; payment of all known claims; four months pass.
  [Now risk of further claims against decedent is eliminated.]
- Executor distributes without order and files closing statement prescribed by Code; six months pass without question being raised.
  [Filing requires statement under oath that required steps taken and that account was sent to distributees.]

At this point all parties are virtually assured of full protection. The risks still open would include any question as to whether the personal representative made full disclosure, any question as to the competency of distributees to consent and release, and any question about the truth of assertions in the closing statement.

Case 3

Hypothetical facts : [Same as Case 1]

The Best Approach
(One hearing at conclusion)

- Informal probate
- Informal appointment
- Advertisement for claims
- Formal proceeding to adjudicate validity of will (heirs joined), and to approve accounts (distributees interested)

This approach involves postponing the formal probate proceeding until the end of administration and is indicated only when the risk of successful contest or of a later will being discovered is very small. The hearing at the close of administration should seal off any questions that might come up between representative and distributee.

Case 4

Hypothetical facts : Testator's estate consists of stocks and notes worth $50,000. His will, executed on his death bed, leaves everything to his third wife whom testator married six months earlier and nothing to his children by his first and second marriages. Everyone except the third wife is unhappy. It seems clear that some of the children, particularly a daughter who kept house for her father until his third marriage, will cause trouble.

One Approach
(A practical combination)

- Informal probate
- Informal appointment

  [In combination, these steps enable executor named in last will to get started with administration. If a will contest is started, he ceases to have power to distribute until contest is ended. The angry daughter could sue to prevent his appointment, but she would have to move fast. Also, she could require bond and restrain powers on ex parte hearing.]
- Formal probate

  [If daughter doesn't start contest, executor should precipitate matter or else the question of will or no will remains to impede administration.]
- Advertises for claims

  [Daughter will have to show hand on claim, if she is going to do so.]
- Executor distributes without order and files closing statement

  [This would be feasible only if daughter, having been eliminated on questions she can raise, is the only problem. Leaves executor with risks of settlement with widow.]

Case 5

Hypothetical facts : [Same as Case 4]

Another Approach
(One continuous proceeding)

- Informal probate
- Informal appointment
  [To start things.]
- Formal proceeding to:
  a. secure adjudication of will
  b. secure order that executor proceed, under responsibility to court, in supervised administration
     [Request for supervised administration can be joined with any proceeding involving all interested parties.]

An order for supervised administration means that the representative, though he has the same powers of collection, sale and management of assets as a non-supervised representative, may not pay claims or distribute the estate without an order of the judge. Also, if the petitioner requests it, certain administrative powers ordinarily available to a personal representative may be curtailed, provided reference to the limitation is endorsed on the letters.

Supervised administration takes the executor and his attorney off the "hot seat" to a degree. It would reduce the burden of justifying various steps which the estate attorney may feel are inevitable, or desirable.

Case 6

Hypothetical facts : Decedent dies intestate survived by three minor children, owning farm worth $75,000.

A Possible Approach
(One hearing at end)

- Informal appointment
- Advertisement for claims; four months pass
- Land sale via power in personal representative
- Formal proceeding to
    a. determine that there was no will
    b. determine who were heirs
    c. settle all questions that might be raised about sale and distribution
- Distribution would be made to conservator-trustee appointed by court to manage assets of children

Flexible System for Administering Decedents' Estates

Table I - Appendix

(Same Viewpoint and More Detail)

I. Formal proceedings

A. Characteristics

1. Order by judge after notice and hearing. Final order on question raised and decided; subject to appeal or vacation as on judgment. (3-220; 3-222; 3-231)
2. Venue and jurisdiction fixed in probate court where will might be probated. Appointing court has exclusive jurisdiction. (3-102; 3-204)
3. Often used proceedings and parties to be joined in each separately described; others described generally.
4. Several requests, each of which might be occasion for separate proceeding, may be joined provided persons affected by each request involved are also joined.
5. Personal representative always subject to proceeding via consent to suit involved in accepting letters. Other interested parties may be joined by process as in action to quiet title, unless proceeding does not concern question of who owns titles and rights conceded to have been decedent's. (3-303; 3-102; 3-103; 1-208)
6. Appeal to court of appeal on record. (1-201)

B. Function

1. To resolve disputes.
2. To gain protection of final order.
3. To accelerate time of certainty.

C. Necessity

1. Not mandatory as to all estates as informal alternatives available for required steps of probate and appointment.
2. Initiation occurs on request in petition by heir, devisee, creditor or personal representative.
3. On petition after notice, hearing and showing of necessity, court may order that administration be supervised, meaning that court order or approval of further steps in settlement would become required in that estate. Such order must be requested; however.

II. Informal proceedings

A. Characteristics

1. Involves statement under penalty of perjury and request for administrative, largely non-discretionary, determination based on statements in application and on matters made evident by the description of the proceeding. (3-208; 3-209; 3-215)
2. No requirement of notice; no requirement of hearing; no requirement that application be handled by judge. Rather, such applications will be addressed to and handled by the probate court, and sections dealing with court structure will enable such matters to be handled by an employee of the court known as probate clerk, or registrar or similar title. (1-205)

3. Produces an administrative response which is sufficient to make a will effective, subject to contest, or to appoint a representative, subject to suit objecting to such appointment. (3-209; 3-215)
4. Does not bar rights, though it may set administration via a personal representative in motion and rights to particular assets, though not to values, may be affected via administration.

B. Function

1. To permit undisputed matters to be handled simply and quickly, while continuing the useful concept that some post-death scrutiny of a will is required to make it operative, and that a personal representative should be officially recognized after death before beginning administration.
2. To separate routine matters not involving disputes or finality from the personal responsibility of a judge, and thus to upgrade the role of judge by keeping his function truly judicial.

C. Necessity

1. Either formal or informal probate is required for any will. Also, appointment of any personal representative must be accomplished in informal or formal proceedings, if an appointment is desired or necessary.

III. Filings

A. Characteristics

1. Involves filing documents meeting requirements of statute with probate court. (3-207; 3-306; 3-406; 3-505 (b); 3-703)
2. No responsive action by court (clerk or registrar) is called for except receipt and filing.

B. Purpose and effect

1. To permit a public notation that the office established by appointment has completed its main business.
2. Starts statute of limitation running on complaints against administrator.
3. Regularizes and controls administration by subjecting representative to requirement of statement, under penalty of perjury, that he has performed acts designed to assure proper administration.
4. Provides interested persons with method of protecting evidence of claim (3-505), demand for bond (3-306) and demand for notice of proceeding (3-207).

IV. Statutory duties and powers for personal representative.

A. Characteristics

1. Uses analogy of trustee.
2. Personal representative has duty to follow code steps re administration. Failure to perform means he may be replaced, held liable for losses or denied protection against later complaints.
3. Representative, through statutory powers, can collect, liquidate, pay claims and distribute without further court order.
4. Purchasers from personal representatives are protected though sale may have been a breach of duty and may make personal representatives liable to distributees.

5. Purchasers from distributee protected, though distribution may subject distributee to liability of restitution.
6. Will may deny power, or party interested in administration may bring proceeding to restrain a particular act. Also, a petition for supervised administration might be appropriate if personal representative is not trusted.

B. Source of power and duties; duration.
1. Appointment in formal or informal proceedings.
2. Various events terminate authority, though not liability.

C. Protection involved for parties.
1. Personal obligation of fiduciary.
2. Opportunity to prevent appointment.
3. Opportunity, through notice after appointment, to require bond.
4. Personal representative always subject to formal proceeding in appointing court.
5. Supervised administration may be sought at beginning of administration, or later.
6. On application of any interested person to judge, and showing that personal representative has breached duty to administer promptly, or is unable to carry out duties, special administrator may be appointed.

V. Supervised administration.

A. Characteristics
1. Results from proceeding, with notice and hearing, seeking continuing control by court of personal representative.
2. Resembles method by which a trustee in bankruptcy, or an executor or administrator under traditional U.S. probate law might be controlled.

B. Purpose
1. To permit one continuous proceeding where a series of controversies is contemplated.

VI. Statutes of limitation.

A. Characteristics
1. Arbitrary time limit within which rights of succession and rights of creditors must be asserted or otherwise recognized, or be barred.
2. Operates as a condition on testator's statutory right to make a will, and on devisee's statutory right to take under a will.
3. Time limits used are keyed to death of decedent, or to act of personal representative which will be known to parties affected by the limitation.

B. Function
1. To permit non-judicial termination of period of uncertainty as to succession.
2. To implement, by certainty of right, the assumption of the parties in non-contentious situations that "everything is all right".

Flexible System for Administering Decedents' Estates

Table II - Appendix

Alternatives for Various Requirements of Administration

1. To probate a will
   a) informal probate proceeding
   b) formal testacy proceeding

2. To appoint an executor
   a) informal appointment proceeding
   b) formal testacy; additional request

3. To appoint an administrator in intestacy
   a) informal appointment proceeding
   b) formal testacy proceeding seeking order of intestacy and determination of heirs

4. To contest a will
   a) executor or contestant may start formal proceedings to corroborate informal, contest informal, or to precipitate question as original matter

5. To challenge appointment of personal representative
   a) if issue is will or no will, formal testacy proceeding
   b) if issue is qualification of person appointed informally, a formal proceeding to question is available

6. To ascertain and bar creditors
   a) advertise for claims and start four month period of limitations; pay claims after four months
   b) disputed claims may be settled via fiduciary's power, or may be sued in probate proceeding between claimant and personal representative (either may start)
   c) secured claims, including right against decedent's insurer, not barred but unenforceable against general estate assets
   d) taxes are the problem of federal and state revenue authority; can't bar as practical matter

7. To collect assets
   a) appointment gives representative right to possess all assets as needed
   b) appointment confers power in representative so that disputes may be sued or settled in probate court if defendent subject to suit in county, or elsewhere
   c) for complex question, may bring formal proceeding, joining interested persons, and get court order on this matter separately from other business of estate

d) duty to insure, pay taxes and repair follows appointment and possession of assets and lasts until sale or distribution

8. To sell, exchange or deal with assets
   a) personal representative has full power by statute
   b) purchasers protected even though sale is wrongful, unless purchasers act collusively with personal representative

9. To protect heirs or devisees from personal representative's behaviour
   a) "caveat" proceeding available permitting one to demand notice of any proceeding by request filed with court after death, thereby blocking informal proceedings unless notice is given as demanded
   b) any interested person can have bond required via demand
   c) any interested person can bring proceeding to prevent exercise of power and get restraining order on ex parte hearing
   d) personal liability of personal representative for breach made meaningful by requirement that inventory and accounts be furnished to parties

10. To produce good title to realty
   a) purchasers from personal representatives protected
   b) distribution by conveyance of personal representative. Title clear if no complaint within six months if question of will or no will has been litigated and creditors barred
   c) purchasers from distributees protected even if distributees subject to liability

11. To gain protection for personal representative
   a) truthful closing statement, no overreaching of relationship, plus six months without complaint
   b) formal accounting proceeding

ARTICLE I.

GENERAL PROVISIONS

Part 1.

Definitions; General

SECTION 1-101. [Short Title.] This Act shall be known and may be cited as the Uniform Probate Code.

SECTION 1-102. [Application of Act.]

(a) This Code shall take effect on January 1, 19__.

(b) Except as specifically provided elsewhere in this Act, on the effective date of this Act

(1) the Act shall apply to any wills of and proceedings concerning decedents dying thereafter except that a will executed prior to the effective date of this Act shall be treated as if executed in compliance with the Act (Section 2-502) if executed in compliance with the law applicable at the time of its execution or if the application of the section of this Code on choice of law (Section 2-505) would make the will effective;

(2) the procedure prescribed by this Act shall apply to any proceedings thereafter commenced regardless of the time of the death of decedent and also to any further procedure in proceedings then pending except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure of this Code;

(3) every personal representative including a person administering an estate of a minor or incompetent holding an appointment on that date

shall continue to hold the appointment but shall have only the powers conferred by this Code and shall be subject to the duties imposed with respect to any act occurring or done thereafter;

(4) an act done before the effective date in any proceeding and any accrued right shall not be impaired by this Code. When a right is acquired, extinguished or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before the effective date, the provisions shall remain in force with respect to that right;

(5) any rule of construction provided in this Code shall apply to instruments executed before the effective date unless there is a clear indication of a contrary intent.

(c) Severability. If any provision of this Code or the application thereof to any person or circumstances is held invalid, the invalidity shall not affect other provisions or applications of the Code which can be given effect without the invalid provision or application, and to this end the provisions of this Act are declared to be severable.

(d) No implied repeal. This Code being a general act intended as a unified coverage of its subject matter, no part of it shall be deemed to be impliedly repealed by subsequent legislation if it can reasonably be avoided.

Comment

Subsection (d) is similar to a provision in the Uniform Commercial Code.

Subparagraphs (a) and (b), unlike the other sections in this Article, have not been approved by all Reporters. As drafted, the provisions reflect rejection of one possible variation that has been discussed. It deals with the situation of a testator who is incompetent on the date the Act becomes effective. Arguably, his will should be excepted from (b) (1) because of his inability to change it to

avoid unwanted application of the Act. But, the various provisions of Part 6 of Article II which may give the will a different meaning than when executed deal with instances where the draftsman did not foresee a problem. Presumably, the incompetent testator would want the new law to apply to his instrument because it would reach a result deemed desirable in light of probable drafting oversight.

Section 2-507 raises a slightly different problem. It makes divorce revoke an extant restamentary provision for the ex-spouse. It is conceivable that a testator who is incompetent on the effective date of the Act would prefer that a provision in his previously executed will in favor of his former spouse remain in effect. Even if this possibility is deemed serious enough to warrant some adjustment in the legislation, it would seem best to make the adjustment in the specific provision which gives rise to the problem, for excepting the will of an incompetent testator from this provision increases the risk of total invalidity.

SECTION 1-103. [Definitions.] When used in this Code, unless otherwise apparent from the context:

(a) "Child" includes an adopted child and any child entitled under Section 2-111 to take by intestate succession from the parent whose relationship is in question. It does not include any other illegitimate child, a stepchild, a foster child, a grandchild, or any more remote descendant.

(b) "Claims", in respect to decedents estates, include liabilities of the decedent which survive, whether arising in contract, in tort or otherwise, and liabilities of the estate which arise at or after the death of the decedent, including funeral expenses, expenses of administration and all estate and inheritance taxes. In respect to protective proceedings, the term has the meaning ascribed to it in Article V of this Code.

(c) "Devise", when used as a noun, includes "legacy" and means a testamentary disposition of real or personal property or both and when used as a verb, means to dispose of real or personal property or both by will.

(d) "Devisee" means any person designated in a will to receive a devise.

(e) "Distributee" means any person who has received property of a decedent from his personal representative other than as a creditor or purchaser.

(f) "Estate" denotes the real and personal property of the decedent, ward or protected person, as from time to time changed in form by sale, reinvestment or otherwise, and augmented by any accretions and additions thereto and substitutions therefor and diminished by any decreases and distributions therefrom. In Article V it has the further meaning stated in Section 5-101 (j).

(g) "Exempt property" refers to that property of a decedent's estate which is described in Section 2-403.

(h) "Fiduciary" includes personal representative and conservator-trustee.

(i) "Formal proceedings" are those conducted with notice to interested persons before a judge, without limitation as to subject matter.

(j) "Heirs" denotes those persons, including the surviving spouse, who are entitled under the statutes of intestate succession to the property of a decedent on his death intestate.

(k) "Informal proceedings" are those conducted without notice to all interested persons before a [registrar] for probate of a will or appointment of a personal representative.

(l) "Interested person" includes heirs, devisees, children, spouses, creditors and any others having a property right in or claim against the estate of a decedent, ward or protected person which may be affected by the proceeding. It also includes fiduciaries representing interested persons. The meaning may vary from time to time and, as to any particular proceeding or part thereof, its

meaning must be determined according to the particular purpose and matter involved. In respect to protective proceedings, the term includes the agencies mentioned in Section 5-506.

(m) "Issue" of a person means all of his lineal descendants except those who are lineal descendants of a living lineal descendant. Adopted children of the person and of his lineal descendants and lineal descendants of these adopted children are lineal descendants of the person. Children of the person who are entitled under Section 2-111 to take by intestate succession from him and lineal descendants of these children are lineal descendants of the person. Children of a lineal descendant of the person who are entitled under Section 2-111 to take by intestate succession from that lineal descendant and lineal descendants of these children are lineal descendants of the person. When a person's lineal descendant is adopted he ceases to be a lineal descendant unless, after the adoption, he has an adoptive parent, or a natural parent whose parental relationship was not terminated by the adoption, who is the person or a lineal descendant of the person.

(n) "Lease" includes an oil and gas lease or other mineral lease.

(o) "Letters" includes letters testamentary, letters of administration and letters of conservator-trusteeship.

(p) "Mortgages" include any conveyance, agreement or arrangement in which property is used as security.

(q) "Net estate", in respect to decedents' estates, refers to the property of a decedent exclusive of exempt property, family allowance and enforceable claims against the estate.

(r) "Person" includes natural persons and corporations.

(s) "Personal property" includes interests in goods, money, choses in action, evidences of debt and chattels real.

(t) "Personal representative" includes executor, administrator, and special administrator. "General personal representative" includes executor and administrator but not special administrator.

(u) "Property" includes both real and personal property.

(v) "Security" includes any note, stock, treasury stock, bond, debenture, evidence of indebtedness, certificate of interest or participation in an oil, gas or mining title or lease or in payments out of production under such a title or lease, collateral trust certificate, transferable share, voting trust certificate or, in general, any interest or instrument commonly known as a security, or any certificate of interest or participation, any temporary or interim certificate, receipt or certificate of deposit for, or any warrant or right to subscribe to or purchase, any of the foregoing.

(w) "Settlement" includes, as to a decedent's estate, the full process of administration, distribution and closing.

(x) "Successors" means those persons, other than creditors, who are entitled to the property of a decedent under his will or the provisions of this Code.

(y) "Testacy proceeding" means a formal proceeding to establish a will or determine intestacy.

(z) "Will" includes codicil; it also includes any testamentary instrument which merely appoints an executor or revokes or revives another will.

(aa) "Real property" includes estates and interests in land, corporeal or incorporeal, legal or equitable, other than chattels real.

[FOR ADOPTION IN COMMUNITY PROPERTY STATES]

[bb] "Separate property" (to be defined locally in accordance with existing concept in adopting state)]

[cc] "Community property" (to be defined locally in accordance with existing concept in adopting state)]

Comment

Additional sections with special definitions for Articles IV, V and VI are 4-101, 5-101 and 6-101. Except as controlled by special definitions applicable to these particular Articles, the definitions in 1-103 apply to the entire Code.

The definitions of "child" and related terms, as they may be affected by the impact of adoption on various property transmissions effective at death to or from an adopted child and his children or issue, and to or from the natural and adopting families of an adopted child, are being given further study by the Reporters. Under a recent draft of Revised Uniform Adoption Act, the critical time for termination of old and substitution of new property and inheritance rights and patterns for adopted children is entry of an interlocutory decree of adoption. This is the same as (c) above. Two other questions may be raised. The first is whether inheritance rights to and from a parent whose parental rights have been permanently terminated otherwise than incident to an adoption, or prior to entry of an interlocutory decree of adoption, should not be cut off at the time of deprivation without regard for whether new familial ties have been created by an interlocutory decree of adoption. The second relates to construction of various class gifts. The provisions of the Revised Uniform Adoption Act differ on the construction point from Section 2-609.

SECTION 1-104. [Use of Terms.] Words of the masculine gender include the feminine and neuter. Words in the singular number include the plural and words in the plural number include the singular.

SECTION 1-105. [Property Moved from a Community Property State to a Common Law State.] Married persons domiciled in this state who own in this state community property acquired while domiciled in a community property state or property acquired with community funds shall be considered as co-owners having present, equal, and existing interests therein in the absence of contrary agreements.

Comment

Property, or its proceeds, acquired by married persons while domiciled in a community property state and then moved into a common law property state does not thereby lose its character as community property. The rights of each spouse in his share of the community property or in its substituted form are recognized by this provision. The parties may by agreement change their interests in the property. However, a change in the manner in which title to the property is held does not, without an agreement, defeat the interest of the other spouse. The law governing the acquisition of property will apply to determine whether the property is community.

The suggestions in this and the following sections will be reconsidered when recommendations by a committee of the ABA Section of Real Property, Probate and Trust Law which has been appointed recently to study "migrant property" problems become available.

SECTION 1-106. [Quasi-Community Property.] Quasi-community property of a husband or wife means all personal property wherever situated and all real property situated in this state heretofore or hereafter required by either of them while domiciled elsewhere which would have been their community property had the spouse acquiring it been domiciled in this state at the time of its acquisition or acquired in exchange for real or personal property wherever situated, acquired other than by gift, devise, bequest or descent by either of them during their marriage while domiciled elsewhere.

ARTICLE I

GENERAL PROVISIONS

Part 2

The [Probate] Court

SECTION 1-201. [The [Probate] Court.] The [Probate] court is a court of record with the same powers as to matters committed to it by this Code and other statutes of this state as a court of record with general jurisdiction in law and equity. These matters include probate of wills; determination of heirship; administration, settlement and distribution of estates of decedents; determination of title to and rights in property claimed by or against estates of decedents, minors and disabled persons; granting of letters testamentary, of administration and of conservator-trusteeship; construction of wills, whether incident to the administration or distribution of an estate or as a separate proceeding; and protection of property of minors and disabled persons.

It has the same legal and equitable powers to effectuate its jurisdiction, punish contempts, and carry out its determination, orders, judgments and decrees as a court of record with general jurisdiction in law and equity and the same validity, finality, and presumption of regularity shall be accorded to its determination, orders, judgments and decrees, including determinations of its own jurisdiction, as to those of a court of record with general jurisdiction in law and equity. No issue determined in a [probate] court shall be tried again on appeal or otherwise re-examined in a manner other than those appropriate to issues determined by a court of record with general jurisdiction in law and equity.

Comment

The court to which the judicial matters described in this Code are assigned should have all of the power and stature of a trial court of general jurisdiction. This is in accordance with the recommendations of Simes and Basye in "The Organization of the Probate Court in America," 42 Mich. L. Rev. 965 and 43 Mich. L. Rev. 113, reprinted in Model Probate Code, (Michigan Legal Publications, Ann Arbor, Michigan, 1946).

Various non-judicial functions to be performed by a public officer are also described in this Code. These are concerned with the informal proceedings described in Part 2 of Article III and with the maintenance of certain files and records that pertain to estates. Non-judicial functions are assigned by this Code to a probate registrar, who is described by Section 1-204. The Code proceeds from the assumption that the registrar will be an officer within the organization of the court to which the jurisdiction described in this section is assigned. Hence the section does not divide the jurisdiction to probate wills or to grant various letters between the officers who will respond to petitions in formal proceedings, and those to whom applications in informal proceedings will be directed. Elsewhere, however, the Code divides the functions to be performed by the registrar from those to be performed by the judge. See sections 3-205, et seq.

In states where constitutional restrictions would prevent delegation of full judicial power to existing probate courts, the jurisdiction to handle informal applications, and the duties described in the Code for the registrar, could be assigned to existing probate courts. Jurisdiction to handle the judicial matters described by the Code would then be assigned to a division of the court of general jurisdiction, and the various references in the Code to the probate judge would be changed to refer to the appropriate court.

In other states where probate courts have legislatively limited jurisdiction but are courts of record manned by lawyer-judges , it may be preferable to remove all restrictions on the probate court's power so it can handle the matters assigned to it by this Code. The office of registrar presumably would be created within the organization of a court of this sort.

No grant of jurisdiction to issue letters of guardianship is included in section 1-201 in the Third Working Draft. This reflects the decision of the Reporters to omit provisions relating to judicial appointments of guardians of the person of minors and incompetents. The decision reflects the view that guardianship jurisdiction relating to minors should be dealt with in a comprehensive Juvenile Court Code, and that guardianship of other incompetents should be part of comprehensive legislation dealing with mentally defective persons. "Guardianship of the estate" of persons having property which they are unable to manage is covered by this Code. However, the term "conservator-trustee" is used rather than any term using the word "guardian". Also, a "testamentary guardian" is described by Part 2 of Article V of this Code. The "testamentary guardian" described in Part 2 derives his authority

from the provisions of a will and from the Code rather than from judicial appointment. Hence no mention of this status is appropriate in reference to a description of the court's jurisdiction.

SECTION 1-202. [Qualifications of Judge.] A [probate] judge shall have the same qualifications as a judge of the [court of general jurisdiction.]

SECTION 1-203. [Court Rules.] The [Supreme Court] may make rules and prescribe forms consistent with this Code for the conduct of business by and procedure in [probate] courts. Each [probate] court may make rules and prescribe forms consistent with this Code and with the rules of the [Supreme Court] for the conduct of business by and procedure in the court, including provisions for distribution of judicial work among judges of a court with two or more judges.

SECTION 1-204. [Registrar [clerk]; Powers.] The registrar [clerk] shall have power to take acknowledgments, administer oaths and affirmations, to certify and authenticate copies of instruments, documents and records of the court, to perform the usual functions of his office, and other non-judicial duties as directed by the judge. Unless otherwise directed by the provisions of Article III, Part 2, of this Code, the registrar [clerk] shall act upon applications for informal probate of wills and informal appointment of personal representatives.

SECTION 1-205. [Notice; Method and Time of Giving.] Except as otherwise specifically provided in this Code, whenever notice is required to be given of a hearing on any petition, the petitioner shall cause notice of the time and place of hearing thereof to be given to any person interested in the subject

of the hearing or to their attorney, if they have appeared by attorney or requested that notice be sent to their attorney, in any one or more of the following ways and within the following times:

(1) by mailing a copy thereof at least 14 days before the time set for the hearing by ordinary, certified or registered mail addressed to him at his post office address given in his request for notice or at his office or place of residence, if known;

(2) by delivering a copy thereof to him personally or to his attorney at least 5 days before the time set for the hearing;

(3) if the address of any person is not known or cannot be ascertained with reasonable diligence, by publishing a copy thereof in a newspaper of general circulation in the county where the hearing is to be held at least once a week for three weeks, the last publication of which is to be at least 10 days before the time set for the hearing.

The court for reason stated may provide for other method or time of giving notice for any hearing.

Proof of the giving of notice shall be made on or before the hearing and filed in the proceeding. Proof may be by an admission of service, a return receipt from the postal authorities, or an affidavit or certificate of the person giving notice or by the publisher of the newspaper publishing the notice or by one of his employees.

SECTION 1-206. [Notice; Waiver; Appearance.] A person, including a guardian ad litem, or conservator-trustee, may waive notice by a writing signed by him or his attorney and filed in the proceeding, or by his appearance at the hearing.

SECTION 1-207. [Persons in Military Service.] At the time of the initiation of any formal proceeding, an affidavit shall be filed setting forth facts showing whether any person entitled to notice is on active duty in the military service of the United States. Whenever it appears that any person on active duty is entitled to notice and is not represented by an attorney, the [judge] shall appoint an attorney to represent him and protect his interest in the proceeding and in any subsequent proceeding relating to the estate. The court shall allow reasonable compensation and necessary expenses to the attorney for the person on active duty.

SECTION 1-208. [Filing Objections to Petition.] Any interested person, on or before the day set for hearing may file written objections to a petition previously filed. To the extent specified by section 3-223, objections to a petition for formal probate of a will must be filed in writing.

SECTION 1-209. [Jury Trial.]

(a) Right to jury trial; waiver. In a proceeding relating to a decedent's estate where the right to trial by jury is guaranteed by the constitution of this state, [or in a formal testacy proceeding], any party may demand trial by jury by statement in his pleading.

(b) When not of right. When, under subsection (a) hereof, there is no right to trial by jury, or if the right is waived, the court in its discretion may call a jury to decide any issues of fact, but the verdict in that case shall be advisory only.

(c) Guardianship and protective proceedings. The right to trial by jury in guardianship and protective proceedings and waiver thereof are governed by Article V of this Code.

Comment

The bracketed language in (a) is suggested as optional for those states wishing to preserve a right of jury trial in will contests, even though the right is not protected by the state's constitution.

SECTION 1-210. [Proof of Death or Status.]

(a) Death certificate. A death certificate purporting to be issued by an official or agency empowered by the law of the place where the death purportedly occurred to issue such a certificate is prima facie proof of the fact, place, date, time and cause of death and the identify of the deceased. These matters may be proved by any other competent evidence.

(b) Official records, reports and findings. An official record or report of a military or executive department of the United States, or other government that a person is missing, detained, dead, or alive, is prima facie evidence of the status and of the dates, circumstances and places disclosed by the record or report. A certified copy of any record or report, authenticated by the custodian thereof, is admissible in evidence.

(c) Disappeared persons. A person who is absent for a continuous period of five years, during which he has not been heard from, and whose absence is not satisfactorily explained after diligent search or inquiry shall be presumed to be dead. His death shall be presumed to have occurred at the end of the period of five years unless there is sufficient evidence for determining that death occurred at some prior time.

Comment

Subsection (c) is inconsistent with Section 1 of Uniform Absence as Evidence of Death and Absentees' Property Act (1938).

Proceedings to secure protection of property interests of an absent person may be commenced as provided in 5-501.

SECTION 1-211. [Vacation and Modification of Judgments.] For good cause, at any time within the period allowed for appeal the judge may vacate or modify an order.

SECTION 1-212. [Records.] The [probate] court shall keep in a form and with an appropriate index prescribed by rule, a record for each decedent or protected person whose estate is the subject of an application or petition.

SECTION 1-213. [Practice in Judicial Proceedings.] Unless specifically provided to thecontrary in this Code or unless inconsistent with its provisions, the [rules of civil procedure] govern formal proceedings under this Code.

SECTION 1-214. [Fraud.] Whenever fraud has been perpetrated in connection with any proceeding or in any statement filed under this Code or used to avoid or circumvent the provisions or purposes of this Code, any injured person may recover damages or obtain any other appropriate relief in an action against the perpetrator of the fraud or restitution from any person benefiting from the fraud, whether innocent or not, regardless of any limitations provided in this Code, by an action commenced within two years from the discovery of the fraud.

Comment

This is an overriding provision that provides an exception to the procedures and limitations outlined in the Code. This provision is, of course, subject to the general principles of res judicata. Innocent purchasers for value would, of course, not come within this provision because they would not have benefited from the fraud.

ARTICLE I

GENERAL PROVISIONS

Part 3

Appeals

SECTION 1-301. [Appeals.] Appellate review, including the right to appellate review, interlocutory appeal, provisions as to time, manner, notice, appeal bond, stays, scope of review, record on appeal, briefs, arguments and power of the appellate court, shall be governed by the rules applicable to appeals to the [Supreme Court] in equity cases from the [court of general jurisdiction], except that in proceedings where jury trial has been had as a matter of right, the rules applicable to the scope of review in jury cases shall apply.

ARTICLE II

INTESTATE SUCCESSION AND WILLS

Part 1

Intestate Succession

Part 1 of Article II contains the basic pattern of intestate succession, historically called descent and distribution. It is no longer meaningful to have different patterns for real and personal property, and under the proposed statute all property not disposed of by a decedent's will passes to his heirs in the same manner. The existing statutes on descent and distribution in the United States vary from state to state. The most common pattern for the immediate family retains the imprint of history, giving the widow a third of realty (sometimes only for life by her dower right) and a third of the personality, with the balance passing to issue. Where the decedent is survived by no issue, but leaves a spouse and collateral blood relatives, there is wide variation in disposition of the intestate estate, some states giving all to the surviving spouse, some giving substantial shares to the blood relatives. The Code attempts to reflect the normal desire of the owner of wealth as to disposition of his property at death, and for this purpose the prevailing patterns in wills are useful in determining what the owner who fails to execute a will would probably want. (Extensive opinion polls would perhaps be desirable but are too expensive.)

The principal features of Part 1 are:

(1) A larger share is given to the surviving spouse, if there are issue, and the whole estate if there are no issue (except where the persons were married less than a year and left parents or issue of parents).

(2) Inheritance by collateral relatives is limited to grandparents and those descended from grandparents. This simplifies proof of heirship and eliminates will contests by remote relatives.

(3) An heir must survive decedent for five days in order to take under the statute. This is an extension of the reasoning behind the Uniform Simultaneous Death Act and is similar to provisions found in many wills.

(4) Adopted children are treated as children of the adopting parents for all inheritance purposes and cease to be children of natural parents; this reflects modern policy of recent statutes and court decisions.

(5) In an era when inter vivos gifts are frequently made within the family, it is unrealistic to preserve concepts of advancement developed when such gifts were rare; the statute therefore provides that gifts during lifetime are not advancements unless declared or acknowledged in writing.

While these changes may strike some persons as rules of law which may in some cases defeat intent of a decedent, this is true of every statute of this type. In assessing the changes it must therefore be born in mind that the decedent may always choose a different rule by executing a will.

SECTION 2-101. [Net Intestate Estate.] Any part of the net estate of a decedent not effectively disposed of by his will shall pass to his heirs as prescribed in the following sections.

SECTION 2-102. [Share of the Spouse.] The intestate share of the surviving spouse shall be:

(1) if there is no surviving issue of the decedent, the entire net intestate estate; but if there is no surviving issue of the decedent and the surviving spouse was married to the decedent for less than one year and if the decedent is survived by parents or issue of parents, then only one-half of the net intestate estate;

(2) if there are surviving issue all of whom are issue of the surviving spouse also, the first [$50,000] (reduced, in case of partial intestacy, by any amount given the spouse by will) plus one-half of the balance of the net intestate estate;

(3) if there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the net intestate estate.

Comment

This section gives the surviving spouse a larger share than most existing statutes on descent and distribution. In doing so, it reflects the desires of most married persons, who almost always leave all of a moderate estate or at least one-half of a larger estate to the surviving spouse when a will is executed. A husband or wife who desires to leave the surviving spouse less than the share provided by this section may do so by executing a will, subject of course to possible election by the surviving spouse to take an elective share of one-third under Part 2 of this Article. Moreover, in the small estate (less than $50,000

after homestead allowance, exempt property, and allowances) the surviving spouse is given the entire estate if there are only children who are issue of both the decedent and the surviving spouse; the result is to avoid protective proceedings as to property otherwsie passing to their minor children.

ALTERNATIVE PROVISION FOR COMMUNITY PROPERTY STATES

[SECTION 2-102. [Share of the Spouse.] The intestate share of the surviving spouse shall be as follows:

As to Separate Property

(1) if there is no surviving issue of the decedent, the entire net intestate estate; but if there is no surviving issue of the decedent and the surviving spouse was married to the decedent for less than one year, and if the decedent is survived by parents or issue of parents, then one-half of the net estate;

(2) if there are surviving issue all of whom are issue of the surviving spouse also, the first [$50,000] (reduced, in case of partial intestacy, by any amount given the spouse by will) plus one-half of the balance of the net intestate estate;

(3) if there are surviving issue one or more of whom are not issue of the surviving spouse, one-half of the net intestate estate;

As to Quasi-Community Property

(4) one-half of the net quasi-community property shall belong to the surviving spouse and the other one-half passes to the surviving spouse.

As to Community Property

(5) One-half of the net community property belongs to the surviving spouse and the otherone-half passes to the surviving spouse.]

Comment

Paragraph (4) should be omitted in any community property state which does not recognize quasi-community property as defined in section 1-106. The term "quasi-community property" is used to make a state's local rules concerning community property apply to property, acquired in a common law jurisdiction or while the couple was domiciled in a common law jurisdiction, which would have been community property if acquired locally by domiciliaries. The term is used in connection with this section dealing with intestate succession, and in Part 2 of this Article in relation to the elective share. Also, see section 3-101 A. The combination assures full protection in a community property state for a surviving spouse of a family that moved from a common law state so recently that little true community property has been accumulated. Paragraph (5) will need to be changed in those community property states which give the interest of the deceased spouse to heirs other than the surviving spouse.

SECTION 2-103. [Share of Heirs Other than Surviving Spouse.] The part of the net intestate estate not passing to the surviving spouse under section 2-102, or the entire net intestate estate if there is no surviving spouse, shall pass as follows:

(1) to the issue of the decedent; if they are all in the same degree of kinship to the decedent they shall take equally, but if of unequal degree, then those of more remote degree take by representation;

(2) if there is no surviving issue, to his parent or parents equally;

(3) if there is no surviving issue or parent, to the brothers and sisters and the issue of each deceased brother or sister by representation; if there is no surviving brother or sister, the issue of brothers and sisters take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree then those of more remote degree take by representation;

(4) if there is no surviving issue, parent or issue of a parent, to each surviving grandparent and the issue of each deceased grandparent

by representation; if there is no surviving grandparent, issue of grandparents take equally if they are all of the same degree of kinship, but if of unequal degree then those of more remote degree take by representation.

Comment

This section provides for inheritance by lineal descendants of the decedent, parents and their descendants, and grandparents and collateral relatives descended from grandparents; in line with modern policy, it eliminates more remote relatives tracing through great-grandparents.

In general the principle of representation (which is defined in section 2-106) is adopted as the pattern which most decedents would prefer.

Most of the provisions of this section are simple to apply. Under subsection (4) however, illustrations of the application of the statute may be helpful:

(1) Suppose an intestate decedent is survived only by his maternal grandfather and grandmother, his paternal grandmother, a paternal uncle and two cousins who are children of a deceased paternal aunt. The estate will be divided into four shares, one for the maternal grandfather, one for the maternal grandmother, one for the paternal grandmother, the fourth to go to the issue of the deceased paternal grandfather by representation (an eighth to the paternal uncle and one-sixteenth to each of the cousins).

(2) Suppose an intestate decedent is survived only by his paternal grandfather, an aunt on the paternal side, no grandparents on the maternal side but three cousins, two of whom are children of a deceased maternal uncle and one a child of another deceased maternal uncle. The estate will be divided into four shares, one for the paternal grandfather, one for the paternal aunt who takes the share of the deceased paternal grandmother by representation, and the other two shares to go equally to the three maternal cousins (one-sixth of the total estate to each). The three maternal cousins here represent both the deceased maternal grandfather and the deceased maternal grandmother; under 2-106 they take such shares equally since they are the surviving heirs in nearest degree. Had the maternal uncle who was the father of two cousins survived, he would have received a fourth (half of two fourths) and the third cousin the other fourth by representation of his parent.

If the pattern of this section is not desired, it may be avoided by a property executed will or, after the decedent's death, by renunciation by particular heirs under section 2-801.

SECTION 2-104. [Requirement That Heir Survive Decedent for Five Days.] Any person who fails to survive the decedent by five full days is deemed to have predeceased the decedent for purposes of homestead allowance, exempt property and intestate succession, and the decedent's heirs are determined accordingly. If the time of death of the decedent or of the person who would otherwise be an heir, or the times of death of both, cannot be determined, and it cannot be established that the person who would otherwise be an heir has survived the decedent by five full days, it is presumed that the person failed to survive for the required period.

Comment

This section is a limited version of the type of clause frequently found in wills to take care of the common accident situation, in which several members of the same family are injured and die within a few days of each other. The Uniform Simultaneous Death Act provides only a partial solution, since it applies only if there is no proof that the parties died otherwise than simultaneously. This section requires an heir to survive by five days in order to succeed to decedent's intestate property; for a comparable provision as to wills, see section 2-601. This section avoids multiple administration and in some instances prevents the property from passing to persons not desired by the decedent. The five-day period will not hold up administration of a decedent's estate because sections 3-209 and 3-216 prevent informal probate of a will or informal issuance of letters for a period of five days from death.

SECTION 2-105. [Escheat.] If there is no heir under the provisions of this Article, the net intestate estate escheats to the [state].

SECTION 2-106. [Representation.] When representation is called for, the estate shall be divided into as many shares as there are surviving heirs in the nearest degree of kinship and deceased persons in the same degree who left issue who survive decedent, each surviving heir in the nearest degree receiving one share and the share of each deceased person in the same degree being divided among his issue in the same manner.

SECTION 2-107. [Kindred of Half Blood.] Relatives of the half blood shall inherit the same share which they would have inherited if they had been of the whole blood.

SECTION 2-108. [Afterborn Heirs.] Relatives of the decedent conceived before his death but born thereafter shall inherit as if they had been born in the lifetime of the decedent.

SECTION 2-109. [Adopted Children.]

(a) General Rule. For all purposes of intestate succession, an adopted child shall be treated as a natural child of his adopting parents; and he shall cease to be treated as a child of his natural parents except that if a natural parent marries or remarries and the child is adopted by the stepfather or stepmother, the child shall continue to be treated as the child of the natural parent who is the spouse of the adopting parent.

(b) More Than One Adoption. For all purposes of intestate succession, a child who has been adopted more than once shall be treated as a child of the parents who have most recently adopted him and shall cease to be treated as a child of his previous parents.

(c) When Adoption is Effected. A child is adopted for these purposes when a final decree of adoption or an interlocutory decree of adoption which has become final has been issued by a court of this state or of any other state or government and while an interlocutory decree of adoption is in force.

Comment

See comment, Section 1-103, supra.

SECTION 2-110. [Scope of "All Purposes of Intestate Succession."] The phrase "all purposes of intestate succession" as used in this Article means succession by, through or from a person, both lineal and collateral.

Comment

This section is intended to assure that sections 2-109 and 2-111, both of which use the phrase "all purposes of intestate succession," are given the fullest effect. Some courts have in the past interpreted statutes conferring inheritance rights on adopted children to exclude inheritance from collaterals, for examale; this section would prevent such a strict construction. Conversely collaterals may inherit from the adopted person.

SECTION 2-111. [Legitimacy; Effect of Illegitimacy on Intestate Succession.]

(a) If the parents of a child shall have lived together as man and wife and have participated in a marriage ceremony in apparent compliance with law before or after the birth of the child, though the attempted marriage be void, the child is deemed to be the legitimate child of both parents for all purposes of intestate succession. A child born or conceived during a marriage is presumed to be the legitimate child of both spouses for the same purposes.

(b) Any child conceived following artificial insemination of a married woman with the consent of her husband shall be treated as their child for all purposes of intestate succession; consent of the husband is presumed unless the contrary is shown by clear and convincing evidence.

(c) An illegitimate child or his issue is entitled to take in the same manner as a legitimate child by intestate succession from and through (1) his mother and (2) his father if the father has either been adjudicated to be the father in a proceeding brought for that purpose or judicially ordered to support the child, or has admitted in open court that he is the father, or has acknowledged

himself to be the father in writing signed by him, or has openly and notoriously recognized the child to be his.

(d) Property of an illegitimate person passes in accordance with the usual rules of intestate succession except that the father or his kindred can inherit only if the father has been adjudicated to be the father in a proceeding brought for that purpose or judicially ordered to support the child, or there has been mutual recognition of the paternity.

Comment

This section is designed to reflect the modern policy toward minimizing illegitimacy and its impact on inheritance rights, but with safeguards against abuse. Status of an illegitimate child who is legally adopted is governed by section 2-109.

SECTION 2-112. [Persons Related to Decedent Through Two Lines.] A person who is related to the decedent through two lines of relationship is entitled to only a single share based on the relationship which would entitle him to the larger share.

SECTION 2-113. [Advancements.] If a person dies intestate as to all his estate, property which he gave in his lifetime to an heir shall be treated as an advancement against the latter's share of the estate if declared in writing by the decedent or acknowledged in writing by the heir to be an advancement. For this purpose the property advanced shall be valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever first occurs. If the recipient of the property fails to survive the decedent, the property shall not be taken into account in computing the share of the recipient's issue.

Comment

This section alters the common law relating to advancements by requiring written evidence of the intent that an inter vivos gift by an advancement. The statute is phrased in terms of the donee being an "heir" because the transaction is regarded as of decedent's death; of course, the donee is only a prospective heir at the time of the transfer during lifetime. Most inter vivos transfers today are intended to be absolute gifts or are carefully integrated into a total estate plan. If the donor intends that any transfer during lifetime be deducted from the donee's share of his estate, the donor may either execute a will so providing or, if he intends to die intestate, charge the gift as an advance by a writing within the present section. The present section applies only when the decedent died intestate and not when he leaves a will.

This section applies to advances to collaterals (such as nephews and nieces) as well as to lineal descendants. The statute does not spell out the method of taking account of the advance, since this process is well settled by the common law and is not a source of litigation.

Release. A section following this section in the 1967 Summer Draft (Second Working Draft) dealt with the subject of release. After further discussion the Reporters decided that no reference in the Code to releases was necessary. A release in favor of a third person which is executed for consideration should be effective as a contract for the benefit of a third person. A written release to the decedent for consideration can be effectuated, at least to some extent, as an advancement. In other situations it seems preferable to compel the decedent to state his intention concerning the effect to be given to a release in a duly executed will. Renunciation by an heir is dealt with in section 2-801.

SECTION 2-114. [Debts to Decedent.] A debt owed to the decedent shall not be charged against the intestate share of any person except the debtor. If the debtor fails to survive the decedent, the debt shall not be taken into account in computing the share of the debtor's issue.

SECTION 2-115. [Alienage.] No person is disqualified to take as an heir because he or a person through whom he claims is or has been an alien.

SECTION 2-116. [Dower and Curtesy Abolished.] The estates of dower and curtesy are abolished.

ARTICLE II

Part 2

Elective Share of Surviving Spouse

SECTION 2-201. [Right to Elective Share.]

(a) When a married person domiciled in this state dies, the surviving spouse has a right of election to take an elective share of one-third of the augmented net estate under the limitations and conditions hereinafter stated.

(b) Where a married person not domiciled in this state dies, the right, if any, of the surviving spouse to take an elective share in property in this state is governed by the law of the decedent's domicile at death.

Comment

Under the common law a widow was entitled to dower, which was a life estate in lands of which her husband was seized of an estate of inheritance at any time during the marriage. Dower encumbers titles and provides inadequate protection for widows in a society which classifies most wealth as personal property. Hence the states have tended to substitute a forced share in the whole estate for dower and the widower's comparable common law right of curtesy. Few existing forced share statutes make adequate provisions for transfers by means other than succession to the surviving spouse and others. This and the following sections are designed to do so. The theory of these sections is discussed in Fratcher, "Toward Uniform Succession Legislation," 91 N.Y.U.L. Rev. 1037, 1050-1064 (1966). The existing law is discussed in MACDONALD, FRAUD ON THE WIDOW'S SHARE (1960). Legislation comparable to that suggested here became effective in New York on Sept. 1, 1966. See Decedent Estate Law, § 18.

SECTION 2-202. [Augmented Net Estate.] The augmented net estate shall be calculated by adding to the value of the net estate the sum of the following amounts:

(a) Transfers incident to death. The value of property transferred by the decedent, to the surviving spouse or anyone else, to the extent that the decedent did not receive adequate and full consideration in money or money's

worth for the transfer, by the following means:

(1) deed deposited in escrow for delivery at or after the death of the decedent;

(2) contract or other device under which the transfer becomes effective at or after the death of the decedent, excluding life and accident insurance, annuities and pensions.

(b) Transfers with retained control or survivorship. The value, as of the decedent's death, of property transferred, settled, arranged, purchased or deposited, directly or indirectly, by the decedent, during or in contemplation of his marriage to the surviving spouse, so that the decedent retained a right of survivorship, power of revocation, power of consumption, special power of appointment exercisable in favor of the surviving spouse, or general power of appointment exercisable by deed, by will, or by either, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, settlement, arrangement, purchase or deposit.

(c) Other gratuitous transfers. The value, as of the decedent's death or the time when the transferee came into possession or enjoyment, whichever first occurs, of property transferred by the decedent, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for any transfer and was not by the transfer performing a duty of support imposed by law,

(1) to the surviving spouse at any time directly or by exercise of a power of appointment of which the decedent was the donee, to the extent that the aggregate of transfers exceeded one thousand dollars in any calendar year; or

(2) to any other person, without the written consent or joinder of the surviving spouse, during or in contemplation of the decedent's marriage to the surviving spouse and within two years before the death of the decedent, to the extent that any single transfer exceeded one thousand dollars and that the total exceeded three thousand dollars in either of those years.

(d) Life insurance. That part of the proceeds of insurance on the life of the decedent including accidental death benefits, which is attributable to premiums paid by him and which is payable to the surviving spouse. Premiums paid by the decedent's creditors, his employer, his partner, or a partnership of which he was a member shall be deemed to have been paid by the decedent.

(e) Annuities. Any lump sum immediately payable and the commuted value, as of the decedent's death, of the right to future payments, of that part of the proceeds of annuity contracts under which the decedent was the primary annuitant which is attributable to premiums paid by him, payable to the surviving spouse. Premiums paid by the decedent's employer, his partner, or a partnership of which he was a member shall be deemed to have been paid by the decedent.

(f) Pensions. The commuted value, as of the decedent's death, of the right to receive any amounts payable thereafter to the surviving spouse, under any public or private pension, disability compensation, death benefit, or retirement plan, excluding the Federal Social Security System, by reason of service performed or disabilities incurred by the decendent.

(g) Community property. The value of the share of the surviving spouse resulting from community property rights in any property in this or any other state owned by the decedent and his surviving spouse at the time of the decedent's death.

Comment

The several subsections create essentially three categories of donative transactions. The first, described in (a) are transactions which are so much like a will that the surviving spouse may treat them as wills for elective share purposes even though they were established before the marriage was contemplated. A second group are transfers which may take the place of a will but also may serve present needs. Described in (b) and (c) (2), these may be included in the augmented net estate only if they were made during or in contemplation of the marriage to the surviving spouse. Any question relating to a transaction in this category can, of course, be eliminated by joining the spouse or intended spouse as provided in 2-204. Finally, several transactions are included only if they are in favor of the surviving spouse. Transfers by will or intestacy to the spouse, which fall within the third category, may be accepted or renounced by the surviving spouse as provided in section 2-206. All other transactions in this category are unaffected by the spouse's suit for an elective share. Except for renounced devises or intestate transfers, all transactions in the third category serve only to reduce the impact of the spouse's right to an elective share on transactions in favor of third persons.

It is important to note that the will-like arrangements in favor of third persons described in subparagraphs (a), (b) and (c) (2) must have been established directly or indirectly by the decedent. Thus no account is taken of property subject to a general power of appointment held by a decedent at the time of his death unless the power is one the decedent reserved in a transaction he originated, or unless the power is exercised in favor of the spouse.

One consequence of the provisions charging a surviving spouse with the value of assets attributable to the decedent will be to eliminate election as a practical prospect in all but unusual situations. The several sections apply to unusual cases and prevent a married person from leaving his spouse completely out of the circle of those to whom his estate passes after his death. Perhaps attempts to deprive survivors of all values formerly controlled by the deceased spouse are so rare that no preventative legislation is warranted. Perhaps, on the other hand, the sections will tend to discourage married persons from attempting to shunt all assets away from their spouse. Most experience to date has been with a system affording some protection. Hence, it's very difficult to predict what would happen if all protection were eliminated.

Subparagraph (g) deals with the possibility that a couple domiciled in a common law state when one dies may own some community property. The community property involved may be land that they acquired with community funds in a community property state. If section 1-105 is changed so that community property which is moved to a common law state retains its community property characteristics, subparagraph (g) would be of greater importance in assuring that the surviving spouse is properly charged with all received from the decedent.

[FOR ADOPTION IN COMMUNITY PROPERTY STATES.]

[SECTION 2-201. [Right to Elective Share.] When a married person domiciled in this state dies, his surviving spouse has the right to take an elective share of one-half of his net quasi-community property, as hereinafter described under the limitations and conditions hereinafter stated.

Comment

No right to an elective share ordinarily exists in community property states because the community property system normally attributes one-half of the net estate to the surviving spouse as property owned by the spouse. With an increasingly mobile population, many of whom move from a common law state to a community property state after many years of marriage, there is an increasing need for protection of some additional sort for surviving spouses of persons dying domiciled in community property states. This section, suggested as optional for community property states, extends the elective share concept to quasi-community property only. See section 1-106. It maintains the idea currently prevalent in community property states that property of a married person which is separate by reason of the time of, or means for, its acquisition remains outside the legally protected interests of a surviving spouse.

SECTION 2-202. [Quasi-Community Property Subject to Elective Share.] The following quasi-community property of a decedent shall be included in determining the elective share of his surviving spouse:

(a) Property owned at death. The value of all quasi-community property owned by the decedent at the time of his death.

(b) Transfers incident to death. The value of quasi-community property transferred by the decedent, to the surviving spouse or anyone else, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, by the following means:

(1) deed deposited in escrow for delivery at or after the death of the decedent;

(2) contract or other device under which the transfer becomes effective at or after the death of the decedent, excluding life and accident insurance, annuities and pensions.

(c) Transfers with retained control or survivorship. The value, as of the decedent's death, of quasi-community property transferred, settled, arranged, purchased or deposited, directly or indirectly, by the decedent, during his marriage to the surviving spouse, so that the decedent retained a right of survivorship, power of revocation, power of consumption, special power of appointment exercisable in favor of the surviving spouse, or general power of appointment exercisable by deed, by will, or by either, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for the transfer, settlement, arrangement, purchase or deposit.

(d) Other gratuitous transfers. The value, as of the decedent's death or the time when the transferee came into possession or enjoyment, whichever first occurs, of quasi-community property transferred by the decedent, to the extent that the decedent did not receive adequate and full consideration in money or money's worth for any transfer and was not by the transfer performing a duty to support imposed by law,

(1) to the surviving spouse at any time directly or by exercise of a power of appointment of which the decedent was the donee, to the extent that the aggregate of transfers exceeded $1,000 in any calendar year; or

(2) to any other person, without the written consent or joinder of the surviving spouse, during the decedent's marriage to the surviving spouse and within two years before the death of the decedent, to the extent that any single transfer exceeded $1,000 and that the total exceeded $3,000 in either of those years.

(e) Life insurance. That part of the proceeds of insurance on the life of the decedent, acquired with his quasi-community property including accidental death benefits, which is attributable to premiums paid by him and which is payable to the surviving spouse. Premiums paid by the decedent's creditors, his employer, his partner, or a partnership of which he was a member shall be deemed to have been paid by the decedent.

(f) Annuities. Any lump sum immediately payable and the commuted value as of the decedent's death, of the right to future payments, of that part of the proceeds of annuity contracts under which the decedent was the primary annuitant which is attributable to premiums paid by him, from his quasi-community property payable to the surviving spouse. Premiums paid by the decedent's employer, his partner, or a partnership of which he was a member shall be deemed to have been paid by the decedent.

(g) Pensions. The commuted value, as of the decedent's death, of the right to receive any amounts payable thereafter to the surviving spouse, under any public or private pension, disability compensation, death benefit, or retirement plan, excluding the Federal Social Security System, by reason of service performed or disabilities incurred by the decedent during his marriage to the surviving spouse.]

SECTION 2-203. [Right of Election Personal to Surviving Spouse.] The right of election of the surviving spouse may be exercised only during his lifetime by him. In the case of a protected person, the right of election may be exercised only by order of the court in which protective proceedings as to his property are pending, after finding that exercise is necessary to provide adequate support for the protected person during his probable life expectancy.

SECTION 2-204. [Waiver of Right to Elect and Other Rights.] The right of election of a surviving spouse and the rights of the surviving spouse to homestead allowance, exempt property and family allowance, or any of them, may be waived, wholly or partially, before or after marriage, by a written contract, agreement or waiver signed by the party waiving after fair disclosure. Unless it provides to the contrary, a waiver of "all rights" in the property or estate of a present or prospective spouse or a complete property settlement entered into after or in anticipation of separation or divorce is a waiver of all rights to elective share, homestead allowance, exempt property and family allowance by each spouse in the property of the other and an irrevocable renunciation by each of all benefits which would otherwise pass to him from the other by intestate succession or by virtue of the provisions of any will executed before the waiver or property settlement.

Comment

The right to homestead allowance is conferred by section 2-401, that to exempt property by section 2-403, and that to family allowance by section 2-404. The right to renounce interest passing by testate or intestate succession is recognized by section 2-801. The provisions of this section, permitting a spouse or prospective spouse to waive all statutory rights in the other spouse's property seem desirable in view of the common and commendable desire of parties to second and later marriages to insure that property derived from prior spouses passes at death to the issue of the prior spouses instead of to the newly acquired spouse. The operation of a property settlement as a waiver and renunciation takes care of the situation which arises when a spouse dies while a divorce suit is pending.

SECTION 2-205. [Proceeding for Elective Share; Time Limit.]

(a) The surviving spouse may elect his elective share in the augmented net estate by filing in the court and mailing or delivering to the personal representative a petition for the elective share within six months after the publication of notice to creditors for filing claims which arose before the death of the decedent.

The [judge] may extend the time for election as he sees fit for cause shown by the surviving spouse before the time for election has expired.

(b) The surviving spouse shall give notice of the time and place set for hearing to persons interested in the estate and to the distributees and recipients of portions of the augmented net estate whose interests will be adversely affected by the taking of the elective share.

(c) The surviving spouse may withdraw his demand for an elective share at any time before entry of a final determination by the [judge].

(d) After notice and hearing, the [judge] shall determine the amount of the elective share and shall order its payment from the assets of the augmented net estate or by contribution as appears appropriate under section 2-207. If it appears that a fund or property included in the augmented net estate has not come into the possession of the personal representative, or has been distributed by the personnal representative, the [judge] shall nevertheless fix the liability of any person who has any interest in the fund or property or who has possession thereof, whether as trustee or otherwise. The proceeding may be maintained against less than all of the persons against whom relief could be sought but no person is subject to contribution in any greater amount than he would have been if relief had been secured against all persons subject to contribution.

(e) The order or judgment of the [probate] court may be enforced as necessary in suit for contribution or payment in other courts of this state or other jurisdictions.

SECTION 2-206. [Effect of Election on Benefits by Will or Statute.]

(a) The surviving spouse's election of his elective share does not affect the share of the surviving spouse under the provisions of the decedent's will or

intestate succession unless the surviving spouse also expressly renounces the benefit of all or any of these provisions in the petition for the elective share. If any provision is so renounced, the property or other benefit which would otherwise have passed to the surviving spouse thereunder shall be treated, subject to contribution under subsection 2-207 (b), as if the surviving spouse had predeceased the testator.

(b) A surviving spouse is entitled to homestead allowance, exempt property and family allowance whether or not he elects to take an elective share and whether or not he renounces the benefits conferred upon him by the will except that, if it clearly appears from the will that a provision therein made for the surviving spouse was intended to be in lieu of these rights, he is not so entitled if he does not renounce the provision so made for him in the will.

SECTION 2-207. [Marshalling of Assets to Satisfy Elective Share.]

(a) In the proceeding to determine the elective share, property which is part of the augmented net estate which passes or has passed to the surviving spouse by testate or intestate succession, homestead allowance or other means and which has not been renounced shall first be applied to the satisfaction of the elective share without any preference or priority as between real and personal property.

(b) Remaining property of the augmented net estate shall be so applied that the balance of the elective share of the surviving spouse is equitably apportioned among the recipients of the augmented net estate in proportion to the value of their interests therein.

(c) Only original transferees from the decedent, including appointees and

their donees to the extent the donees have the property or its proceeds, are subject to the contribution to make up the elective share of the surviving spouse. A person liable to contribution may choose to give up the property transferred to him or to pay its value as of the time when it is considered in computing the augmented net estate.

Comment

Section 2-401 provides that homestead allowance is charged against any benefit received by a surviving spouse as a part of an elective share to the extent that the property involved was part of the decedent's estate. Thus the spouse will be preferred to creditors in respect to this part of her elective share, as well as preferred to creditors in respect to transfers prior to death constituting part of the augmented estate, unless the transfers were in fraud of creditors. Sections 2-403 and 2-404 have the effect of giving a spouse certain exempt property and allowances in addition to the amount of the elective share.

ARTICLE II

Part 3

Children Unprovided for in Wills

SECTION 2-301. [Pretermitted Children.]

(a) Children born or adopted after execution of will. If a testator fails to provide in his will for any of his children born or adopted after the execution of his will, the omitted child shall receive the share of the estate provided in this section unless:

(1) it appears from the will that the omission was intentional:

(2) when the will was executed the testator had one or more children and devised substantially all his estate to the other parent of the omitted child; or

(3) the testator provided for the child by transfers outside the will and the intent that the transfers be in lieu of a testamentary provision is shown by statements of the testator or from the amount of the transfers or other evidence.

(b) Children believed to be dead when will executed. If at the time of execution of the will the testator fails to provide in his will for a child because he believes the child to be dead, the child shall receive the share of the estate provided in this section.

(c) Share of omitted child. The omitted child shall receive a share in the estate equal in value to that which he would have received if the testator had died intestate, provided that, if the will makes provision for any other child or children of the testator, the share of the omitted child shall not exceed the value of the smallest provision made for any other child. If the will makes substantial provision for any other child or children of the testator, the share of the omitted child shall be taken from the property or share devised to the other child or children, unless this would reduce the amount received by some other child for whom provision was made to less than the share of the omitted child. In other cases the devises made by the will shall abate as provided in section 3-602.

ARTICLE II

INTESTATE SUCCESSION AND WILLS

Part 4

Exempt Property and Allowances

SECTION 2-401. [Homestead Allowance.] A surviving spouse of a decedent domiciled in this state is entitled to a homestead allowance of $5,000. If there is no surviving spouse, each minor child of the decedent is entitled to a homestead allowance amounting to $5,000 divided by the number of minor children of the decedent. Homestead allowance is exempt from and has priority over all claims against the estate. Homestead allowance is charged against any benefit or share passing to the surviving spouse or unmarried minor child by the will of the decedent, by intestate succession or by way of

elective share, so far as the elective share is part of the estate, but the allowance shall not be diminished if it is greater than the benefit or share.

Comment

The term "minor" is not defined for purposes of this Article. Therefore the term would have whatever meaning is ascribed to it be existing law in an adopting state.

An earlier draft described homestead as one-half of the estate but limited it to $10,000. The shift to a set dollar amount was dictated by the desirability of having a certain level below which administration may be dispensed with or be handled summarily, without regard to the size of allowances under sections 2-403 and 2-404. The "small estate" line is controlled largely, though not entirely, by the size of the homestead allowance. This is because Part 9 of Article III dealing with small estates was drafted on the assumption that the only justification for keeping a decedent's assets from his creditors was to benefit the decedent's spouse and minor children.

Another reason for the shift to a set amount is related to the fact that homestead allowance may prefer a decedent's minor children over his adult children. It was felt desirable to minimize the consequence of application of an arbitrary age line among children of a testator.

SECTION 2-402. [Constitutional Homestead.] The value of any constitutional right of homestead in the family home received by a surviving spouse or child shall be charged against that spouse or child's homestead allowance to the extent that the family home is part of the decedent's estate or would have been but for the homestead provision of the constitution.

Comment

This section is designed for adoption only in states with a constitutional homestead provision. The value of the surviving spouse's constitutional right of homestead may be considerably less than the full value of the family home if the constitution gives her only a terminable life estate enjoyable in common with minor children.

SECTION 2-403. [Exempt Property.] In addition to the homestead allowance, the surviving spouse of a decedent domiciled in this state is entitled from the estate to one automobile without limitation as to value, and to value not exceeding $2,000 in household furniture, furnishings, appliances and personal effects. If there is no surviving spouse, children of the decedent are entitled jointly, in addition to homestead allowance, to value not exceeding $2,000 in household furniture, furnishings, appliances and personal effects. Exempt property is exempt from and has priority over all claims against the estate. Exempt property is not charged against any benefit or share passing to the surviving spouse or children by the will of the decedent, by intestate succession, or by way of elective share, except to the extent that the exempt property is specifically devised to the spouse or child who receives it.

SECTION 2-404. [Family Allowance.] In addition to the right to homestead allowance and exempt property the surviving spouse domiciled in this state 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 administration according to their previous standard of living, which allowance may not continue for longer than one year if the estate is insolvent. The allowance may be paid as a lump sum or in periodic installments. It is payable to the surviving spouse, if living, for the use of the surviving spouse and unmarried minor children; otherwise to the unmarried minor children, their guardians or other persons having their care and

custody; but in case any unmarried minor child is not living with the surviving spouse, the allowance may be made partially to the child or his guardian or other person having his care and custody, as their needs may appear. The family allowance is exempt from and has priority over all claims but not over the homestead allowance and exempt property. The family allowance is not charged against any benefit or share passing to the surviving spouse or unmarried minor children by the will of the decedent, by intestate succession, or by way of elective share. The death of any person entitled to family allowance terminates his right to payments thereof not yet made.

SECTION 2-405. [Source, Determination and Documentation.] So far as possible, property specifically devised to the surviving spouse by the will of the decedent shall be used to satisfy the right of the surviving spouse to homestead allowance and exempt property, and property specifically devised to the unmarried minor children shall be used to satisfy their right to homestead allowance and exempt property. If the estate is otherwise sufficient, property specifically devised to others shall not be used for these purposes. Under these restrictions, the surviving spouse or the guardians of the unmarried minor children may select property of the estate as homestead allowance and exempt property. The personal representative may make these selections if the surviving spouse or the guardians of the unmarried minor children are unable or fail to do so within a reasonable time.

The personal representative may execute an instrument or deed of distribution to establish the ownership of property taken as homestead allowance or exempt property. He may determine the family allowance in a lump sum not exceeding $6,000 or periodic installments not exceeding $500 per month for one year, and may disburse funds of the estate in payment of the family allowance and any part of the homestead allowance payable in cash. The personal representative or any interested person aggrieved by any selection, determination, payment, proposed payment, or failure to act under this section may petition the [probate] court for appropriate relief; which relief may provide a family allowance larger or smaller than that which the personal representative determined or could have determined.

Comment

See sections 3-606, 3-607.

ARTICLE II

Part 5

Wills

Foreword

Part 5 of Article II deals with capacity and formalities for execution and revocation of wills. If the will is to be restored to its rightful role as the major instrument for disposition of wealth at death, its execution must be kept simple. Minimal formalities are therefore embodied in the statute, but the statute also provides for a more formal method of execution with acknowledgment before a public officer (called a self-proved will.) The basic intent of these sections is to validate the will whenever possible. To this end, the age for making wills is lowered to eighteen, formalities for a written and attested will are kept to a minimum

(normally signature by the testator and by two witnesses in his presence,) choice of law as to validity of execution is broadened, and revocation by operation of law is limited to divorce or annulment.

SECTION 2-501. [Who May Make a Will.] Any person eighteen years of age or older who is of sound mind and not a disabled person as defined in section 5-401 may make a will.

Comment

This section states a uniform minimum age of eighteen for capacity to execute a will.

SECTION 2-502. [Execution.] Except as provided in section 2-505 [sections 2-502A and 2-505,] every will shall be in writing signed by the testator or in the testator's name by some other person in the testator's presence and by his direction, and shall be signed by two witnesses in the presence of the testator.

Comment

The formalities for execution of a will have been reduced to a minimum. The testator must sign the will (or have another person sign for him in his presence and at his direction,) but he need not sign in the presence of the witnesses or acknowledge that the signature is his. Nor need he "publish" or declare the will to be his to the witnesses. The will must be signed by two witnesses in the presence of the testator, but they need not sign in the presence of each other. There is no requirement that the testator request the witnesses to sign. The witnesses are not described in the statute as "attesting," nor are they required to "subscribe." It is believed that obtaining the signature of two persons to the document in the presence of the testator is sufficient formality to make the testator aware of the gravity of the execution process and to minimize chances of fraud.

[SECTION 2-502 A. [Holographic Will.] A will which does not comply with section 2-502 is valid as a holographic will, whether or not witnessed, if the signature and the material provisions are in the

the handwriting of the testator.]

Comment

Provision for holographic wills is optional for states wishing to permit wills not witnessed as provided in section 2-502. The proposed section would require only "material" provisions and the signature to be in the testator's handwriting, not the entire will as some statutes presently require. Thus a stamped date would not invalidate the holographic will.

SECTION 2-503. [Self-proved Will.] A will may at the time of its execution or at any subsequent date be made self-proved, by the acknowledgment thereof by the testator and the affidavits of the attesting witnesses, each made before an officer authorized to administer oaths under the laws of this State, and evidenced by the officer's certificate, under official seal, attached or annexed to the will in form and content substantially as follows:

THE STATE OF _____

COUNTY OF _____

Before me, the undersigned authority, on this day personally appeared _____, _____, and _____, known to me to be the testator and the witnesses, respectively, whose names are signed to the attached or foregoing instrument and, all of these persons being by me first duly sworn, _____, the testator, declared to me and to the witnesses in my presence that the instrument is his last will and that he had willingly signed and executed it as his free and voluntary act for the purposes therein expressed; and each of the witnesses stated to me, in the presence and hearing

of the testator, that he signed the will as witness in the presence of the testator and that the testator was at that time eighteen years of age or over and was of sound mind and under no constraint or undue influence.

_____
Testator

_____
Witness

_____
Witness

Subscribed and acknowledged before me by _____, the testator, subscribed and sworn before me by _____, and _____ witnesses, this _____ day of _____, A. D., _____.

(SEAL) (SIGNED)_____

_____
(OFFICIAL CAPACITY OF OFFICER)

Comment

A self-proved will shall be admitted to probate as provided in sections 3-211, 3-225, 3-226 without the testimony of any subscribing witness, but otherwise it shall be treated no differently than a will not self-proved. In particular and without limiting the generality of the foregoing, a self-proved will may be contested, revoked, or amended by a codicil in exactly the same fashion as a will not self-proved. The significance of the procedural advantage for a self-proved will is limited to formal testacy proceedings because section 3-210 dealing with informal probate dispenses with the necessity of testimony of witnesses even though the instrument is not self-proving under this section.

SECTION 2-504. [Who May Witness.]

(a) Any person generally competent to be a witness may act as a witness to a will.

(b) No will or any provision thereof is invalid because the will is signed by an interested witness.

Comment

This section simplifies the law relating to interested witnesses. Interest no longer disqualifies a person as a witness, nor does it invalidate or forfeit a gift under the will. Of course, the purpose of this change is not to foster use of interested witnesses, and attorneys will continue to use disinterested witnesses in execution of wills. But the rare and innocent use of a member of the testator's family on a home-drawn will would no longer be penalized. This change does not increase appreciably the opportunity for fraud or undue influence. A substantial gift by will to a person who is one of the witnesses to the execution of the will would itself be a suspicious circumstance, and the gift could be challenged on grounds of undue influence. The requirement of disinterested witnesses has not succeeded in preventing fraud and undue influence; and in most cases of actual undue influence, the influencer is careful not to sign as witness but to use disinterested witnesses.

An interested witness is competent to testify to prove execution of the will, under section 3-225.

SECTION 2-505. [Choice of Law as to Execution.] A written will executed in compliance with the law at the time of execution of the place where the will is executed, or of the place where at the time of execution the testator is domiciled or has his habitual residence, or of the state of which he is a national at the time of execution, shall have the same force and effect in this state as if executed in compliance with section 2-502.

Comment

This section permits probate of wills in this state under certain conditions even if they are not executed in accordance with the formalities of section 2-502. Such wills must be in writing but otherwise are valid if they meet the requirements for execution of the law of the place where the will is executed (when it is executed in another state or country) or the law of testator's domicile or nationality (whether it is executed in this state or in another state or country.) Thus if testator is domiciled in state 1 and executes a holographic will in state 2 while on vacation, the will is validly executed if state 1 permits holographic wills but state 2 does not. Or if a national of Mexico executes a will in this state which does not meet the requirements of section 2-502 but does meet the requirements of Mexican law, the will would be recognized as validly executed under this section. The purpose of the section is to provide a wide opportunity to validate expectations of testators. When the Uniform Probate Code is widely adopted, the impact of this section will become minimal.

SECTION 2-506. [Revocation by Writing or by Act on Document.]

A will or any part thereof is revoked

(1) by a subsequent will which revokes the prior will or part expressly or by inconsistency; or

(2) by being burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator or by another person in his presence and by his direction.

Comment

Revocation of a will may be by either a subsequent will or an act done to the document. If revocation is by a subsequent will, it must be properly executed. This section employs the traditional language which has been interpreted by the courts in many cases. It leaves to the court the determination of whether a subsequent will which has no express revocation clause is inconsistent with the prior will so as to revoke it wholly or partially, and in the case of an act done to the document the determination of whether the act is a sufficient burning, tearing, cancelling, obliteration or destruction and was done with the intent and for the purpose of revoking. The latter necessarily involves exploration of extrinsic evidence, including statements of testator as to intent.

The section specifically permits partial revocation. Each court is free to apply its own doctrine of dependent relative revocation. The Reporters

considered a section codifying the doctrine, but decided that the need for uniformity was not great in this area and that there was an advantage in leaving the courts free to work out satisfactory solutions to individual cases based on the testator's intent.

SECTION 2-507. [Revocation by Divorce; No Revocation by Other Changes of Circumstances.] If after executing a will the testator is divorced or his marriage annulled, the divorce or annulment revokes any disposition or appointment of property made by the will to the former spouse and any nomination of the former spouse as executor, trustee or guardian, unless the will expressly provides otherwise. If these provisions are not revoked by any means except the operation of this section, they are revived by testator's remarriage to the former spouse. For purposes of this section, divorce or annulment includes any valid divorce or annulment and a divorce or annulment judgment or decree not recognized as valid by the laws of this state for other purposes, if obtained by the surviving spouse, or if obtained by the decedent and acknowledged as valid by the surviving spouse by entering into a marriage ceremony with a third person. No other change of circumstances revoke a will.

Comment

The section deals with what is sometime called revocation by operation of law. It provides for revocation by a divorce or annulment only. No other change in circumstances operate to revoke the will; this is intended to change the rule in some states that subsequent marriage or marriage plus birth of issue operate to revoke a will. Of course, a specific devise may be adeemed by transfer of the property during the testator's lifetime except

as otherwise provided in this Code; although this is occasionally called revocation, it is not within the present section. The provisions with regard to invalid divorce decrees parallel those in section 2-802.

SECTION 2-508. [Revival by Revocation of Revoking Instrument.] If a will or part thereof has been revoked by a subsequent will, the later revocation of this subsequent will by act under section 2-506(2) revives the former will or part thereof if there is clear and convincing evidence that the testator intended to revive the will or part, or if the revoking instrument is a codicil which revoked only a part of the will by inconsistency and not expressly and the evidence is insufficient to prove that the testator intended no revival. No will or part can be revived unless it is in the testator's possession, custody or control at the time of his death; proof of testator's statements at or after the act of revocation is admissible to establish intent.

Comment

A revoked will can be revived by reexecution or by execution of a codicil incorporating the revoked will by reference, in accordance with the formalities for execution of any will; these are really instances of execution of a new will. The present section deals only with revival when an earlier will is revoked expressly or by inconsistency by a later will and subsequently the revoking instrument is destroyed by act of the testator with the intent that the earlier will be reinstituted. The policy issue is whether this intent must by incorporated in a document executed with the formalities required for any will, or whether the testator's intent orally expressed should be given effect. The above section gives effect to that intent when it can be proved with clear and convincing evidence. Use of extrinsic evidence to establish intent is justified here because (1) such evidence is admissible in any case involving revocation by act in order to prove that the act itself was intended as a revocation; (2) in many states the same evidence could be used to establish dependent relative revocation and thus allow probate of the second will as unrevoked; and (3) there is general understanding among non-lawyers that the earlier will, still intact, is good if the revoking instrument is destroyed.

A special provision for revival by remarriage after provisions of a will for a spouse are revoked by divorce or annulment is found in section 2-506.

The probate of a revived will should normally be handled by a formal proceeding. On informal probate, see the requirements of sections 3-208(e)(3), 3-211, 2-312 and 2-314.

There was strong disagreement among the Reporters on this section and the policy expressed. One group would have preferred the following section, on the grounds that the Code facilitates easy execution of a new will and that the testator should either reexecute his old will or execute a new will, complying with the formalities and assuring that his real intent is carried out. Underlying this position is concern that use of extrinsic evidence of intent permits fraud in some cases. The alternative section would read:

"Revival. No will or part thereof which is revoked in any manner, or which is invalid, can be revived other than by reexecution or by execution of a will incorporating by reference the revoked or invalid will or part."

SECTION 2-509. [Incorporation by Reference.] Any writing in existence when a will is executed may be incorporated by reference if the language of the will manifests this intent and describes the writing sufficiently to permit its identification.

SECTION 2-510. [Testamentary Additions to Trusts.] (This is section 1 of the Uniform Testamentary Additions to Trusts Act already promulgated.)

SECTION 2-511. [Events of Independent Significance.] A will may dispose of property by reference to acts and events which have significance apart from their effect upon the dispositions made by the will, whether they occur before or after the execution of the will or before or after the testator's death. The execution or revocation of a will of another person is such an event.

APPENDIX

Part 5

Execution of Wills

The following section may be proposed at a later date if the United States becomes a party to the International Convention of Rome (1966). An international will is one executed under the terms of this section implementing the Convention. The section follows the Draft Uniform Law on the Form of Wills proposed by Unidroit, The International Institute for the Unification of Private Law, Rome.

SECTION 2-502 B. [International Wills.]

(a) (1) A will shall be valid as regards form, irrespective of the place where it is made and irrespective of the nationality, domicile or residence of the testator, if it is made in the form of an international will complying with the provisions set out hereafter.

(2) Failure to observe any such provision shall not by itself affect the validity of the document as a will of another kind.

(b) (1) The will shall be made in writing.

(2) It may be written in any language, by hand or by any other means.

(3) It need not be written by the testator himself.

(c) (1) The testator shall declare in the presence of two witnesses and of a person qualified to receive the will that the document is his will.

(2) The testator need not inform the witnesses, or the person

qualified to receive the will, of the content of the will.

(d) (1) The will shall be signed by the testator in the presence of the witnesses and of the person qualified to receive it.

(2) The signature of the testator shall be placed at the end of the will.

(e) The witnesses and the person qualified to receive the will shall there and then sign the will in the presence of the testator.

(f) (1) The date of reception shall be indicated on the document.

(2) The absence of a date or the indication of an erroneous date shall not affect the validity of the will.

(g) (1) If the will consists of several sheets, each sheet shall be signed or initialled by the testator, unless the sheets follow each other and form a whole.

(2) Every correction in the body of the will shall be signed or initialled by the testator.

(3) Additions subsequent to the signatures shall be signed by the testator, the witnesses and the person qualified to receive the will.

(h) The signature or initials of the testator required by this law may be replaced by the fingerprint of the testator.

(i) (1) If the testator is unable to read, the will shall be read to him in the presence of the witnesses and of the person qualified to receive the will.

(2) If the testator does not know the language in which the will is drawn up, the will shall be read to him, translated into a language which he knows, in the presence of the witnesses and of the person qualified to receive the will.

(3) Such circumstances shall be mentioned in the document.

(j) The person who received the will shall satisfy himself of the identity of the testator and of the witnesses.

(k) (1) The capacity of the witnesses shall be governed by the internal law of the place where the will is received.

(2) The fact that a will contains a disposition in favour of a witness or of the person who received the will or in favour of a parent, relation, including relation by marriage, or spouse of any of them, shall not affect his capacity to act as a witness or to receive the will.

(l) The will shall be left in the custody of the qualified person who has received it.

(m) The will shall cease to be valid, as an international will, if it be withdrawn by the testator.

[(n) A person qualified to receive an international will is an attorney at law currently licensed to practice in this state.]

ARTICLE II

Part 6

Rules of Construction

Foreword

Part 6 deals with a variety of construction problems which commonly occur in wills. All of the "rules" set forth in this part yeild to a contrary intent expressed in the will and are therefore merely presumptions. Some of the sections are found in all states, with some variation in wording; others are relatively new. The sections deal with such problems as death before the testator (lapse), the inclusiveness of the will as to property of the testator, effect of failure of a gift in the will, change in form of

securities specifically devised, ademption by reason of fire, sale and the like, exoneration, exercise of power of appointment by general language in the will, and inclusion of adopted children in class gifts.

One of the sections, 2-609, provides a rule of construction applicable to documents other than wills. It is simpler to include those documents here rather than create a separate isolated section elsewhere. The problem occurs just as frequently in interpretation of inter vivos trusts as of wills.

SECTION 2-601. [Requirement That Devisee Survive Testator by Five Days.] A devisee who fails to survive the testator by five full days is deemed to have predeceased the testator, unless the will of decedent creates a presumption that the devisee is deemed to survive the testator or requires that the devisee survive the testator for any stated period in order to take under the will.

Comment

This parallels section 2-104 requiring an heir to survive by five days in order to inherit.

SECTION 2-602. [Presumption That Will Passes All Property; After-Acquired Property.] A will is presumed to pass all property which the testator owns at his death, including property acquired after the execution of the will.

SECTION 2-603. [Anti-lapse; Deceased Devisee; Class Gifts.] Unless a contrary intent is indicated by the will, if any relative who is designated as a devisee or would have been a devisee under a class gift had he survived the testator, fails to survive the testator, whether

the devisee dies before or after the execution of the will, or is deemed to have predeceased the testator by reason of section 2-601, the issue of the deceased devisee who survive the testator by five full days shall take in place of the deceased devisee by representation. A relative is any lineal descendant of any grandparent of the testator.

Comment

This section prevents lapse by death of a devisee before the testator if the devisee is a relative and leaves issue who survive the testator. A relative is one related to the testator by kinship and is limited to those who can inherit under section 2-103 (through grandparents); it does not include persons related by marriage. Issue include adopted persons and illegitimates to the extent they would inherit from the devisee; see section 1-103(n). Note that the section is broader than some existing anti-lapse statutes which apply only to gifts to children and other descendants, but is narrower than those which apply to devises to any person. The section is expressly applicable to class gifts, thereby eliminating a frequent source of litigation. It also applies to the so-called "void" gift, where the devisee is dead at the time of execution of the will.

The five day survival requirement stated in section 2-601 does not require issue who would be substituted for their parent by this section to survive their parent by any set period.

The application of the section to "void" gifts, though contrary to some decisions, seems justified by the assumption that the testator must have meant something by the provision in his will. If the devisee who predeceased the making of the will is designated as a member of a class, it still seems likely that the testator would want his issue to be treated like the issue of another member of the class who was alive at the time the will was executed but who died before the testator.

Section 2-604. [Failure of Testamentary Provision.]

(a) Non-residuary Devise. Except as provided in section 2-603, if a devise not included in the residuary clause fails for any reason, it shall become a part of the residue unless a contrary intent is indicated by the will.

(b) Residuary Devise to Several Persons. Except as provided in

section 2-603, if the residue is devised to two or more persons and the share of one of the residuary devisees fails for any reason, his share shall pass to the other residuary devisee, or to other residuary devisees in proportion to their interests in the residue, unless a contrary intent is indicated by the will.

Comment

If a devise fails by reason of lapse and the conditions of section 2-603 are met, the latter section governs rather than this section. There is also a special rule for renunciation contained in section 2-801; a renounced devise may be governed by either section 2-603 or the present section, depending on the circumstances.

SECTION 2-605. [Change in Securities; Accessions; Nonademption.] If securities are specifically devised and subsequent to execution of the will other securities of the same or another entity are distributed to the testator by reason of his ownership of the specifically devised securities, as a result of a partial liquidation, stock dividend, stock split, merger, consolidation, reorganization, recapitalization, redemption, exchange or other transaction, and if these other securities are part of the testator's estate at his death, the specific gift shall include the additional or substituted securities unless a contrary intent is indicated by the will.

SECTION 2-606. [Nonademption of Specific Devises in Certain Cases; Sale by Conservator-Trustee; Unpaid Proceeds of Sale, Condemnation or Insurance.]

(a) If specifically devised property is sold by a conservator-trustee, or if a condemnation award or insurance proceeds are paid to a conservator-trustee as a result of condemnation or casualty, the specific devisee has the right to a general pecuniary devise equal to the proceeds of sale,

the condemnation award or the insurance proceeds. This subsection does not apply if subsequent to the sale, condemnation or casualty, it is determined by the court that the disability of the testator has ceased and the testator survives such determination by one year.

(b) Unless a contrary intent is indicated by the will, if specifically devised property is not part of the estate at death, the specific devisee shall have the same right to:

(1) any balance of the purchase price (together with any security interest) owing to the testator at death by reason of sale of the property;

(2) any amount of a condemnation award for the taking of the property unpaid at death;

(3) any proceeds unpaid at death on casualty insurance on the property;

(4) property owned by testator at his death as a result of foreclosure, or in lieu of foreclosure, of the security for a specifically devised obligation.

SECTION 2-607. [Exoneration.] Unless a contrary intent is indicated by the will, a specific devise shall pass subject to any security interest which existed at the time of execution of the will or which is a renewal, extension or refinancing of a security interest existing at the time of execution of the will; but if any security interest is initially created after

the execution of the will, the devisee is entitled to exoneration.

Comment

See section 3-516 empowering the personal representative to pay an encumbrance under some circumstances; the last sentence of that section makes it clear that such payment does not increase the right of the specific devisee. The present section governs the substantive rights of the devisee. The common law rule of exoneration of the specific devise is restricted by this section to a mortgage or other incumbrance placed on the property after the will is executed, but in the latter situation exoneration applies to personal as well as real property. Thus, if testator specifically devised stock to a named devisee and pledged the stock to a bank on a short-term obligation prior to his death, the specific devisee of the stock could force the personal representative to pay off the loan in order that the stock would not be sold, assuming other assets sufficient to pay the debt under normal rules of abatement as provided in section 3-602.

SECTION 2-608. [Exercise of Power of Appointment.] A will, whether or not it contains a residuary clause, does not exercise a power of appointment held by the testator unless an intent to exercise the power is indicated by the will.

Comment

Although there is some indication that more states will adopt special legislation on powers of appointment, and this Code has therefore generally avoided any provisions relating to powers of appointment, there is great need for uniformity on the subject of exercise by a will purporting to dispose of all of the donee's property, whether by a standard residuary clause or a general recital of property passing under the will. Although a substantial number of states have legislation to the effect that a will with a general residuary clause does manifest an intent to exercise a power, the contrary rule is stated in the present section for two reasons: (1) this is still the majority rule in the United States, and (2) most powers of appointment are created in marital deduction trusts and the donor would prefer to have the property pass under his trust instrument unless the donee affirmatively manifests an intent to exercise the power.

Under this section, the intent to exercise the power does not have to be expressed. The intent must be "indicated by the will." Such wording permits a court to find the manifest intent if the language of the will interpreted in light of all the surrounding circumstances shows that the donee intended an exercise, except, of course, if the donor has conditioned exercise on an express

reference to the original creating instrument. In other words, the modern liberal rule on interpretation of the donee's will would be available under this section.

SECTION 2-609. [Construction of Gifts in Wills, Deeds and Trusts to Accord with Law of Intestate Succession.] Unless a contrary intent is indicated by the instrument, a gift by will, deed or other instrument to an individual or member of a class described generically in relation to a particular person as child, children, lawful issue, grandchildren, descendants, heirs, heirs of the body, next of kin, distributees, relatives, nieces, nephews or the like shall include any person who would be treated as so related for purposes of intestate succession, but not an adopted person unless he was adopted while a minor or after having been a member of the household of the adopting parent while a minor.

Comment

The purpose of this section is to facilitate a modern construction of gifts, usually class gifts, in various kinds of instruments. This section would require parallel construction with the rules of this Code as to intestate succession, particularly section 2-103 (heirs), 2-108 (afterborn heirs), section 2-109 (adopted persons), and section 2-111 (determination of legitimacy and effect of illegitimacy.)

Section 2-610. [Advancement in Testate Estate; Ademption by Satisfaction.] Property which a testator gave in his lifetime to a devisee shall be treated as an advancement against the devise, or ademption in whole or in part, if the will provides for deduction of the lifetime gift, or if the testator declares in writing that the gift is to be deducted from the devise or is in satisfaction of the devise, or if the devisee acknowledges in writing that the gift is an advancement or satisfaction. For purpose of advancement or partial satisfaction,

property given during lifetime shall be valued as of the time the devisee came into possession or enjoyment of the property or as of the time of death of the testator, whichever first occurs.

Comment

This section parallels section 2-113 on advancements and follows the same policy of requiring written evidence that lifetime gifts are to be taken into account in distribution of an estate, whether testate or intestate. Although courts traditionally call this "ademption by satisfaction" when a will is involved, and "advancement" when the estate is intestate, the difference in terminology is not significant. Some wills expressly provide for lifetime advances by a hotchpot clause. Where the will is silent, the above section would require either the testator to declare in writing that the gift is an advance or satisfaction or the devisee to acknowledge the same in writing. The second sentence on value accords with section 2-113 and would apply if property such as stock is given. If the devise is specific, a gift of the specific property during lifetime would adeem the devise by extinction rather than by satisfaction, and this section would be inapplicable.

ARTICLE II

Part 7

Contractual Arrangements Relating to Death

SECTION 2-701. [Contracts Concerning Succession.] A contract to make a will or devise, or not to revoke a will or devise, or to die intestate, can be established only by:

(1) provisions of a will sufficiently stating the contract;

(2) an express reference in a will to a contract and extrinsic evidence proving the terms of the contract; or

(3) a writing signed by the testator evidencing the contract.

The execution of a joint will or mutual wills gives rise to no presumption of a contract.

SECTION 2-702. [Non-Testamentary Instruments Relating to Death.] A provision in an insurance policy, contract, bond, mortgage, promissory note, deposit agreement, pension plan, trust agreement, conveyance or any other written instrument effective as a gift, conveyance, trust or contract reflecting the purpose and intention of the party or parties that money or other benefits theretofore due to, controlled by, or owned by one who has since died shall be paid, or that land or property shall pass to some person designated or to be designated to another party to the transaction in writing by the decedent, at or after the death of the decedent, or that money due under a contract shall cease to be due in the event of the death of the promisee or promissor before payment or demand, does not make the instrument a will and no provision in this Code shall invalidate it.

ARTICLE II

Part 8

General Provisions

Foreword

Part 8 contains three general provisions which cut across both testate and intestate succession. The first section permits renunciation; the existing law in most states permits renunciation of gifts by will but not by intestate succession, a distinction which cannot be defended on policy grounds. The second section deals with the effect of divorce and separation on the right to elect against a will, exempt property and allowances, and an intestate share. The last section spells out the legal consequence of murder on the right of the murderer to take as heir, devisee, joint tenant or life insurance beneficiary.

SECTION 2-801. [Renunciation.] A person may renounce testate or intestate succession or both, wholly or partially, if he has not accepted possession as heir or devisee, within six months after death unless the taker of the property is not then ascertained, in which case he may renounce within six months after ascertainment. Property renounced by an heir or devisee passes as if he had failed to survive the decedent. Creditors of the renouncing heir or devisee have no interest in the property renounced, whether their claims are based on contract, tort, tax obligations or otherwise.

Comment

This section is designed to facilitate renunciation in order to aid post-mortem planning. Although present law in all states permits renunciation of a devise under a will, the common law did not permit renunciatiation of an intestate share. There is no reason for such a distinction, and some states have already adopted legislation permitting renunciation of an intestate share. Renunciation may be made for a variety of reasons, including carrying out the decedent's wishes not expressed in a properly executed will.

Under the rule of this section, renounced property passes as if the renouncing person had failed to survive the decedent. In the case of intestate property, the heir who would be next in line in succession would take; often this will be the issue of the renouncing person, taking by representation. For consistency the same rule is adopted for renunciation by a devisee; if the devisee is a relative who leaves issue surviving the testator, the issue will take under section 2-603; otherwise disposition will be governed by section 2-604 and general rules of law.

The section limits renunciation to six months after the death of the decedent (or if the taker of the property is not ascertained at that time, then six months after he is ascertained.) If the personal representative is concerned about closing the estate within that six months period, in order to make distribution, he can obtain a waiver of the right to renounce; normally this should be no problem, since the heir or devisee cannot renounce once he has taken possession of the property.

The presence of a spendthrift clause does not prevent renunciation under this section.

SECTION 2-802. [Effect of Divorce, Valid or Invalid; Effect of Valid Decree of Separation.]

(a) A person who is validly divorced from the decedent or whose marriage to the decedent has been validly annulled is not a surviving spouse unless, by virtue of a subsequent marriage, he is married to the decedent at the time of death.

(b) For purposes of Parts 1, 2 and 4 of this Article, a surviving spouse does not include:

(1) a person who obtains a final decree or judgment of divorce from the decedent or an annulment of their marriage, not recognized as valid in this state, unless they subsequently participate in a marriage ceremony purporting to marry each to the other, or subsequently live together as man and wife.

(2) a person who, by participating in a marriage ceremony with a third person, acknowledges as valid a decree or judgment of divorce or annulment obtained by the decedent.

(c) If a final decree or judgment of separation recognized as valid under the law of this state, has been rendered against the surviving spouse and is still in effect at the time of death, the surviving spouse has no right to an elective share under Part 2 or to homestead, exempt property and allowances under Part 4 of this Article.

Comment

Although some existing statutes bar the surviving spouse for desertion or adultery, the present section requires some definitive legal act to bar the surviving spouse. Normally this is divorce. Subsection (a) states an obvious proposition, but subsection (b) deals with the difficult problem of invalid divorce or annulment, which is particularly frequent as to foreign divorce decrees but may arise as

to a local decree where there is some defect in jurisdiction; the basic principle underlying these provisions is estoppel against the surviving spouse. Where there is only a legal separation, rather than a divorce, there has often been no permanent property settlement; subsection (c) applies if the decree is rendered against the surviving spouse but does not operate against the surviving spouse if he or she is the person who obtained the decree. Even in a proper case the separation operates only as a bar to elect against the decedent's will or to homestead, exempt property and allowances; it does not bar the surviving spouse to a share in intestate property under section 2-102.

SECTION 2-803. [Effect of Homicide on Intestate Succession, Wills, Joint Assets, Life Insurance and Beneficiary Designations.]

(a) A surviving spouse, heir or devisee who feloniously and intentionally kills the decedent is not entitled to any benefits under the will or under this Article, and the estate of the decedent passes as if the killer had predeceased the decedent. Property appointed by the will of the decedent to or for the benefit of the killer shall pass as if the killer had predeceased the decedent.

(b) Any joint tenant who feloniously and intentionally kills another joint tenant shall by the killing effect a severance of the interest of the decedent so that the share of the decedent passes as his property and the killer has no rights by survivorship. This provision applies to joint tenancies [and tenancies by the entirety] in real and personal property, joint accounts in banks, savings and loan associations, credit unions and other institutions, and any other form of co-ownership with survivorship incidents.

(c) A named beneficiary of a bond, life insurance policy, or other contractual arrangement who feloniously and intentionally kills the

principal obligee or the person upon whose life the policy is issued is not entitled to any benefit under the bond, policy or other contractual arrangement, which shall become payable as though the killer had predeceased the decedent.

(d) A final judgment of conviction of felonious and intentional killing is conclusive for purposes of this section. In the absence of a conviction of felonious and intentional killing, the [probate] court may determine whether the killing was felonious and intentional for purposes of this section, on the basis of clear and convincing evidence.

(e) The provisions of this section shall not affect the rights of any person who, before rights under this section have been adjudicated, purchases for value and without notice from the killer property which the killer would have acquired except for this section; but the killer shall be liable for the amount of the proceeds. Any insurance company, bank or other obligor making payment according to the terms of its policy or obligation is not liable by reason of this section unless prior to payment it has received at its home office or principal address written notice of a claim under this section.

Comment

This section should not preclude the court from imposing a constructive trust to prevent a killer from profiting in other less common situations not covered by the provisions of the section. Thus, if a joint annuity is issued on the lives of A and B, and A murders B, B's estate may obtain a constructive trust of the proceeds during A's life. Or if a trust is set up to pay income to A for life, on A's death to divide the principal among A's surviving issue, and A's son B murders A, the court may divide the principal on an equitable basis to preclude B from sharing, as though B had predeased A.

ARTICLE II

Part 9

Custody, Deposit and Verification of Wills

SECTION 2-901. [Deposit of Will with Court in Testator's Lifetime.]

(a) Deposit of will. A will may be deposited by the person making it, or by his agent with any [probate] court for safekeeping. The [registrar] shall give a certificate of deposit for it, upon the payment of the required fee.

(b) How enclosed. The will shall be enclosed in a sealed wrapper, which shall have endorsed thereon "Will of," followed by the name of the testator, his address and his social security number, if any. The [registrar] shall endorse thereon the day when and the person from whom it was received. The wrapper also shall be endorsed with the name of the person to whom the will is to be delivered after the death of the testator. It is not to be opened or delivered except as provided in this Article.

(c) To whom delivered. During the lifetime of the testator, a deposited will shall be delivered only to him, or to a person authorized by him in writing to receive it. Upon being informed of his death, the [registrar] shall notify any person designated to receive the will and deliver it to him if he requests it, or to the appropriate court or authorized person on the request of any interested person.

(d) When will to be opened. If the will is not delivered to a person named on the wrapper, it is to be opened by the [registrar] after being informed of the testator's death. The [registrar] shall give notice by mail to any executor named in the will and to other appropriate persons

as determined by the [court] that the will is on deposit with the court. The will shall be retained by the [court] as a deposited will until offered for probate. The [court] shall keep a true copy of any will that is transmitted elsewhere for probate.

Comment

M. P. C. section 59, changed to shift depository function to court [registrar], to accommodate international wills and to simplify method by which testator may take the will from deposit during his lifetime.

SECTION 2-902. [Duty of Custodian of Will; Liability.] After the death of a testator and on request of an interested person, any person having custody of a will of the testator shall deliver it to an appropriate court or to a person authorized to give effect to its terms. Any person who wilfully refuses or fails to deliver a will is liable to any person aggrieved for the damages which may be sustained by the refusal or failure. Also, any person who wilfully refuses or fails to deliver a will after being ordered by the court in a proceeding brought for the purpose of compelling delivery shall be subject to penalty for contempt of court.

Comment

M. P. C. section 63, slightly changed. A person authorized by a court to accept delivery of a will from a custodian may, in addition to a registrar or clerk, be a universal successor or other person authorized under the law of another nation to carry out the terms of a will.

[SECTION 2-903. [Verification of Will; Declaration of Due Execution of a Will in Testator's Lifetime.]

(a) Venue. A testator may during his lifetime petition a [probate]

court in the county of his domicile for an order declaring that his will has been duly executed and is his valid will subject only to subsequent revocation.

(b) Petition. The petition shall contain (1) a copy of the will which the plaintiff wishes to verify, (2) an allegation that the will is in writing and was signed by the petitioner or in the petitioner's name by some other person in the petitioner's presence and by his direction and was signed by two witnesses in the presence of the testator, and (3) an allegation that the instrument was properly executed with testamentary intent. The original will shall be filed with the petition.

(c) Defendants. The defendants to the proceedings shall be named from among the heirs presumptive of the plaintiff and the devisees under earlier wills of the plaintiff. If these are not numerous, all whose interests are adverse shall be named as defendants. If they are so numerous that joinder of all is impracticable, several may be sued as representative parties on behalf of all. Before the court allows the action to proceed, if all of the heirs presumptive and devisees under earlier wills are not joined, it shall find that the defendants will adequately protect the interest of all others adverse to the plaintiff.

(d) Service. The defendants shall be served as provided in 1-208. The court may order additional persons made defendants and served to assure the adequate representation of the interest of those adverse to the plaintiff. Interested persons shall be freely allowed to intervene.]

Comment

See comments to section 2-906.

SECTION 2-904. [Hearing; Witnesses.]

(a) Hearing; Inquiry by Court. After notice, the court shall hear the testator, the attesting witnesses if available and other witnesses or relevant evidence as the testator or parties defendant may present. The court may make any independent inquiry it deems appropriate.

(b) Witnesses; Competence. Any person who is a competent witness may testify concerning any issue despite possible disqualification after the death of the testator and shall not be precluded by reason of interest.

(c) Court Witnesses. The court may call as independent witnesses, physicians, psychologists, psychiatrists, and other persons of its own choosing to examine the testator or to testify in the proceedings.

SECTION 2-905. [Order; Judgment.]

(a) If the court is satisfied that the allegations of the petition have been sustained, it shall by order declare that the testator's will has been duly executed and is his valid will subject only to subsequent revocation and shall order the will retained in custody of the court.

(b) The judgment, if for the plaintiff, shall bind the defandants and all persons whose interests they represent. The judgment, if for the defendants, shall be a conclusive determination that the will which was the subject of the adjudication was not a valid will.

SECTION 2-906. [Withdrawal of Will, Revocation.] A will declared to be valid under this procedure may be withdrawn during the testator's lifetime upon his verified application filed with the court and when so withdrawn shall be deemed revoked. A will declared to be valid hereunder may also be revoked or modified by a subsequent written will or codicil.

Comment

A copy of the will is included in the petition for convenience under common practice in providing copies of the petition to the parties to the proceedings. If this section is enacted, section 2-506 should be amended by adding: "(c) Withdrawing a verified will by petition under section 2-903."

Sections 2-903 - 2-906 provide for a declaratory determination of the due execution of a will during the testator's lifetime. This is not a probate of the will because it is subject to revocation or subsequent modification by testamentary instruments or similar proceedings on subsequent instruments. The area of contest is cut down, however, by this proceeding which goes beyond preservation of testimony to a judicial determination of the effect of a prior act and existing instrument. It is essentially a proceeding in the nature of a class action similar to a declaratory judgment proceeding designed to accommodate those testators who desire a formal determination of the valid execution of their wills while the best evidence is available. Although perhaps this is a procedure which will not be often used, it is one often recommended and of considerable attraction to the public. Its availability offers some insurance against unwarranted will contests. Material discussing the matter may be found in:

> First Tentative Draft of Uniform Act to Establish Wills Before Death of Testator, 1932 Handbook National Conference Comm. Unif. State Laws, p. 463, 465; Am. L. Prop. section 14.2 (Atkinson); Cavers, Ante Mortem Probate, 1 U. of Chi. L. Rev. 440 (1934); Mechem, Why Not a Modern Wills Act?, 33 Iowa L. Rev. 501, 521 (1948); Kutscher, Living Probate, 21 Am. B.J. 427 (1935); Kutscher, Living Probate, Further Consideration, 70 U.S.L. Rev. 133 (1936); Lloyd V. Wayne Cir. Ct., 56 Mich. 236 (1895).

ARTICLE III

PROBATE OF WILLS AND ADMINISTRATION

Part 1

General Provisions

SECTION 3-101. [Devolution of Estate at Death; Restrictions.] The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations expressed or implicit in this Code to facilitate the prompt settlement of estates. Upon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will or, in the absence of testamentary disposition, to his heirs, subject to provisions for homestead allowance, exempt property and family allowance, to rights of creditors, elective share of the surviving spouse, and to administration. The provisions of this Code shall apply without any preference or priority as between real and personal property.

ALTERNATIVE SECTION FOR COMMUNITY PROPERTY STATES

[SECTION 3-101 A. [Devolution of Estate at Death; Restrictions.] The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations expressed or implicit in this Code to facilitate the prompt settlement of estates. Upon the death of a person, his separate property devolves to the persons to whom it is devised by his last will, or in the absence of testamentary disposition, to his heirs; and upon the death of a husband or wife, the decedent's

quasi-community property and his share of their community property devolve to the persons to whom it is devised by his last will, or in the absence of testamentary disposition, to his heirs, but all of their community property which is under the management and control of the decedent is subject to his debts and administration, and that portion of their community property which is not under the management and control of the decedent but which is necessary to carry out the provisions of his will is subject to administration; but the devolution of all the above described property is subject to provisions for homestead allowance, exempt property and family allowances, to rights of creditors, elective share of the surviving spouse, and to administration.]

Comment

In its present form, this section will not fit existing concepts concerning community property in all states recognizing community ownership. States differ in respect to how much testamentary power a decedent has over the community. Also, some community property states may not adopt the quasi-community property concept. Finally, some changes of language also may be necessary to reflect differing views concerning what estate is subject to "separate" and "community" debts.

SECTION 3-102. [Proceedings Affecting Devolution and Administration Proper Court.] Persons interested in decedents' estates may apply to the [probate registrar] for determination in the informal proceedings provided in this Article, and may petition the [probate judge] for judicial orders in the formal proceedings provided herein and for orders or instructions as otherwise desirable incident to estate administration. The [probate] court is the only court which can make determinations in informal proceedings concerning estates and shall have exclusive jurisdiction of formal proceedings to determine how decedents' estates subject to the laws of this

state are to be administered, expended and distributed. The [probate] court has concurrent jurisdiction of any other action or proceeding to which the estate, through the personal representative, may be a party, including actions to determine title to property alleged to belong to the estate, and of any action or proceeding in which property distributed by a personal representative or its value is sought to be subjected to rights of creditors or successors of the decedent.

SECTION 3-103. [Proceedings Within the Exclusive Jurisdiction of [Probate] Court; Service.] In proceedings for judicial orders on matters within the exclusive jurisdiction of the [probate] court, persons interested in the estate may be subjected to the orders of the court in respect to property in or subject to the laws of this state by notice in conformity with section 1-205. The giving of notice to all persons interested in any proceeding shall not be necessary to a valid order as to those who are properly given, or who waive, notice.

SECTION 3-104. [Proceedings Independent; Exception.] Unless supervised administration is ordered as provided in section 3-105, each judicial proceeding relating to an estate is independent of any other or further proceeding. Parties to one proceeding are not thereby subject to the court's order in any other proceeding. Resort to one or more proceedings does not involve any other or further obligation on the part of the personal representative to seek other orders from the court.

Comment

This section and others in Article III describe a system of administration of decedents' estates which gives interested persons control of whether matters relating to estates will become occasions for judicial orders. Sections 3-105 through 3-108 describe supervised administration, a judicial proceeding which is continuous throughout administration. This proceeding corresponds with the theory of administration of decedent's estates which prevails generally in the United States. See, section 62, Model Probate Code. If supervised administration is not requested, persons interested in an estate may use combinations of the formal proceedings (order by judge after notice to persons concerned with the relief sought) and informal proceedings (request for the limited response that nonjudicial personnel of the probate court are authorized to make in response to verified application) provided in the remaining Parts of Article III to secure authority and protection needed to administer the estate. Nothing except self-interest will compel resort to the judge. When resort to the judge is necessary or desirable to resolve a dispute or to gain protection, the scope of the proceeding is framed by the petition. The securing of necessary jurisdiction over interested persons in a formal proceeding is facilitated by sections 3-103 and 3-303.

SECTION 3-105. [Supervised Administration; Petition.] A petition for supervised administration may be filed by any interested person or by a personal representative at any time or joined with a petition for the appointment of a personal representative. After notice to other interested persons, the [judge] may order that administration of a decedent's estate proceed under the continuing supervision of the court.

Comment

An order for supervised administration may be appropriate; (a) when the estate is, or may be insolvent; or (b) when numerous contested claims against the estate result in, or appear likely to cause, a multiplicity of independent proceedings against a personal representative; or (c) where the kind, location or condition of the decedent's assets is such as to make the collection and preservation of the values in the estate an unusually complex process involving a high degree of probability that the personal representative, or other interested parties, will need several orders or instructions from the court in the process of administration; or (d) where serious doubts, not resolvable by proceedings to probate a will, exist as to who may

be the successors to the decedent, and such circumstances, or other complications, make it desirable to provide a continuous proceeding for the resolution of various problems that should be resolved prior to final distribution and settlement of the estate.

In an earlier draft the words "upon a finding of necessity" followed "judge" in the second sentence. These words were dropped because it was concluded that the granting of an order for supervised administration should be obtainable on petition without regard to "necessity," or any other predetermined standard. But, a suggestion to substitute "shall order" for "may order" in the same sentence was rejected. The permissive expression gives a judge some flexibility which might be used, for example, to permit interested parties to arrange for payment to a creditor whose demand for supervised administration brings the question before the judge.

SECTION 3-106. [Supervised Administration; Effect on Other Proceedings in [Probate] Court.]

(a) The filing of a petition for supervised administration of a decedent's estate shall stay action on any informal application then pending.

(b) If a will has been previously probated in informal proceedings, the filing of a petition for supervised administration shall have no effect on the previous informal probate unless the petition also requests a formal determination of testacy, in which case, the effect shall be governed by section 3-221.

(c) If a personal representative has been appointed previously, after he has received notice of the filing of a petition for supervised administration under section 3-106 he shall refrain from exercising his power to pay creditors and to distribute any estate. The filing of the petition shall not affect his other powers and duties unless the [judge] restrains the exercise thereof pending full hearing on the petition.

Comment

The duties and powers of personal representatives are described in Part 4 of this Article. The ability of a personal representative to create a good title in a purchaser of estate assets is not hampered by the fact that the personal representative may breach a duty created by statute, court order or other circumstances in making the sale. See section 3-413. However, formal proceedings against a personal representative may involve requests for restraining orders which, if granted, would subject the personal representative to the penalties for contempt of court if he disregarded the mandate. See section 3-308. If a proceeding also involved a demand that particular real estate be kept in the estate pending determination of a petitioner's claim thereto, notice of the pendency of the proceeding could be recorded as is usual under the jurisdiction's system for the lis pendens concept.

SECTION 3-107. [Supervised Administration; Nature of Proceeding.] Supervised administration is a formal proceeding to secure settlement of a decedent's estate by continuous judicial control of the personal representative. A supervised personal representative is responsible to the court, as well as to the interested parties, and is subject to directions concerning the estate made by the [judge] on motion of any interested party, or on his own motion, and after notice as directed by the judge or as provided by rule.

Comment

One significant difference between supervised and nonsupervised administration is that in the former, the judge can initiate hearings or procedures as necessary to secure proper administration. Another is that the personal representative is obligated to complete administration in a manner that would eliminate, to the extent possible, any question as to liability of distributees. See section 3-701. Whether one notice to all interested persons at the beginning of supervised administration may serve to bind all persons to all orders that may be made in the course of the proceeding may be doubted. Surely, a single notice would not protect a personal representative or others against the later complaint of one affected by an order who was not given fair notice of the fact that the court was requested to make the order. See Mullane v. Central Hanover Bank, 339 S. Ct. 306 (1959).

SECTION 3-108. [Supervised Administration: Powers of Personal Representative.] Unless restricted by the [judge], a supervised personal representative has all the powers of personal representatives under this Code, but he shall refrain from exercising any power to pay creditors, or to distribute the estate without prior order of the [judge.] Any restriction on the power of a personal representative which may be ordered by the [judge] may be endorsed on his letters of appointment and, unless so endorsed, shall be ineffective as to persons dealing in good faith with the personal representative.

Comment

This section provides authority to issue special letters showing restrictions of power of supervised administrators. In general, persons dealing with personal representatives are not bound to inquire concerning the authority of a personal representative, and are not affected by provisions in a will or judicial order unless they know of it. But, it is expected that persons dealing with personal representatives will want to see the personal representative's letters, and this section has the practical effect of requiring them to do so. No provision is made for noting restrictions in letters except in the case of supervised representatives. See section 3-415.

ARTICLE III

Part 2

Probate of Wills and Appointment Proceedings

SECTION 3-201. [Wills; Informal or Formal Probate; Necessity.] Except as provided in section 3-901 of this Code, to be effective to prove the transfer of any property, or to nominate an executor, a will

must be probated informally by the [registrar], or probated formally by the [judge] in proceedings initiated for that purpose.

Comment

This section follows section 85 of the Model Probate Code, but is changed to introduce informal probate by the [registrar] as an alternative to judicial probate. Reference to the [registrar] in these sections is intended to refer to whatever administrative officer may be designated to handle non-judicial matters concerning estates. In smaller counties which are required to have a probate judge, the judge may serve in both administrative and judicial capacities. The exception under section 3-901 deals with transfers by affidavit in estates worth less than $5,000.

SECTION 3-202. [Informal or Formal Appointment Proceedings; Requirement.] To acquire the powers and assume the duties and liabilities of a personal representative of a decedent, a person must be appointed in informal or formal proceedings, qualify and be issued letters.

Comment

This section makes it clear that appointment by a public official is required before one can acquire the status of personal representative. "Qualification" is dealt with in section 3-301. "Letters" are the subject of section 3-302. Section 3-401 is also related, since it deals with the time of accrual of duties and powers of personal representatives.

SECTION 3-203. [Combined Applications or Petitions.] An application for informal probate may, but need not, be combined with an application for informal appointment of a personal representative. A petition for a formal testacy order may be combined with requests for judicial orders concerning a personal representative.

Comment

This and other sections express the concept that the probate of a will and the administration of the decedent's estate under the will

are separable and may be dealt with independently. It may be desirable to establish the validity of a decedent's will but unnecessary to administer his estate. If this is so, no appointment of a personal representative should be sought. Under the Model Probate Code, the appointment of an executor or administrator with will annexed occurred as a part of a single court proceeding which included the probate of any will. Section 62 and related sections, M. P. C. The approach of this Code is to permit interested persons to use official procedures to the extent their interests dictate, subject, of course, to the rights and powers of others to initiate official or judicial proceedings that they deem necessary or desirable.

SECTION 3-204. [Appointment or Testacy Proceedings, Informal or Formal; Venue.]

(a) Proper [county]. Venue for informal or formal testacy or appointment proceedings is:

(1) in the [county] where the decedent has his domicile at the time of his death; or

(2) if the decedent was not domiciled in this state, in any [county] where property of the decedent was located at the time of his death. The situs of tangible personal estate is its location and the situs of intangible personal estate is the location of the instrument evidencing a debt, obligation, stock or chose in action, or the residence of the debtor if there is no instrument evidencing the debt, chose in action, or obligation in this state. An interest in property held in trust is located where the trustee may be sued.

(b) Application of petition in more than one [county]. Testacy or appointment proceedings concerning a particular decedent shall not be maintained in more than one [county]. If a proceeding is commenced in more than one [county] of this state, it shall be stayed except in the

[county] where first filed until final determination there of venue. If the decedent was not domiciled in the state, the [county] as described by (a) (2) of this section where a proceeding was first commenced is the proper [county]. If the proper venue is finally determined to be in another [county], the entire file shall be transferred to the proper [county].

(c) Transfer of file relating to personal representative. If it appears to the[judge] at any time that it would be for the best interest of the persons interested in the estate, the [judge], upon petition and after notice to interested persons, in its discretion, may order any pending proceedings, or any file relating to a previously appointed personal representative, transferred to the [probate] court of another [county]. After transfer, the court to which any proceeding is transferred shall have the same jurisdiction as the court transferring it had, and shall bear the same relationship to any transferred file and to persons interested therein as that borne by the transferring court, for all other purposes.

(d) Venue in formal testacy or appointment proceedings involving conflicting claims of domicile. If conflicting claims as to the domicile of a decedent are made in formal testacy or appointment proceedings commenced in this state and in one or more other states whose judgments are entitled to full faith and credit, the courts of this state shall stay, dismiss, or permit suitable amendments in, the proceeding here unless it is determined that the local proceeding was commenced before the proceeding elsewhere. The determination of domicile in the proceeding first commenced shall be accepted as determinative in the proceeding in this state.

Comment

M. P. C. section 61 is related. A change is the provision in (d) requiring the courts of this state to respect the priority of proceedings commenced elsewhere for probate or appointment when such proceedings involve a claim of domicile which is in conflict with a claim of domicile made in connection with the local proceeding. This provision presupposes that a formal testacy proceeding will be an application to a court for a binding order concerning the testacy of the decedent and that a formal appointment proceeding involves a request for a judicial order that the decedent died intestate and determining heirs. In either case, the assumption also is that the order will be entered after due notice and opportunity for contest.

The transfer procedure authorized by (c) requires judicial attention. Hence, a petition to transfer a file in a pending proceeding must be included with a request for other formal adjudication, or be made the subject of a separate petition which could be heard after appropriate notice.

SECTION 3-205. [Informal or Formal Testacy or Appointment Proceedings; Application or Petition; Who May Apply or Petition.] Any interested person may apply to the [registrar] for informal probate of the decedent's will, or for informal appointment of a personal representative, or for both if the requests involved are consistent, or may petition the [judge] for a judicial order in a formal testacy or appointment proceeding.

SECTION 3-206. [Persons Entitled to Letters.]

(a) Order of persons entitled in informal appointment proceedings. In informal proceedings, letters testamentary or letters of general administration may be granted to the persons hereinafter mentioned who are not disqualified and who have not renounced their right to be appointed in the following order:

(1) to the executor designated in any probated will.

(2) to the heirs or devisees of the decedent.

(3) to the surviving spouse of the decedent.

(4) to the child or children of the decedent who reside in the state in which the decedent was domiciled at the time of his decease.

(5) 45 days after the death of the decedent, any creditor.

A person or persons entitled to letters, other than an executor, may nominate a qualified person to act in his stead. Any person may renounce by appropriate writing his right to the appointment or to nominate.

(b) Order of persons entitled in formal proceedings. Unless probable insolvency of the estate is shown, letters testamentary or letters of general administration shall be granted in formal proceedings to persons as determined by the priorities stated in (a) above, except if there is objection from any party having a substantial interest in the estate to the appointment of one or more of the persons so indicated, the [judge] may appoint any person who is acceptable to those representing a majority in interest of the heirs or devisees, or, in default of accord, any suitable person. If it appears that the estate is probably insolvent, or that it has little value in excess of that needed to meet probable expenses, cost and claims, the [judge] may appoint any person not disqualified who is acceptable to a majority in interest of the creditors, or, in default of accord, any suitable person.

(c) Who are disqualified. No person is qualified to serve as a

domiciliary personal representative who is

(1) under twenty-one years of age;

(2) of unsound mind;

(3) a non-resident of this state who has not appointed a resident agent to accept service of process in all actions in any court in respect to matters concerning the estate and caused such appointment to be filed with the [probate] court;

(4) a person whom the [judge] finds unsuitable in formal proceedings.

Comment

The statement of priorities applicable to informal proceedings is applicable to formal proceedings but is qualified by the ability of a person with a substantial interest to protest theselection of the person with priority, as described in (b). The provision for majority approval which is triggered by such a protest can be handled in a formal proceeding since all interested persons will be before the court, and a judge capable of handling discretionary matters, will be involved.

Priority to administer is given to heirs over the spouse of the decedent. The spouse will be the sole heir except in cases where there are issue by another spouse, where the marriage occurred less than one year prior to death and there are no issue, or where the estate exceeds $50,000 (see section 2-102), and one who must vote with the others to express the position of the heirs in other cases. The effect of the provisions is to coerce agreement among interested persons concerning whether the spouse should handle the estate when there are other heirs.

SECTION 3-207. [Informal or Formal Testacy or Appointment Proceedings; Demand for Notice.] Any interested person who desires to be notified before any order is made in an informal or formal testacy or appointment proceeding relating to the decedent, may file a request for notice with the [court] at any time after the death of the testator.

A request is not effective unless it contains a statement showing the interest of the person making it and his address, or that of his attorney, and is effective only as to matters occurring after filing.

Comment

This provision is derived from section 67 of Model Probate Code. When read with the fact that no will may be probated, or no personal representative appointed, until the decedent has been dead at least five days, it provides a means by which relatives or creditors of a decedent may protect themselves against risks they may apprehend concerning informal proceedings. See sections 3-209 and 3-216.

SECTION 3-208 [Informal Probate or Appointment Proceedings; Application; Contents.] Applications for informal probate or informal appointment shall be directed to the [registrar], and shall be verified by the applicant as being true, accurate and complete to the best of his knowledge and belief in respect to the following information:

(a) Every application for informal probate of a will or for informal appointment of a personal representative other than a special, ancillary or successor representative, shall contain the following:

(1) a statement of the interest of the applicant;

(2) the name, age, domicile and date of death of the decedent, and the names, addresses, and the ages of any who are minors, of the spouse, children, heirs and devisees so far as known or ascertainable with reasonable diligence by the applicant;

(3) if the decedent was not domiciled in the state at the time of his death, a statement that there is property of the decedent within the [county];

(4) a statement identifying any personal representative of the decedent appointed in this state or elsewhere whose appointment

has not been terminated;

(5) a statement indicating whether the applicant is aware of any demand for notice of any probate or appointment proceeding concerning the decedent that may have been filed in this state or elsewhere.

(b) An application for informal appointment of an administrator in intestacy shall state in addition to the statements required by (a):

(1) that after the exercise of reasonable diligence, the applicant is unaware of any unrevoked testamentary instrument relating to property that is or may be subject to the law of this state, or, a statement why any such instrument of which he may be aware is not being probated;

(2) the priority of the person whose appointment is sought.

(c) An application for informal probate of a will shall state the following in addition to the statements required by (a):

(1) that the original of the decedent's last will is in the possession of the court, or accompanies the application, or that a certified copy of a will probated in another jurisdiction accompanies the application;

(2) that the applicant, to the best of his knowledge, believes the will to have been validly executed;

(3) that after the exercise of reasonable diligence, the applicant is unaware of any other unrevoked, conflicting testamentary instrument of the decedent, or that any instrument of which he is aware does not revoke the will for reasons that are stated.

(d) An application for informal appointment of an executor, or of a personal representative to administer an estate under a will shall describe the will by date of execution and state the time and place of probate or the pending application or petition for probate. The application for appointment shall adopt the statements in the application or petition for probate and state the name and address of the person whose appointment is sought.

Comment

Forcing one who seeks informal probate or informal appointment to make oath before a public official concerning the details required of applications should deter persons who might otherwise misuse the no-notice feature of informal proceedings. The application is available as a part of the public record. If deliberately false representation is made, remedies for fraud will be available to injured persons without specified time limit (see Article I). The section is believed to provide important safeguards that may extend well beyond those presently available under supervised administration for persons damaged by deliberate wrong doing.

SECTION 3-209. [Informal Probate; Duty of [Registrar]; Effect of Informal Probate.] Upon receipt of an application requesting informal probate of a will, the [registrar], upon making the findings required by section 3-210, after determining that the application is not one requiring approval of the judge under section 3-211, or, having secured the written approval of the judge to informal probate of the will if required, and after being satisfied that any notice required by section 3-212 has been given, shall, if at least five days have elapsed since the decedent's death, issue a written statement of informal probate. Informal probate is conclusive as to all persons until superseded by an order in a formal testacy proceeding, or vacation in accordance with section 3-214. No defect in the application or procedure relating

thereto which leads to informal probate of a will shall render the probate void.

Comment

M.P.C. sections 68 and 70 contemplate probate by judicial order as the only method of validating a will. This "umbrella" section and the sections it refers to describe an alternative procedure called "informal probate." It is a statement of probate by the administrative officers of the court, although a succeeding section describes cases in which approval of the judge is required. "Informal probate" is subjected to safeguards that seem appropriate to a transaction which has the effect of making a will operative and which may be the only official reaction concerning the validity of the will. "Informal probate," it is hoped, will serve to keep the simple will which generates no controversy from becoming involved in truly judicial proceedings. The procedure is very much like "probate in common form" as it is known in England and some states.

SECTION 3-210. [Informal Probate; Proof and Findings Required.]

(a) The [registrar] shall determine that an application for original, informal probate of a will is complete, that the applicant is an interested person who has made oath or affirmation that the statements contained in the application are true to the best of his knowledge and belief and, on the basis therof, that the venue is proper. If the application indicates that a personal representative has been appointed in another [county] of this state, it shall be denied. The [registrar] also shall find that an original, duly executed and unrevoked will, or a certified copy of a will probated in another jurisdiction, is in its possession, that the testator is deceased and that the time limit for probate of his will has not expired. As proof of due execution, if the will appears to have been duly executed or contains a recital by attesting witnesses of facts constituting due execution, it may presume due execution from the appearance and recital, or the [registrar] may accept the sworn statement

or affidavit of any person with personal knowledge of the circumstances of execution, whether or not the person was an attesting witness. As proof of death, the [registrar] may accept a duly executed death certificate, or other suitable proof.

(b) Informal probate of a will which has been previously probated elsewhere may be granted at any time upon written application by any interested person, together with deposit of a certified copy of the will and of the stat ement probating it under the seal of the office or court where it was first probated.

Comment

The purpose of this section is to permit informal probate of a will which, from a simple attestation clause, appears to have been executed properly. It is not necessary that the will be notarized as is the case with "pre-proved" wills in some states. If a will is "pre-proved" as provided in Article II, it will, of course, "appear" to be well executed and include the recital necessary for easy probate here. If the instrument does not contain a proper recital by attesting witnesses, it may be probated informally on the strength of an affidavit by a person who can say what occurred at the time of execution.

Except where probate has occurred previously in another state, informal probate is available only where an original will exists and is available to be filed with the court. Lost or destroyed wills must be established in formal proceedings. See section 3-221.

SECTION 3-211. [Informal Probate; Approval of Judge Required.]

(a) The [registrar] shall not probate any will which has been torn, mutilated, burned in part, or marked in any way as to leave doubt as to whether the marking occurred before or after execution, without first submitting the same to the judge and receiving the judge's written approval of its informal probate. Applications for informal probate which relate to one or more of a known series of testamentary instruments executed by a particular testator, the latest of which does not expressly

revoke the earlier, shall not be acted upon until the instruments have been submitted to the judge and he has given his written approval of the request involved.

(b) After a will has been probated informally, an application for informal probate of another testamentary instrument of the same testator shall be denied unless, after reference of the matter to the judge, the judge indicates in writing that the instrument neither totally revokes nor is totally revoked by, the previously probated will. This subsection is inapplicable where the informal probate of the first presented instrument has been vacated pursuant to section 3-215 of this Code.

Comment

The [registrar] handles the informal proceeding, but is required to refer certain matters to the "judge." The "judge" should be a judicial officer who is associated with the public office which includes the [registrar]. Section 3-219 describes the advisory function of the judge as it is involved at various points in informal proceedings. Use of the judge in advisory capacity does not make the matter a judicial proceeding, nor alter the weight or effectiveness of any informal order.

SECTION 3-212. [Informal Probate; Notice Requirements.] If a demand for notice as described in section 3-207 of this Code has been filed with the court, or if the application shows that a demand for notice has been filed in an appropriate office elsewhere, the [registrar] shall delay informal probate until at least five days notice that the will would be offered for informal probate has been given to the person demanding it. This notice may be waived in writing or shall be unnecessary if the person demanding it has since died. Unless waived in writing, notice also must be given to any person representative

of the decedent whose appointment has not been terminated.

SECTION 3-213. [Informal Probate; Court [Registrar] Not Satisfied by Proof.] If the [registrar] is not satisfied for reasons other than the applicant's failure to meet the requirements of section 3-209 that a will is entitled to be probated in informal proceedings it may, with the written approval of the judge, refuse the application.

Comment

The purpose of this section is to recognize that the [registrar] should have some authority to deny probate to an instrument even though all stated statutory requirements may be said to have been met. But, as a check on the exercise of such discretion, the [registrar] may not deny probate where stated requirements have been met, unless the written approval of the judge is obtained. Denial of an application for informal probate cannot be appealed. Rather, the proponent may initiate a formal proceeding so that the matter may be brought before the judge in the normal way for contested matters.

SECTION 3-214. [Informal Probate; Vacation.] Upon the written application of a duly appointed personal representative of the decedent, or, if none, of the person who previously sought and obtained informal probate of a will, filed before the probate has become conclusive under section 3-234, the [registrar] shall vacate the previous probate upon a showing that the will was totally revoked by a later executed instrument. In other cases, relief for erroneous informal probate may be had only in a formal proceeding.

Comment

This is new. It is designed to permit persons seeking to settle an estate with minimum contact with a court to secure elimination of an informal probate when a later will which they concede to be valid is discovered. Once the prior probate is vacated, the later will may be probated informally. See section 3-210.

SECTION 3-215. [Informal Appointment Proceedings; Duty of [Registrar]; Effect of Appointment.] Upon receipt of an application for original, informal appointment of a personal representative, and after determining that the requirements of section 3-216 have been met, the [registrar] shall appoint the person seeking appointment subject to qualification and acceptance. The status of personal representative, and the powers and duties pertaining thereto, conferred as a result of informal appointment though subject to termination as provided in section 3-310 shall not be subject to retroactive vacation.

SECTION 3-216. [Informal Appointment Proceedings; Proof and Findings Required.] In informal proceedings, the [registrar] shall determine that an application for appointment is complete, that any will to which the requested appointment relates has been formally or informally probated, that any notice required by section 3-217 and any approval required by section 3-218 has been given and obtained, and, unless indicated by the probate of a will, that the decedent has been dead five days. The [registrar] may accept a duly executed death certificate, or any other suitable evidence, as proof of death. The [registrar] also shall determine from the statements in the application whether the petitioner is entitled to request an appointment, and whether the person whose appointment is sought is entitled to receive the appointment. In any case where the [registrar] is not satisfied for any reason other than failure to meet the requirements of this and related sections that the requested appointment should be made, it may, with the approval of the judge, decline the application.

Comment

Authority to decline an application for appointment is conferred on the [registrar] acting with the judge's approval. Unlike section 3-213, the judge's approval of a proposed declination of appointment does not need to be in writing. Appointment of a personal representative confers broad powers over the assets of a decedent's estate. The process of declining a requested appointment for unclassified reasons should be one which a registrar can use quickly and informally.

SECTION 3-217. [Informal Appointment Proceedings; Notice Requirements.] The moving party must mail notice of his intention to seek an appointment informally at least seven days prior to the making of application: (i) to any person demanding it as provided in section 3-207; and (ii) to any person having a prior right to appointment not waived in writing and filed with the court unless, after due diligence, the applicant is unable to locate the person having priority in which case he shall give a sworn statement to that effect to the court.

SECTION 3-218. [Informal Appointment Proceedings; Approval of Judge Required.]

(a) If an application for informal appointment indicates the existence of a possible testamentary instrument which is unrevoked, may relate to property subject to the laws of this state, and is not filed for probate in this court, the [registrar] shall refer the matter to the judge who shall approve the requested appointment before it can be made. Approval is proper if the judge believes the instrument is probably ineffective as a testamentary instrument.

(b) If the appointment of a domiciliary administrator in intestacy is sought notwithstanding an unrevoked will which may or may not have

been probated, the [registrar] shall refer the matter to the judge who shall approve the requested appointment before it can be made. Approval is proper if all heirs and devisees of the decedent are competent and join in a written request that the estate be administered as intestate and the judge believes that no injustice will result from granting the request.

Comment

This and other sections which require reference in informal matters to the judge are designed to minimize the number of matters involving important discretion that are assigned to the [registrar.]

SECTION 3-219. [Informal Probate or Appointment Proceedings; Nature of Judge's Advice.] In instances in which the judge's approval is required in connection with a request for informal probate or appointment, the judge acts only in advisory capacity to the nonjudicial officer of the court. His approval or refusal to approve in any instance is of no evidentiary or other value in any formal proceeding.

SECTION 3-220. [Formal Testacy Proceedings; Nature; When Commenced.] A formal testacy proceeding is litigation to determine whether a decedent left a valid will. A formal testacy proceeding may be commenced by:

(1) an interested person filing a petition as described in section 3-221 (a) in which he requests that the [judge] proceed, after notice and hearing to enter an order probating a will; or

(2) an heir of the decedent filing a petition to set aside an informal probate of a will or to prevent informal probate of a will which is the subject of a pending application.

(3) an heir filing a petition in accordance with section 3-221 (b) for an order that the decedent died intestate.

A petition under (1) may petition for formal probate of a will without regard to whether the same or a conflicting will has been informally probated. A formal testacy proceeding may, but need not, involve a request for appointment of a personal representative.

Commencement of a formal testacy proceeding shall stay any pending application for informal probate of any will of the decedent dealing with the same assets, or any pending application for informal appointment of a personal representative of the decedent.

Unless a petition in a formal testacy proceeding also requests confirmation of the previous informal appointment, a previously appointed personal representative, after notice of the commencement of a formal probate proceeding, shall refrain from any further distribution of the estate during the pendency of the formal proceeding. A petitioner who seeks the appointment of a different personal representative in a formal proceeding also may request an order restraining the present personal representative from exercising any of the powers of his office and requesting the appointment of a special administrator. In the absence of such a request, or if the request is denied, the commencement of a formal proceeding shall have no effect on the powers and duties of a previously appointed personal representative other than those relating to distribution.

Comment

The word "testacy" is used to refer to the general status of a decedent in regard to wills. Thus, it embraces the possibility that he left no will, any question of which of several instruments is his valid will, and the possibility that he died intestate as to a part of his estate, and testate as to the balance.

The formal proceedings described by this section may: (i) be an original proceeding to secure "solemn form" probate of a will; (ii) be a proceeding to secure "solemn form" probate to corroborate a previous informal probate; (iii) be brought to block a pending application for informal probate, or to prevent an informal application from occurring thereafter; (iv) be brought to contradict a previous order of informal probate; (v) be brought to secure a declaratory judgment of intestacy and determining heirs in a case where no will has been offered. If a pending informal application for probate is blocked by a formal proceeding, the applicant may withdraw his application and avoid the obligation of going forward with prima facie proof of due execution. See section 3-226. The petitioner in the formal proceedings may be content to let matters stop there, or he can frame his petition, or amend, to bring his action under (3) so that he may secure an adjudication of intestacy which would prevent further activity concerning the will.

If a personal representative has been appointed prior to the commencement of a formal testacy proceeding, the petitioner must request confirmation of the appointment to indicate that he does not want the testacy proceeding to have any effect on the duties of the personal representative, or refrain from seeking confirmation, in which case, the proceeding suspends the distributive power of the previously appointed representative. If nothing else is requested or decided in respect to the personal representative, his distributive powers are restored at the completion of the proceeding, with section 3-403 directing him to abide by the will.

SECTION 3-221. [Formal Testacy or Appointment Proceedings; Petition; Contents.] Petitions for formal probate of a will, or for formal appointment of a personal representative, shall be verified, directed to the [judge], request a judicial order after notice and hearing and contain further statements as indicated herein:

(a) A petition for formal probate of a will shall

(1) request an order as to the testacy of the decedent in relation to a particular instrument which may or may not have been informally probated,

(2) contain the statements required for informal applications as stated in the five subparagraphs under section 3-208 (a), and the statements required by subparagraphs (2) and (3) of section 3-208 (c) and

(3) state whether the original of the last will of the decedent is in the possession of the court or accompanies the petition.

If the original will is neither in the possession of the court or accompanying the petition and no certified copy of a will probated in another jurisdiction accompanies the petition, the petition also shall state the contents of the will, and indicate that it is lost, destroyed or otherwise unavailable.

(b) A petition for formal appointment of an administrator in intestacy shall request a judicial finding and order that the decedent left no will and determining the heirs, contain the statements required by (a) and (b) of section 3-208, and indicate whether supervised administration is sought. A petition may request an order determining intestacy and heirs without requesting the appointment of an administrator, in which case, the statements required by subparagraph (2) of section 3-208 (b) above may be omitted.

(c) A petition for formal appointment of a personal representative to administer an estate under a will shall contain the statements required for informal applications by section 3-208 (d) above and indicate whether supervised administration is sought. Also it shall describe any question of priority concerning appointment of a personal representative that is involved.

Comment

If a petitioner seeks an adjudication that a decedent died intestate, he is required also to obtain a finding of heirship. A formal proceeding that is to be effective on all interested persons must follow reasonable notice to such persons. It seems desirable to force the proceedings through a formal determination of heirship because the finding will bolster the order, as well as preclude later questions that might arise at the time of distribution.

Unless supervised administration is sought, there will be little occasion for a formal order concerning appointment of a personal representative except where disagreement exists over who should serve. A formal order concerning appointment settles disputes of priority.

SECTION 3-222. [Formal Testacy Proceeding; Notice of Hearing on Petition.]

(a) When and to whom notice is given. Upon commencement of a formal testacy proceeding, the [judge] shall fix a time and place for hearing. Notice shall be given by the petitioner to the persons herein enumerated and to any additional person who have filed a demand for notice under section 3-207 of this Code.

Notice shall be given to the following persons: the surviving spouse, children, and heirs of the decedent, the devisees and executors named in any will that is being, or has been, probated, or offered for informal or formal probate in the [county,] or that is known by the petitioner to have been probated, or offered for informal or formal probate elsewhere, and any personal representative of the decedent whose appointment has not been terminated.

In addition, the petitioner shall give notice by publication to all unknown persons who may have any interest in the matters being litigated.

(b) Notice to and search for alleged decedent. If it appears by the petition or otherwise that the fact of the death of the alleged decedent

may be in doubt, or on the written demand of any interested person, a copy of the notice of the hearing on said petition shall be sent by registered mail to the last known address of the alleged decedent. The court shall direct the petitioner to report the results of, or make, a reasonably diligent search for the alleged decedent in any manner that may seem advisable, including any or all of the following methods:

(1) by inserting in one or more suitable periodicals a notice requesting information from any person having knowledge of the whereabouts of the alleged decedent;

(2) by notifying officers of justice and public welfare agencies in appropriate locations of the disappearance of of the alleged decedent;

(3) by engaging the services of an investigation agency.

The costs of any search so directed shall be paid by the petitioner if there is no administration or by the estate of the decedent in case there is administration.

Comment

The provisions concerning search for the alleged decedent are derived from Model Probate Code, section 71, M. P. C.

Testacy proceedings involve adjudications that no will exists. Unknown wills as well as any which are brought to the attention of the court are affected. Persons with potential interest under unknown wills have the notice afforded by death and by publication. Arguably, the notice requirements should extend also to persons named in a will that is known to the petitioners to exist, irrespective of whether it has been probated or offered for formal or informal probate. But, a requirement of this sort might result in a very burdensome, possibly fruitless and probably disruptive obligation to notify persons named in obviously obsolete instruments. Moreover, it seemed unwise to require the petitioner to guess whether some instrument of which he is aware is or is not one that should be taken seriously. Another idea was that of requiring the

petitioner to affirm that he was not secreting and had not destroyed any potentially testamentary document of the decedent, other than any that might be mentioned in his pleading. This was rejected also. Among other considerations, section 1-214 provides a very significant deterrent against actual fraud of the sort suggested. Furthermore, it has never been wise for testators to leave conflicting testamentary instruments lying about at death. The fact that some testators act unwisely, and that the "wrong" will may be probated while the "right" will is excluded as a consequence, seems to be an inadequate reason for establishing a procedure which would tend to cause great inconvenience in all formal testacy proceedings, simply to narrow the chance of unwanted results, in a very small number of cases involving thoughtless testators.

However, it would not be inconsistent with this section for the court to adopt rules designed to make petitioners exercise reasonable diligence in searching for as yet undiscovered wills.

SECTION 3-223. [Formal Testacy Proceedings; Written Objections to Probate.] Any party to a formal proceeding who opposes the probate of a will for any reason except that it is expressly revoked by a later will which is the subject of a petition for formal probate, shall state his objections to the will in his pleadings. Amendments shall be freely allowed in the interests of justice.

Comment

M. P. C. section 72 requires a contestant to file written objections to any will he would oppose. The provision prevents potential confusion as to who must file what pleading that can arise from the notion that the probate of a will is in rem. The petition for probate of a revoking will is sufficient warning to proponents of the revoked will.

SECTION 3-224. [Formal Testacy Proceedings; Uncontested; Hearings and Proof.] If a petition in a testacy proceeding is un opposed, the [judge] may order probate or intestacy on the strength of the pleadings if satisfied that the conditions of section 3-228 have been met, or conduct a hearing in open court and require proof of the matters necessary to

support the order sought. A hearing shall be conducted if the petitioner requests it.

Comment

For various reasons, attorneys handling estates may want interested persons to be gathered for a hearing before the [judge] on the formal allowance of the will. The [judge] is not required to conduct a hearing unless one is requested, however.

If no hearing is required, uncontested formal probates can be completed on the strength of the pleadings. There is no good reason for summoning attestors when no interested person wants to force the production of any evidence on a formal probate. There seems to be no valid distinction between litigation to establish a will, and other civil litigation, in respect to whether the court may enter judgment on the pleadings.

SECTION 3-225. [Formal Testacy Proceedings; Testimony of Subscribing Witnesses.]

(a) Where evidence concerning execution of the will is necessary in uncontested proceedings for probate, the affidavit or testimony of one of the subscribing witnesses to the instrument propounded shall be sufficient. In contested cases, the testimony of at least one of the subscribing witnesses, if within the state, competent and able to testify shall be received. Due execution of the will may be proved by other evidence.

(b) Due execution of a self-proved will shall be conclusively presumed without the testimony of any attesting witness upon filing the will and the acknowledgment and affidavits annexed or attached thereto, unless there is proof of fraud or forgery affecting the acknowledgment or affidavit.

Comment

M. P. C. section 76, combined with section 77, substantially unchanged. The self-proved will is described in Article II. See

section 2-503. The "conclusive presumption" described here would foreclose questions like whether the witnesses signed in the presence of the testator and whether the testator knew that the instrument he signed purported to be his will. It would not preclude proof of undue influence, lack of testamentary capacity, revocation or any relevant proof that he was unaware of the contents of the document. The balance of the section is derived from M. P. C. sections 76 and 77.

SECTION 3-226. [Formal Testacy Proceedings; Burdens in Contested Cases.] In contested cases, petitioners who seek to establish intestacy have the initial burden of going forward with prima facie proof of death, venue, and heirship. Proponents of a will have the initial burden of going forward with prima facie proof of testamentary intent and due execution in all cases, and, if they are also petitioners, with prima facie proof of death and venue. Contestants of a will have the initial burden of going forward with prima facie proof of lack of testamentary capacity, undue influence, fraud, duress, mistake or revocation. Parties have the ultimate burden of persuasion as to matters on which they have the initial burden of going forward. It a will is opposed by the petition for probate of a later will revoking the former, it shall first be determined whether the later will is entitled to probate, and if a will is opposed by a petition for a declaration of intestacy, it shall first be determined whether the will is entitled to probate.

Comment

This is new. It is designed to clarify by stating what is believed to be a fairly general approach to questions concerning burdens of going forward with evidence in will contest cases.

SECTION 3-227. [Formal Testacy Proceedings; Effect of Final Order in Another Jurisdiction.] A final order or decree concerning succession of a decedent's estate of a court whose judgments are

entitled to full faith and credit, in a proceeding that is designed to give notice and opportunity for contest to all interested persons reasonably entitled to notice, shall be conclusive in this state and shall be accepted as the basis for implementing orders by a court of this state if the foreign court found that the decedent was domiciled at his death in the other jurisdiction. A petition for local implementation of the foreign order or decree shall be accompanied by an authenticated copy of any will and the findings and order concerning it made by the foreign court, its order concerning intestacy and heirship, or other orders concerning the estate. The findings of the foreign court, including its findings of domicile, shall be conclusive in this state notwithstanding the possibility that the laws of this state otherwise applicable to determine the validity of the will or to determine heirs would produce a different result.

Comment

This section is designed to extend the effect of final orders of another jurisdiction of the United States. It should not be read to restrict the obligation of the local court to respect the judgment of another court when parties who were personally before the other court also personally are before the local court. An "authenticated copy" includes copies properly certified under the full faith and credit statute. If conflicting claims of domicile are made in proceedings which are commenced in different jurisdictions, section 3-204 (d) applies. Section 3-227 is intended to apply where a formal proceeding elsewhere has been previously concluded, or where there is no conflict between local and foreign proceedings in respect to domicile. Hence, if a local formal proceeding not involving a claim of local domicile is concluded before formal proceedings and domicile are concluded, local law will control, for this section is not intended to cut across the principle of res judicata.

Informal proceedings by which a will is probated or a personal representative is appointed are not proceedings which must be respected by a local court under either section 3-204 (d) or this section. By use of informal proceedings, it is possible to begin and conclude administration without a formal order of the sort that may be important under sections 3-204 (d) or 3-227.

SECTION 3-228. [Formal Testacy Proceedings; Order.] After the time required for any notice has expired, upon proof of notice, and after any hearing that may be necessary, if the [judge] finds that the testator is dead and venue proper, it shall determine the decedent's domicile at death, his heirs and his state of testacy. Any will found to be valid and unrevoked shall be formally probated. The petition should be dismissed or appropriate amendment allowed if the court is not satisfied that the alleged decedent is dead.

Comment

M. P. C. section 80 (a), slightly changed. If the court is not satisfied that the alleged decedent is dead, it may permit amendment of the proceeding so that it would become a proceeding to protect the estate of a missing or disabled person. See Article V of this Code.

SECTION 3-229. [Formal Testacy Proceedings; Probate of More Than One Instrument.] If two or more instruments are offered for probate before a final order in a formal testacy proceeding is entered, more than one instrument may be probated where neither expressly revokes the other nor contains provisions which work a total revocation by implication. If more than one instrument is probated, the order shall indicate what provisions control in respect to the nomination of an executor, if any. The order may, but need not, indicate how any provisions of a particular instrument are affected by the other instrument. After a final order in a testacy proceeding has been entered, no petition for probate of any other instrument of the decedent may be entertained, except incident to a petition to vacate or modify a previous probate order and subject to the time limits of the proceedings.

Comment

Except as otherwise provided in section 3-231, an order in a formal testacy proceeding serves to end the time within which it is possible to probate after-discovered wills, or to give effect to late-discovered facts concerning heirship.

This section authorizes a court to engage in some construction of wills incident to determining whether a will is entitled to probate. It seems desirable to leave the extent of this power to the sound discretion of the court.

SECTION 3-230. [Formal Testacy Proceedings; Partial Intestacy.] If it becomes evident in the course of a formal testacy proceeding that, though one or more instruments are entitled to be probated, the decedent's estate is or may be partially intestate, the [judge] shall enter an order to that effect and determining the heirs of the decedent.

SECTION 3-231. [Formal Testacy Proceeding; Effect of Order.] Subject to any right of appeal, and subject to vacation as provided in section 3-232, a formal testacy order under section 3-228, including an order that the decedent left no valid will and determining heirs, is final as to all persons, as to all estate of the testator subject to local law, and as to all issues that the court considered or might have considered incident to its rendition relevant to the question of whether the decedent left a valid will, except that:

(1) Later discovered will; discovery of unknown heir.

(A) the [judge] shall entertain a petition for modification or vacation of its order and probate of another will of the decedent if it is shown that the proponents of the later-offered will, in spite of the exercise of reasonable diligence in efforts

to locate any will, were unaware of its existence at the time of the earlier proceeding, or were unaware of the earlier proceeding and had no notice thereof, except by publication.

(B) If intestacy of all or part of the estate has been ordered, the determination of heirs of the decedent may be reconsidered when it is shown that one or more persons were omitted from the determination if it is also shown that the persons were unaware of their relationship to the decedent, or were unaware of his death and had no notice of any proceeding concerning his estate, except by publication.

(C) A petition for vacation under either (A) or (B) above must be filed prior to the earlier of the following time limits:

(i) If a personal representative has been appointed for the estate, the time of entry of any order approving final distribution of the estate, or, if the estate is closed by statement, six months from the filing of the closing statement.

(ii) Whether or not a personal representative has been appointed for the estate of the decedent, the time when it is no longer possible to initiate an original proceeding to probate a will of the decedent.

(iii) Twelve months from the entry of the order to be vacated.

(D) The order originally rendered in the testacy proceeding may be modified or vacated, as is appropriate under the circumstances, by the order of probate of the later-offered will, or the order redetermining heirs.

(2) Alleged decedent alive. The finding of the fact of death shall be binding as to the alleged decedent only if notice of the

hearing on the petition in the formal testacy proceeding was sent by registered mail addressed to the alleged decedent at his last known address and the [judge] finds that the search provided in section 3-222 (b) was made.

If the alleged decedent is not dead and if notice was sent and search was made, his sole rights shall be at any time to recover estate from the personal representative if it be in his hands, or to recover the estate or its proceeds from the distributees, if either be in their hands.

Comment

The provisions barring proof of late-discovered wills is derived in part from section 81 of Model Probate Code. The same section is the source for the provisions of (2) above. The provisions permitting vacation of an order determining heirs on certain conditions were established through the effort to make complete parallels of the possibilities for adjudications of intestacy and adjudications of testate status. See section 3-220. An objective is to make it possible to handle an intestate estate exactly as a testate estate may be handled. If this is achieved, some of the pressure on persons to make wills may be relieved.

If an alleged decedent turns out to have been alive, heirs and distributees are liable to restore the "estate of its proceeds." If neither can be identified through the normal process of tracing assets, their liability is at an end. The liability of distributees to claimants whose claims have not been barred, or to persons shown to be entitled to distribution when a formal proceeding changes a previous assumption informally established which guided an earlier distribution, is different. See sections 3-609 and 3-704.

SECTION 3-232. [Formal Testacy Proceeding; Vacation of Order for Other Cause.] An order in a formal testacy proceeding may be modified or vacated within the time permitted for appeal therefrom for good cause shown as provided in section 1-215.

Comment

The reference is to the general section in Article I that authorizes vacation of probate court orders within the time permitted for appeal.

SECTION 3-233. [Informal and Formal Probate and Testacy Proceedings; Ultimate Time Limit.] No informal or formal probate or testacy proceeding may be commenced after the third anniversary of the decedent's death, except; (i) if a previous informal or formal proceeding was initiated and dismissed because the [registrar] or [judge] was not satisfied that the alleged decedent was dead, informal or formal proceedings may be initiated at any time thereafter if it is found that death occurred prior to the initiation of the previous proceeding and that the proponent has not delayed unduly in initiating the subsequent proceeding; (ii) an informal or formal proceeding may be commenced by any person interested in the estate of an absentee, disappeared or missing person for whom a conservator-trustee has been appointed, at any time within three years after the conservator-trustee learns of the death of the protected person or otherwise becomes able to establish death; and (iii) a formal testacy proceeding to contest an informally probated will may be commenced within twelve months from the date of the informal probate. An original proceeding to determine the heirs of an intestate may be brought at any time during which any will might be probated has elapsed.

Comment

This section establishes a basic limitation period of three years within which it may be determined that a decedent left a will. But, an exception assures that heirs will have at least one year after an informal probate to initiate a contest. If the informal probate occurred less than two years after death, the heirs will have longer than one year. If no will is probated within three years from death, the section has the effect of

making the assumption of intestacy final. If a will has been informally probated within the period, the section has the effect of making the informal probate conclusive after three years or within twelve months from informal probate, if later. Heirs of devisees can protect themselves against change of assumption within the three years that the decedent died either testate or intestate by bringing a formal proceeding which shortens the period to that described in sections 3-231 and 2-232. A personal representative who has been appointed under an assumption concerning testacy that may be turned around in the three-year period if there has been no formal proceeding, is protected by section 3-404, which relieves a personal representative of liability for surcharge for certain distributions made pursuant to an informally probated will, or under authority of informally issued letters of administration.

Distributees who receive an estate distributed before the three-year period expires without any formal determination serving to accelerate the time for certainty, remain potentially liable to persons determined to be entitled by formal proceedings instituted within the basic period under sections 3-609 and 3-706.

Purchasers from personal representatives and distributees may be protected without regard to whether the three-year period has run. See sections 3-415 and 3-610.

All creditors' claims are barred after three years from death. See section 3-504 (a) (2). A consequence of this and the section being discussed is that administration probably will not be necessary if none is instituted within three years after death. Nonetheless, later administration is not barred, for it may provide a convenient way of collecting and distributing assets even though no question concerning testacy or claims is possible.

The basic premise underlying all of these time provisions is that interested persons who want to assume the risks implicit in the three-year period of limitations should be provided legitimate means by which they can do so. At the same time, parties should be afforded ample opportunity for earlier protection if they want it. But, earlier protection cannot be fully achieved without a judicial proceeding which is, of course, subject to the notice requirements implicit in the due process concept.

SECTION 3-234. [Formal Appointment Proceedings; Findings; Order.]

(a) Commencement of a formal appointment proceeding that does not involve an issue as to the testacy of the decedent shall stay any pending

application for informal appointment of a personal representative of the decedent. A previously appointed personal representative, after notice of the commencement of a formal appointment proceeding, shall refrain from exercise of any power of administration or distribution of the estate, except as necessary to preserve assets, unless and until the judge shall order otherwise. A formal appointment proceeding that is combined with a formal testacy proceeding shall have the effect on previous and pending informal proceedings concerning the decedent's estate described in section 3-220

(b) If appointment of a personal representative is sought in formal proceedings, the [judge], after notice to interested persons and hearing, shall determine that the matters required to be contained in the petition by the preceding sections of this Part have been established, and make an order finding the domicile of the decedent, and determining who upon qualification, is entitled to be appointed personal representative of his estate. If supervised administration is also ordered, the order shall indicate any limitations on the power of the personal representative which are to be mentioned in the letters and make such other provision as may by desirable to assure suitable supervision of the administration.

Comment

A petition for formal appointment of a personal representative may be combined with a petition in a formal testacy proceeding. However, it is not necessary to formally petition for the appointment of a personal representative in such a case because a personal representative may be appointed on informal application either before or after formal proceedings which establish whether the decedent died testate or intestate. See sections 3-205, 3-208 (b) and (d) and 3-215. Furthermore, procedures for securing the appointmen t of a new personal

representative after a previous assumption as to testacy has been changed is provided by section 3-313. These may be informal, or related to pending formal proceedings concerning testacy. Hence, the times when it will be necessary to obtain a formal order relating to appointment are when there is a dispute concerning who has priority to serve that cannot be resolved incident to a determination of testacy, or when supervised administration is sought under sections 3-105 et seq. Requests for formal appointments in other cases are not prohibited, however. It is important to distinguish "formal appointment" proceedings from "supervised administration." The former applies generally to any proceeding after notice involving a request for an appointment. The latter originates in a "formal proceeding," but is descriptive of the relationship of the appointee to the appointing court. In other words, a personal representative appointed in a formal proceeding may or may not be supervised.

Another point should be noted. The [judge] does not issue letters even though a formal proceeding seeking appointment is involved and results in an order authorizing appointment. Rather, section 3-301 et seq. control the subjects of qualification and issuance of letters.

SECTION 3-235. [Certificate of Probate or Intestacy.] The court shall issue certificates evidencing findings or orders entered in any proceeding together with authenticated copies of any wills so established, to any interested person upon request and payment of the fees required therefor. Certificates relating to probated wills shall indicate whether the decedent was domiciled in this state and whether the proceedings were formal or informal.

ARTICLE III

Part 3

Personal Representative; Appointment, Control and Termination

Section 3-301. [Qualification.] Prior to the issuance of letters, a personal representative shall qualify by filing any required bond and a statement of acceptance of the duties of the office.

Comment

This and related sections of this Part describe details and conditions of appointment that may be applicable to all personal representatives without regard to whether the appointment proceeding involved is formal or informal, or whether the personal representative is supervised.

SECTION 3-302. [Issuance and Contents of Letters.] After a personal representative has qualified, the [registrar] shall issue letters testamentary, letters of administration with will annexed, letters of administration, letters of special administration, or letters of ancillary administration as appropriate under the circumstances. If the letters confer authority to administer the estate under a will of the decedent, the dates of execution and probate of the will shall be stated in the letters. The [registrar] shall issue certified copies of letters upon request of the personal representative and payment of the fee required therefor.

Comment

This section should be read with section 3-108 which directs endorsement on letters of any restrictions of power of a supervised administrator.

SECTION 3-303. [Acceptance of Appointment; Consent to Jurisdiction.] By accepting appointment, a personal representative submits personally to the jurisdiction of the [probate] court in any proceeding relating to the estate that may be instituted by any interested person. Notice of any proceeding shall by delivered to the personal representative, or mailed to him by ordinary mail at his address, as listed in the application or petition for appointment or as thereafter reported to the court.

Comment

Except for personal representatives appointed pursuant to section 3-105, appointees are not deemed to be "officers" of the appointing court (see section 3-403) or to be parties in one continuous judicial proceeding that extends until final settlement. See section 3-104. Yet, it is desirable to continue the present pattern which prevents a personal representative who might make himself unavailable to service within the state from affecting the power of the appointing court to enter valid orders affecting him. See Michigan Trust Co. v. Ferry, 228 U.S. 346, 57 L.Ed. 867, 33 Sup. Ct. 550 (1912). The concept employed to accomplish this is that of requiring each appointee to consent in advance to the personal jurisdiction of the probate court in any proceeding relating to the estate that may be instituted against him. The section requires that he be given notice of any such proceeding, which, when considered in the light of the responsibility he has undertaken, should make the procedure sufficient to meet the requirements of due process.

SECTION 3-304. [Bond Not Required Without Court Order, Exceptions.] No bond is required of a personal representative appointed in informal proceedings, except (i) upon the appointment of a special administrator; (ii) when an executor or other personal representative is appointed to administer an estate under a will containing an express requirement of bond or (iii) when bond is required under section 3-306. When a personal representative is appointed in any formal proceeding, bond may be required by the order, but no bond is required in formal proceedings if the will relieves the executor of bond, unless bond has been requested by an interested party and the [judge] is satisfied that it is desirable. No bond is required of any personal representative who, pursuant to statute, has deposited cash or collateral with an agency of this state to secure performance of his duties.

Comment

This section must be read with the next three sections. The purpose of these provisions is to move away from the idea that bond always should be required of a probate fiduciary, or required unless a will excuses it. Also, it is designed to keep the registrar acting pursuant to applications in informal proceedings, from passing judgment in each case on the need for bond. The point is that the

court and registrar are not responsible for seeing that personal representatives perform as they are supposed to perform. Rather, they are coerced to do so by the remedies available to interested persons. Interested persons are protected by their ability to demand prior notice of informal proceedings (section 3-207), contest a requested appointment by use of a formal testacy proceeding (section 3-220) or by use of a formal proceeding seeking the appointment of another person (section 3-234). Section 3-102 gives general authority to the court in a formal proceeding to make appropriate orders as "desirable incident to estate administration." This should be sufficient to make it clear that an informal application may be blocked by a formal petition which disputes the matters stated in the petition. Furthermore, an interested person has the remedies provided in sections 3-306 and 3-308. Finally, interested persons have assurance under this Code that their rights in respect to the values of a decedent's estate cannot be terminated without a judicial order after notice or before the passage of three years from the decedent's death.

It is believed that the total package of protection thus afforded may represent more real protection than a blanket requirement of bond. Surely, it permits a reduction in the procedures which must occur in uncomplicated estates where interested persons are perfectly willing to trust each other and the fiduciary.

SECTION 3-305. [Amount and Terms of Required Bond or Security.] When bond is required and the provisions of the will or order do not specify the amount, unless stated in his application or petition, the applicant shall file a statement under oath with the [registrar] indicating his best estimate of the value of the personal estate of the decedent and of the income expected from the personal and real estate during the next year. The person being appointed shall execute and file a bond with the [registrar], or give other suitable security, in an amount equal to or greater than the estimate. A bond is to the state and is for the benefit of the persons interested in the estate and shall be conditioned upon the faithful discharge of all duties of the trust according to law. The [registrar] shall determine that the bond is executed by an authorized corporate surety, or one or more responsible

individual sureties, or that its performance is secured by pledge of personal property, mortgage on real property or other adequate security. The [registrar] may permit the amount of the bond to be reduced by the value of assets of the estate deposited with a domestic banking or trust company in a manner that prevents their unauthorized disposition. On petition of the personal representative or another interested person the [judge] may permit reduction of the amount of the bond, release sureties, or permit the substitution of another bond with the same or different sureties.

Comment

This section permits estimates of value needed to fix the amount of required bond to be filed when it becomes necessary. A consequence of this procedure is that estimates of value of estates no longer need appear in the petitions and applications which will attend every administered estate. Hence, a measure of privacy that is not possible under most existing procedures may be achieved.

SECTION 3-306. [Demand for Bond by Interested Person.]

(a) Any person apparently entitled to a share of the residue, or to a devise of personal property estimated to be worth in excess of $500, or any creditor having a claim in excess of $500, may make a written demand that a personal representative give bond. The demand must be filed with the [registrar] and a copy mailed to the personal representative, if appointment and qualification have occurred. Thereupon, bond shall be required. From the time of receipt of notice and until the filing of the bond, the personal representative shall refrain from exercising any powers of his office except as necessary to preserve the estate. Failure of the personal representative to give suitable bond within thirty (30) days from receipt of notice is cause for his removal and appointment of a successor personal representative.

(b) A bond required by demand of a creditor shall be in the amount estimated to be necessary to protect the interests of creditors.

(c) The amount of a bond required by demand of an heir or devisee shall be determined by section 3-305 or, in formal proceedings, be the amount fixed by order.

Comment

The demand for bond described in this section may be made in a petition or application for appointment of a personal representative, or may be made after a personal representative has been appointed. The mechanism for compelling bond is designed to function without unnecessary judicial involvement. If demand for bond is made in a formal proceeding, the judge can determine the amount of bond to be required with due consideration for all circumstances. If demand is not made in formal proceedings, methods for computing the amount of bond are provided by statute so that the demand can be complied with without resort to judicial proceedings.

SECTION 3-307. [Terms and Requirements of Bonds.] The following requirements and provisions apply to any bond required by the foregoing sections:

(a) Unless otherwise provided by the terms of the approved bond, sureties are jointly and severally liable with the personal representative and with each other.

(b) Enforcing liability of surety.

(1) Execution of bond is consent to suit. By executing an approved bond of a personal representative, the surety consents to the jurisdiction of the probate court which issued letters to the primary obligor in any proceeding pertaining to the fiduciary duties of the personal representative and naming the surety as a party defendant, provided that notice of the proceeding is delivered to the surety or mailed to him by ordinary mail at his address as listed with the court where the bond is filed.

(2) Probate court proceeding on bond. On petition of a successor personal representative, any other personal representative of the same decedent, or any interested person, a proceeding in the [probate] court may be initiated against a surety for breach of the obligation of the bond of the personal representative.

(3) Bond not void upon first recovery. The bond of the personal representative is not void after the first recovery but may be proceeded upon from time to time until the whole penalty is exhausted.

(c) Limitation of action on bond. No actions or proceedings may be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation.

Comment

Paragraph (a) is based, in part, on section 109 of the Model Probate Code. Paragraph (b) is derived from section 118 of the Model Probate Code.

SECTION 3-308. [Order Restraining Personal Representative.]

(a) On written petition of any person who appears to have an interest in the estate, the [judge] may order a personal representative to refrain from performing specified acts of administration, disbursement or distribution, or from exercising any powers or discharging any duties of his office if it appears to the [judge] that, unless restrained, the personal representative may take some action which would jeopardize unreasonably the interest of the applicant or of some other interested person. Persons with whom the personal representative may transact business may be made parties. The restraining order shall be effective until the propriety of the proposed action of the personal representative has been determined or the proceeding dismissed.

(b) The [judge] shall cause notice of the restraining order to be mailed to the personal representative. The notice shall state a time not sooner than seven days nor later than twenty-one days from the date and place where the question raised by the application will be considered in preliminary hearing. At the preliminary hearing the [judge] may dissolve the restraining order, or dissolve it upon the filing of bond or other security or assurance that provides reasonable protection for the person requesting the restraining order, or continue it, with or without modification, pending a full hearing after notice to all interested parties.

(c) A personal representative who disregards a restraining order after receiving notice thereof may be punished for contempt of court and shall be liable for any losses occurring as a result thereof.

Comment

Cf. section 3-221 which makes provision for a restraining order against a previously appointed personal representative incident to a formal testacy proceeding. The above section describes a remedy which is available for any cause against a previously appointed personal representative, whether appointed formally or informally.

This remedy, in combination with the safeguards relating to the process for appointment of a personal representative, permit "control" of a personal representative that is believed to be equal, if not superior to that presently available with respect to "supervised" personal representatives appointed by inferior courts. The request for a restraining order may mark the beginning of a new proceeding but the personal representative, by the consent provided in section 3-303, is practically in the position of one who, on motion, may be cited to appear before a judge.

SECTION 3-309. [Termination of Appointments; General.] Termination of appointment of a personal representative occurs as indicated in sections 3-310 - 3-313. Termination ends the right and power pertaining to the office of personal representative as conferred by this Code or any will, except that a personal representative, at any time prior to distribution or

until restrained or enjoined by court order, may perform acts necessary to protect the estate and may deliver the assets to a successor representative. Termination does not discharge a personal representative from liability for transactions or omissions occurring before termination, or relieve him of the duty to preserve assets subject to his control, to account therefor and to deliver the assets. Termination shall not affect the jurisdiction of the [probate] court over the personal representative in proceedings which may be commenced against him, but shall only terminate his status as personal representative for purposes of any actions which may be subsequently commenced against him in any other court.

Comment

"Termination," as defined by this and succeeding provisions, provides definiteness respecting when the powers of a personal representative (who may or may not be discharged by court order) terminate.

It is to be noted that this section does not relate to the status of the personal representative in actions which may have been commenced against him prior to termination. In such cases, a substitution of successor or special representative should occur if the plaintiff desires to maintain his action against the estate.

It is important to note that "termination" is not "discharge." However, an order of the [judge] entered under 3-701 or 3-702 both terminated the appointment of, and discharges, a personal representative.

SECTION 3-310. [Termination of Appointment: Death or Disability.] The death of a personal representative or the appointment of a conservator-trustee for the estate of a personal representative, terminates his appointment. The representative of the estate of the deceased or disabled personal representative shall have the duty to protect assets belonging to the estate being administered by his decedent or ward and possessed by such decedent or ward

at the time his appointment terminated, and has the power to perform acts necessary for protection. The representative shall account for and deliver the estate assets to a successor personal representative. The representative may apply for the appointment of a special or successor personal representative to carry on the administration of the estate which was being administered by his decedent or disabled person.

SECTION 3-311 [Termination of Appointment; Voluntary.]

(a) An appointment of a personal representative terminates as provided in section 3-703 (c), one year after the filing of a closing statement.

(b) An order closing an estate as provided in section 3-701 or 3-702 terminates an appointment of a personal representative.

(c) A personal representative may resign his position by filing a written statement of resignation with the [registrar] after he has given at least fifteen (15) days written notice to the persons known to be interested in the estate of his intention to resign. If no one applies or petitions for the appointment of a successor representative within this time, the filed statement of resignation shall be ineffective unless the appointment of a special administrator for the estate is secured and the resigning personal representative delivers the assets of the estate to the special administrator.

Comment

Subparagraph (c) above provides a procedure for resignation by a personal representative that may occur without judicial assistance.

An earlier draft provided for automatic termination twelve months following appointment and provided an informal procedure for extending an appointment beyond such time. This scheme, which was designed to encourage prompt settlement of estates, was rejected after considerable discussion. The prevailing view of the Reporters was that automatic

termination would occasion more paper work for personal representatives who, for reasons beyond their control in many cases, could not complete administration in twelve months.

SECTION 3-312. [Termination of Appointment; Cause for Removal; Procedure.]

(a) Whenever it appears that the best interests of the estate would be served, the [judge] may remove a personal representative in a proceeding as described in (b) of this section. Subject to the best interests of the estate, cause for termination of appointment exists if it is shown that a personal representative, or the person seeking his appointment, misrepresented material facts in the proceedings leading to his appointment, or that the personal representative has disregarded an order of the [judge], has ceased to be a resident of the state without designating an agent to accept service as provided in section 3-206 (b), has become incapable of discharging his trust effectively, or has mismanaged the estate or failed to perform any duty pertaining to the office.

(b) A person interested in the estate may petition for removal of a personal representative for cause at any time. Upon filing of the petition, the [judge] shall fix a time and place for hearing. Notice shall be given by the petitioner to the personal representative, and to other persons as the [judge] may order. If not otherwise restrained, as provided in section 3-308, after receipt of notice of removal proceedings, the personal representative shall not act except to preserve the estate. If removal is ordered, the [judge] also shall direct by order the disposition of the assets remaining in the name of, or under the control of, the personal representative being removed.

Comment

Thought was given to qualifying (b) above so that no formal removal proceedings could be commenced until after a set period from entry of any previous order reflecting judicial consideration of the qualifications of the personal representative. It was decided, however, that the matter should be left to the sound judgment of interested persons and the judge.

SECTION 3-313. [Termination of Appointment; Change of Testacy Status.] Except as otherwise ordered in formal proceedings, the probate of a will subsequent to the appointment of a personal representative in intestacy or under a prior will, or the vacation of an informal probate of a will subsequent to the appointment of a personal representative thereunder, shall not terminate the appointment of the personal representative although his powers may be reduced as provided in section 3-220. Termination shall occur upon appointment in informal or formal appointment proceedings of a person entitled to the subsequent appointment. If no request for new appointment is made within thirty (30) days from expiration of time for appeal from the order in formal testacy proceedings, or from the informal probate, changing the right to appointment, the previously appointed personal representative may upon request be appointed personal representative under the recently probated will, or as in intestacy, as the case may be.

Comment

This section and section 3-221 describe the relationship between formal or informal proceedings which change a previous assumption concerning the testacy of the decedent, and a previously appointed personal representative. The basic assumption of both sections is that an appointment, with attendant powers of management, is separable from the basis of appointment; i.e., intestate or testacy?; what will is the last will? Hence, a previously appointed personal representative continues to serve in spite of formal or informal proceedings that may give another a prior right to serve as personal representative. But, if the testacy status is changed in formal proceedings, the petitioner also may request appointment of the person who would be entitled to serve if his assumption concerning the decedent's will

prevails. Provision is made for a situation where all interested persons are content to allow a previously appointed personal representative to continue to serve even though another has a prior right because of a change relating to the decedent's will. It is not necessary for the continuing representative to seek reappointment under the new assumption for section 3-403 is broad enough to require him to administer the estate as intestate, or under a later probated will, if either status is established after he was appointed.

SECTION 3-314. [Special Administrator; Appointment Proper; Procedure.] A special administrator may be appointed:

(1) informally by the [registrar] on the application of any interested person when necessary to protect the estate of a decedent prior to the appointment of a general personal representative,

(2) in a formal proceeding by order of the [judge] on the application of any interested person upon a finding, after notice to the personal representative and hearing, that appointment is necessary to preserve the estate, or to secure its proper administration. The appointment shall be for a specified time, to perform duties respecting specific property, or to perform particular acts, and on other terms as the court may direct. When it appears to the [judge] that an emergency exists, appointment may be ordered prior to notice and hearing.

Comment

The appointment of a special administrator other than one appointed pending original appointment of a general personal representative must be handled by the [judge]. If a need arises because of temporary absence or anticipated incapacity for delegation of the authority of a personal representative, the problem can be handled without judicial intervention by use of the delegation powers granted to personal representative by section 3-416.

SECTION 3-315. [Special Administrator; Who May Be Appointed.]

(a) When a special administrator is to be appointed pending the probate of a will which is the subject of a pending application or petition for probate,

the person named executor in the will shall be appointed if available and qualified.

(b) In other cases, any proper person may be appointed special administrator.

Comment

In some areas of the country, particularly where wills cannot be probated without full notice and hearing, appointment of special administrators pending probate is sought almost routinely. The provisions of this Code concerning informal probate should reduce the number of cases in which a fiduciary will need to be appointed pending probate of a will. Nonetheless, there will be instances where contests begin before probate and where it may be necessary to appoint a special administrator. The objective of this section is to reduce the likelihood that contestants will be encouraged to file contests as early as possible simply to gain some advantage via having a person who is sympathetic to their cause appointed special administrator. Most will contests are not successful. Hence, it seems reasonable to prefer the named executor as special administrator where he is otherwise qualified.

SECTION 3-316. [Special Administrator; Appointed Informally; Powers and Duties.] A special administrator appointed by the [registrar] in informal proceedings pursuant to section 3-314 (1) shall have the power and authority of any personal representative as necessary to collect, manage and preserve the assets of the estate and to account therefor to the general personal representative upon his qualification.

SECTION 3-317. [Special Administrator; Formal Proceedings; Power and Duties.] A special administrator appointed by order of the [judge] in any formal proceeding shall have the power and authority of a general personal representative except as limited in the appointment.

SECTION 3-318. [Termination of Appointment; Special Administrator.] The appointment of a special administrator terminates in accordance with the provisions of the order of appointment, or on the appointment of his successor. In other cases, the appointment of a special administrator is subject to termination as provided in sections 3-310 through 3-312.

ARTICLE III

Part 4

Duties and Powers of Personal Representatives

SECTION 3-401. [Time of Accrual of Duties and Powers.] The duties and powers of a personal representative commence upon the issuance of his letters. The powers of a personal representative relate back in time to give his acts occurring prior to appointment the same effect as those occurring thereafter where beneficial to the estate. A personal representative may ratify and accept acts on behalf of the estate done by others where such acts would have been proper for a personal representative.

Comment

This section codifies the doctrine that the authority of a personal representative relates back to death from the moment it arises. It also makes it clear that authority of a personal representative arises upon the issuance of his letters which, under section 3-301, cannot occur until the appointee has qualified. The sentence concerning ratification is designed to eliminate technical questions that might arise concerning the validity of acts done by others prior to appointment. Section 3-416 (16) relates to delegation of authority after appointment.

SECTION 3-402. [Priority Among Different Letters.] A person to whom general letters are first issued has exclusive authority under the letters until his appointment is terminated or modified. If, through error, general letters are afterwards issued to another, the first appointed representative may recover any property of the estate in the hands of the representative subsequently appointed, but the acts of the latter done in good faith before notice of the first letters, are not void for want of validity of appointment.

Comment

The qualification relating to "modification" of an appointment is intended to refer to the change that may occur in respect to the exclusive authority of one with letters upon later appointment of a co-representative or of a special administrator. The sentence concerning erroneous dual appointment is derived from recent New York legislation. See section 704, Surrogate's Court Procedure Act.

SECTION 3-403. [General Duties; Relation and Liability to Persons Interested in Estate; Standing to Sue.]

(a) A personal representative is a fiduciary who, in addition to the specific duties expressed in this Code, is under a general duty to settle and distribute the estate of the decedent in accordance with the terms of the will and this Code, and as expeditiously and with as little sacrifice of value as is reasonable under all of the circumstances. He shall use the authority conferred upon him by this Code, the terms of the will, if any, any order in proceedings to which he is party, and the rules generally applicable to fiduciaries, for the best interests of creditors of the decedent and successors to the estate.

(b) A personal representative shall not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time. Subject to other obligations of administration, an informally probated will is authority to distribute according to its terms and informally issued letters are authority to distribute undevised estate to the heirs of the decedent if, at the time of distribution, the personal representative has not received notice of a pending petition in a formal testacy proceeding, formal appointment proceeding or supervised administration proceeding. Nothing in this section shall affect the duty of the personal representative to administer and distribute the estate in accordance with the rights of claimants, the surviving spouse, any unmarried minor children and any pretermitted child of the decedent as described elsewhere in this Code.

(c) A personal representative of a decedent who was domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as his decedent had immediately prior to death.

Comment

This and the next section are especially important sections for they state the basic theory underlying the duties and powers of personal representatives. Whether or not a personal representative is supervised, this section applies to describe the relationship he bears to interested parties. If a supervised representative is appointed, or if supervision of a previously appointed personal representative is ordered, an additional obligation to the court is created. See section 3-107.

The fundamental responsibility is that of a trustee. Unlike many trustees, a personal representative's authority is derived from appointment by the public agency known as the [probate] court. But, the Code also makes it clear that the personal representative, in spite of the source of his authority,

is to proceed with the administration, settlement and distribution of the estate by use of statutory powers and in accordance with statutory directions. See section 3-404. Subsection (b) is particularly important, for it ties the question of personal liability for administrative or distributive acts to the question of whether the act was "authorized at the time." Thus, a personal representative may rely upon and be protected by, an informally probated will, or an informal order appointing him to administer on the assumption that the estate is intestate even though formal proceedings occurring later may change the assumption as to whether the decedent died testate or intestate. See section 3-209 concerning the status of an informally probated will, and section 3-201 concerning the ineffectiveness of an unprobated will. However, it does not follow from the fact that the personal representative distributed under authority that the distributees may not be liable to restore the property or values received if the assumption concerning testacy is later changed in formal proceeding. See sections 3-609 and 3-706. Thus, a distribution may be "authorized at the time" within the meaning of this section, but be "improper" under the latter sections.

Paragraph (c) is designed to reduce or eliminate differences in the amenability to suit of personal representatives appointed under this Code and under traditional assumptions. Also, the subsection states that so far as the law of the appointing forum is concerned, personal representatives are subject to suit in other jurisdictions. It, together with various provisions of Article IV, are designed to eliminate many of the present reasons for ancillary administrations.

SECTION 3-404. [Personal Representative to Proceed Without Court Order; Exception.] Except where supervised administration has been ordered, a personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate without adjudication, order, or direction of the [judge], but he may invoke the jurisdiction of the [probate] court, in proceedings authorized by this Code, to resolve questions concerning the estate or its administration.

Comment

This section is intended to confer authority on the personal representative to initiate a proceeding at any time when it is necessary to resolve a question relating to administration. Section 3-102 grants broad subject matter jurisdiction to the [probate] court which covers a proceeding initiated for any purpose other than those covered by more explicit provisions dealing with testacy proceedings, proceedings concerning disputed claims and proceedings to close estates.

SECTION 3-405. [Duty of Personal Representatives: Information to Heirs and Devisees.] Not later than thirty (30) days after his appointment every personal representative, except any special administrator or a person appointed pursuant to a formal appointment proceeding, shall give information of his appointment to the heirs of the decedent, if his appointment was made on the assumption that the decedent left no will, to the devisees if his appointment related to a will, or to heirs and devisees if it appears that the estate is partially testate. The information shall be delivered or sent by ordinary mail to each of the foregoing persons known to the personal representative and for whom he has an address. The information shall include the name and address of the personal representative, indicate that it is being sent to persons who appear to have some interest in the estate being administered, and describe the court where papers relating to the estate are on file. The personal representative's failure to give this information shall be a breach of his duty to the persons concerned but shall not affect the validity of his appointment, powers or other duties. A personal representative may inform other persons of his appointment by delivery or ordinary mail.

Comment

This section requires the personal representative to inform persons who appear to have an interest in the estate as it is being administered, of his appointment. The communication involved is not to be confused with the notice requirements implicit in the due process requirement. The rights of persons other than those who are to get the information here described cannot be cut off except by the running of the three year statute of limitations provided in section 3-233, or by a formal judicial proceeding which will include full notice to all interested persons. The rights of such persons can be shifted from rights to specific property of the decedent to the proceeds from sale thereof, or to rights to values received by distributees. However, such a shift of protected interest from one thing to another, or to funds or obligations, is not new in respect to the status of trust beneficiaries. A personal representative may initiate formal proceedings to determine whether persons, other than those appearing to have interests, may be interested in the estate, under section 3-221 or, in connection with a formal closing, as provided by section 3-701.

SECTION 3-406. [Duty of Personal Representative; Inventory and Appraisement.] Within three months after his appointment, a personal representative, who is not a special administrator or a successor to another representative who has previously discharged this duty, shall prepare an inventory of property owned by the decedent at the time of his death, listing it with reasonable detail, and indicating, as to each item, its fair market value as of the date of the decedent's death, and the type and amount of any encumbrance that may exist with reference to any item.

The personal representative shall send a copy of the inventory to all persons interested in the estate except creditors, or he may file the original of the inventory with the court and furnish a copy to any interested person who requests it.

Comment

This and the following sections eliminate the practice now required by many probate statutes under which the judge is involved in the selection of appraisers. If the personal representative breaches his duty concerning the inventory, he may be removed. Section 3-312. Or, an interested person seeking to surcharge a personal representative for losses incurred as a result of his administration might be able to take advantage of any breach of duty concerning inventory. The section provides two ways in which a personal representative may handle an inventory. If the personal representative elects to send copies to all interested persons, information concerning the assets of the estate will not become a part of the records of the probate court. It would still be necessary for the personal representative to give needed information to creditors who request it, because the personal representative owes the duties of a trustee to creditors as well as to the successors of the decedent. The alternative procedure is to file the inventory with the court and give copies to interested persons requesting the same. This procedure would be indicated in estates where a large number of persons are "interested" and the burden of sending copies to all would be substantial. The court's role in respect to the second alternative is simply to receive and file the inventory with the file relating to the estate.

SECTION 3-407. [Employment of Appraisers.] The personal representative may employ a qualified and disinterested appraiser to assist him in ascertaining the fair market value as of the date of the decedent's death of any asset the value of which may be subject to reasonable doubt. Different persons may be employed to appraise different kinds of assets included in the estate. The names and addresses of any appraiser shall be indicated on the inventory with the item or items he appraised.

SECTION 3-408. [Duty of Personal Representative; Supplementary Inventory.] Whenever any property not included in the original inventory comes to the knowledge of a personal representative, or whenever the personal representative learns that the value indicated in the original inventory for any item is erroneous and misleading, he shall make a supplementary inventory or appraisement showing the market value as of the date of the decedent's death of the new item or the revised market value, and the appraisers or other data relied upon, if any, and file it with the court if the original inventory was filed, or furnish copies thereof or information thereof to persons interested in the new information.

SECTION 3-409. [Duty of Personal Representative; Possession of Estate.] Every personal representative has a right to, and shall take possession or control of the decedent's estate, except that property in the possession of the person presumptively entitled thereto as heir or devisee shall be possessed by the personal representative only when reasonably necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by the

heir or devisee shall be conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is reasonably necessary for purposes of administration. The personal representative shall pay taxes on all property in his possession. He shall keep buildings and fixtures in his possession in tenantable repair. He may maintain an action to recover possession of any property or to determine the title thereto.

Comment

Section 3-101 provides for the devolution of title on death. Section 3-412 defines the status of the personal representative with reference to "title" and "power" in a way that should make it unnecessary to discuss the "title" to decedent's assets which his personal representative acquires. This section deals with the personal representative's duty and right to possess assets. It proceeds from the assumption that it is desirable whenever possible to avoid disruption of possession of the decedent's assets by his devisees or heirs. But, if the personal representative decides that possession of an asset is necessary or desirable for purposes of administration, his judgment is made conclusive in any action for possession that he may have to institute against an heir or devisee. It may be possible for an heir or devisee to question the judgment of the personal representative in a later action for surcharge for breach of fiduciary duty, but this possibility should not interfere with the personal representative's administrative authority as it relates to possession of the estate.

SECTION 3-410. [Power to Avoid Transfers.] The property liable for the payment of debts of a decedent shall include all property transferred by him by any means which is in law void or voidable as against his creditors, and the right to recover such property, so far as necessary for the payment of the debts of the decedent, shall be exclusively in the personal representative.

Comment

M. P. C. section 125, with additions.

SECTION 3-411. [Property Embezzled or Converted.] If any person embezzles or converts to his own use any of the personal property of a decedent before the appointment of a personal representative, the person shall be liable to return the property or its value to the estate. No person shall be charged as executor by his own wrong [de son tort.]

Comment

This section is similar to section 129 of the Model Probate Code.

SECTION 3-412. [Powers of Personal Representatives; In General.] Until termination of his appointment a personal representative has the same power over the title to property of the estate as an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing, or order of court.

Comment

The personal representative is given the broadest possible "power over title." He receives a "power," rather than title, because the power concept eases the succession of assets which are not possessed by the personal representative. Thus, if the power is unexercised prior to its termination, its lapse clears the title of devisees and heirs. The power over title of an absolute owner is conceived to embrace all possible transactions which might result in a conveyance or encumbrance of assets, or in a change of the rights of possession. The relationship of the personal representative to the estate is that of a trustee. Hence, personal creditors or successors of a personal representative cannot avail themselves of his title to any greater extent than is true generally of creditors and successors of trustees. Interested persons who are apprehensive of possible misuse of power by a personal representative may use the protective devices implicit in the several sections of Parts 1 and 3 of this Article to ease their concern. See especially sections 3-105, 3-306, 3-308, and 3-312.

SECTION 3-413. [Improper Exercise of Power; Breach of Fiduciary Duty. If the exercise of power concerning the estate is improper, the personal representative shall be liable for breach of his fiduciary duty

to interested persons for resulting damage or loss to the same extent as a trustee of an express trust. The exercise of power in violation of court order, or contrary to the provisions of the will may be breaches of duty. The rights of purchasers and others dealing with a personal representative shall be determined as provided in sections 3-414 and 3-415 and may be unaffected by the fact that the personal representative breached his fiduciary duty in the transaction.

Comment

An interested person has two principal remedies to forstall a personal representative from committing a breach of fiduciary duty.

(1) Under section 3-308, he may apply to the court for an order restraining the personal representative from performing any specified act or from exercising any power in the course of administration.

(2) Under section 3-312, he may petition the court for an order removing the personal representative.

Evidence of a proceeding, or order, restraining a personal representative from selling, leasing, encumbering or otherwise affecting title to real property subject to administration, if properly recorded under the laws of this state, would be effective to prevent a purchaser from acquiring a marketable title under the usual rules relating to recordation of real property titles.

In addition sections 3-102 and 3-104 authorize the joinder of third persons who may be involved in contemplated transactions with a personal representative in proceedings to restrain a personal representative under section 3-308.

SECTION 3-414. [Sale or Encumbrance to Personal Representative Voidable; Exceptions.] Any sale or encumbrance to the personal representative, his spouse, agent or attorney, or any corporation or trust in which he has more than a one-third beneficial interest, is voidable unless,

(1) the transaction was consented to by all interested persons affected thereby, or approved by the [judge;]

(2) the will expressly authorized the transaction by the personal representative with himself.

The title of a purchaser for value without notice of the circumstances of the transaction with the personal representative is not affected unless the purchaser should have known of the defect in the title of his seller.

Comment

If a personal representative violates the duty against self-dealing described by this section, a voidable title to assets sold results. Other breaches of duty that may relate to a sale of assets will not cloud the title created by the sale, unless the purchaser has actual knowledge of the breach. See section 3-415.

SECTION 3-415. [Persons Dealing with Personal Representatives, Protection.] A person dealing with or assisting a personal representative without actual knowledge that the personal representative is improperly exercising his power is protected as if the personal representative properly exercised the power. The person is not bound to inquire whether the personal representative is properly exercising his power, and is not bound to inquire concerning the provisions of any will or any order of court that may affect the propriety of the acts of the personal representative. Except for restrictions on powers of supervised personal representatives which are endorsed on letters as provided in section 3-108 no provision in any will or order of court purporting to limit the power of a personal representative shall be effective except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative. The protection here expressed extends to instances where some procedural irregularity or jurisdictional

defect including the case where the alleged decedent is found to be alive occurred in proceedings leading to the issuance of letters. The protection here expressed is in addition to rather than by substitution for that provided by comparable provisions of the laws relating to commercial transactions and laws simplifying transfers of securities by fiduciaries.

Comment

This section qualifies the effect of a provision in a will which purports to prohibit sale of property by a personal representative. The provisions of a will may prescribe the duties of a personal representative and subject him to surcharge or other remedies of interested persons if he disregards them. See section 3-403. But, the will's prohibition is not relevant to the rights of a purchaser unless he had actual knowledge of its terms. Interested persons who want to prevent a personal representative from having the power described here must use the procedures described in section 3-105 3-108. Each state will need to identify the relation between this section and other statutory provisions creating liens on estate assets for inheritance and other taxes. The section cannot control whether a purchaser takes free of the lien of unpaid federal estate taxes. Hence, purchasers from personal representatives appointed pursuant to this Code will have to satisfy themselves concerning whether estate taxes are paid, and if not paid, whether the tax lien follows the property they are acquiring. See section 6324, Internal Revenue Code.

SECTION 3-416. [Transactions Authorized for Personal Representatives; Exceptions.] Except as restricted or otherwise provided by the will or by an order in a formal proceeding and subject to the priorities stated in section 3-602, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

(1) retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested or which are otherwise improper for trust investment;

(2) receive assets from fiduciaries, or other sources;

(3) complete compromise or refuse performance of the decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may:

(i) execute and deliver a deed of conveyance, for cash payment of all sums remaining due, or the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or

(ii) deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement;

(4) satisfy written charitable pledges of the decedent irrespective of whether such pledges constituted binding obligations of the decedent or were properly presented as claims when, in the judgment of the personal representative, the decedent would have wanted the pledges completed under the circumstances;

(5) when funds are not needed to meet debts and expenses currently payable and are not immediately distributable, deposit liquid assets of the estate, including moneys received from the sale of other assets, in federally insured interest-bearing accounts or other short-term loan arrangements that may be reasonable for use by trustees generally;

(6) abandon property when, in the opinion of the personal representative, it is valueless, or is so encumbered, or is in condition that it is of no benefit to the estate;

(7) vote stocks or other securities in person or by general or limited proxy;

(8) pay calls, assessments, and other sums chargeable or accruing against or on account of securities, unless barred by the provisions relating to claims;

(9) hold a security in the name of a nominee or in other form without disclosure of the interest of the estate but the personal representative shall be liable for any act of the nominee in connection with the security so held;

(10) insure the assets of the estate against damage, loss and liability and himself against liability in respect to third persons;

(11) borrow money with or without security to be repaid from the estate assets or otherwise; and advance money for the protection of the estate;

(12) effect a fair and reasonable compromise with any debtor or obligor, or extend, renew or in any manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge or other lien upon property of another person, he may, in lieu of foreclosure, accept a conveyance or transfer of encumbered assets from the owner thereof in satisfaction of the indebtedness secured by lien;

(13) pay taxes, assessments, compensation of the personal representative, and other expenses incident to the administration of the estate;

(14) sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(15) allocate items of income or expense to either estate income or principal, as permitted or provided by law;

(16) employ persons, including attorneys, auditors, investment advisors, or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary;

(17) prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties;

(18) sell, mortgage, or lease any real or personal property of estate;

(19) continue any unincorporated business or venture in which the decedent was engaged at the time of his death (i) in the same business form for a period of not more than four months from the date of appointment of a general personal representative where

continuation is a reasonable means of preserving the value of the business including good will, (ii) in the same business form for any additional period of time that may be approved by order of the [judge] in a formal proceeding to which the persons interested in the estate are parties, or (iii) throughout the period of administration if the business is incorporated by the personal representatave and if none of the probable distributees of the business who are competent adults object to its incorporation and retention in the estate;

(20) incorporate any business or venture in which the decedent was engaged at the time of his death;

(21) provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate;

(22) satisfy and settle claims and distribute the estate as provided in this Code.

Comment

This section accepts the assumption of the Uniform Trustee's Powers Act that it is desirable to equip fiduciaries with the authority required for the prudent handling of assets and extends it to personal representatives. The section requires that a personal representative act reasonably and for the benefit of the interested person. Subject to this and to the other qualifications described by the preliminary statement, the enumerated transactions are made authorized transactions for personal representatives. Sub-paragraphs (22) and (13) support the other provisions of the Code, particularly section 3-404, which contemplate that personal representatives will proceed with all of the business of administration without court orders.

In part, sub-paragraph (4) involves a substantive question of whether noncontractual charitable pledges of a decedent can be honored by his personal representative. It is believed, however, that it is not desirable from a practical standpoint to make much turn on whether a charitable pledge is, or is not, contractual. Pledges are rarely made the subject of claims. The effect of sub-paragraph (4) is to permit the

personal representative to discharge pledges where he believes the decedent would have wanted him to do so without exposing himself to surcharge. The holder of a contractual pledge may, of course, pursue the remedies of a creditor.

SECTION 3-417. [Powers and Duties of Successor Personal Representative.] A successor personal representative has the same power and duty as the original personal representative to complete the administration and distribution of the estate, as expeditiously as possible, but he has a duty not to exercise any power which was expressly made personal to the executor named in the will.

SECTION 3-418. [Co-representatives; When Joint Action Required.] When two or more persons are appointed co-representatives, the concurrence of all is required on all acts connected with the administration and distribution of the estate, except: (i) any co-representative may receive and receipt for property due the estate, (ii) when the concurrence of all cannot readily be obtained in the time reasonably available for emergency action, (iii) where any others have delegated their power to act, or (iv) where the will provides otherwise. Persons dealing with a co-representative who are actually unaware that another has been appointed to serve with him shall be as fully protected as if the person with whom they dealt had been the sole personal representative.

Comment

With certain qualifications, this section is designed to compel co-representatives to agree on all matters relating to administration when circumstances permit. Delegation by one to another representative is a form of concurrence in acts that may result from the delegation. A co-representative who abdicates his responsibility to co-administer the estate by a blanket delegation breaches his duty to interested persons

as described by section 3-403. Section 3-416 (16) authorizes delegation, but only that which is reasonable and for the benefit of interested persons.

SECTION 3-419. [Powers of Surviving Personal Representative.] Every power exercisable by copersonal representatives may be exercised by the survivors or survivor of them when the appointment of one is terminated, unless the terms of the will provide otherwise. Where one of two or more nominated as coexecutors is not appointed, those appointed may exercise all the powers incident to the office unless the will otherwise provides.

Comment

Source, M. P. C. section 102.

SECTION 3-420. [Compensation of Personal Representative.] A personal representative is entitled to reasonable compensation for his services. If a will provides for compensation of the personal representative, he may renounce the provision before qualifying and be entitled to reasonable compensation. A personal representative may also renounce his right to all compensation.

SECTION 3-421. [Expenses in Estate Litigation.] When any personal representative or person nominated as personal representative defends or prosecutes any proceeding in good faith and with just cause, whether successful or not, he shall be entitled to receive from the estate his necessary expenses and disbursements including reasonable attorney's fees in the proceedings.

Comment

Litigation prosecuted by a personal representative for the primary purpose of enhancing his prospects for compensation would not be in good faith.

ARTICLE III

PROBATE OF WILLS AND ADMINISTRATION OF DECEDENTS' ESTATES

Part 5

Creditors' Claims

SECTION 3-501. [Claims Not Paid in Normal Course of Administration.] No action to enforce a claim against a decedent's estate may be revived or commenced before the appointment of a personal representative. After appointment of a personal representative and until the estate is closed, all proceedings and actions to enforce claims against a decedent's estate shall follow the procedures prescribed by section 3-505. After the estate is closed, a creditor whose claim has not been barred may recover directly from the distributees as provided in section 3-705, or from a former personal representative individually as provided in section 3-706.

Comment

This and succeeding sections are designed to force creditors of decedents to assert their claims against duly appointed personal representatives. Creditors of a decedent are interested persons who may seek the appointment of a personal representative (section 3-205). If no appointment is granted to another within 45 days after the decedent's death, a creditor may be eligible to be appointed if other persons with priority decline to serve or are ineligible (section 3-206). But, if a personal representative has been appointed and has closed the estate under circumstances that leave a creditor's claim unbarred, creditors are permitted to enforce their claims against distributees. The methods for closing estates are outlined in sections 3-701 through 3-703. Termination of appointment under sections 3-309, et seq. may occur though the estate is not closed and so may be irrelevant to the question of whether creditors may pursue distributees.

SECTION 3-502. [Notice to Creditors.] Unless notice has already been given under this section, a personal representative shall upon his appointment publish a notice in a newspaper of general circulation in the county once a week for three successive weeks, announcing his appointment and address, and notifying creditors of the estate to present their claims within four months from the date of the first publication of the notice or be forever barred. In addition, the personal representative may mail or deliver a copy of this notice to any creditor.

Comment

Failure to advertise for claims would involve a breach of duty on the part of the personal representative. If, as a result of such breach, a claim is later asserted against a distributee under section 3-704, the personal representative may be liable to the distributee for costs related to discharge of the claim and the recovery of contribution from other distributees. The protection afforded personal representatives under section 3-703 would not be available, for that section applies only if the personal representative truthfully recites that he has advertised for claims as required by this section.

SECTION 3-503. [Statutes of Limitations.] No claim which was barred by any statute of limitations at the time of the decedent's death shall be allowed or paid. The running of any statute of limitations is suspended during the four months following the decedent's death. For purposes of any statute of limitation, the proper presentation of a claim under section 3-505 is equivalent to commencement of an action on the claim.

Comment

This section means that four months is added to the normal period of limitations by reason of a debtor's death before a debt is barred. It implies also that after the expiration of four months from death, the normal statute of limitations may run and bar a claim even though the non-claim provisions of section 3-504 have not been triggered. Hence, the non-claim and limitation provisions of section 3-504 are not exclusive.

It should be noted also that under sections 3-504 and 3-505 it is possible for a claim to be barred by the process of claim, disallowance and failure by the creditor to commence a proceeding to enforce his claim prior to the end of the four month suspension period. Thus, the regular statute of limitations applicable during the debtor's lifetime, the non-claim provisions of sections 3-504 and 3-505, and the three-year limitation of section 3-504 all have potential application to a claim. The first of the three to accomplish a bar applies.

SECTION 3-504. [Limitations on Presentation of Claims.]

(a) Claims arising before death; nonclaim; limitation. All claims against a decedent's estate, which arose before the death of the decedent, including claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliqui dated, founded on contract, tort, or other legal basis, shall be forever barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(1) if notice to creditors has been published, within four months after the date of the first published notice to creditors;

(2) if notice to creditors has not been published, within three years after the decedent's death.

(b) Claims arising at or after death. All claims against a decedent's estate which arise at or after the death of the decedent, other than estate and inheritance taxes, but including other claims of the state and any subdivision thereof, whether due or to become due, absolute or contingent, liquidated or unliquidated, founded on contract, tort, or other legal basis, shall be forever barred against the estate, the personal representative, and the heirs and devisees of the decedent, unless presented as follows:

(1) a claim based on a contract with the personal representative, within four months after performance by the personal representative is due;

(2) any other claim, within four months after it arises.

(c) Liens and liability insurance not affected. Nothing in this section shall affect or prevent any action or proceeding to enforce any mortgage, pledge or other lien upon property of the estate, or any action to establish liability of the decedent or the personal representative for the sole purpose of enforcing the liaiblity of any insurer of the decedent or of the personal representative.

Comment

There was some disagreement among the Reporters over whether a short period of limitations, or of non-claim, should be provided for claims arising at or after death. After discussion, sub-paragraph (b) was inserted because most felt it was desirable to accelerate the time when unadjudicated distributions would be final. The time limits stated would not, of course, affect any personal liability in contract, tort, or by statute, of the personal representative. Under section 3-509 a personal representative is not liable on transactions entered into on behalf of the estate unless he agrees to be personally liable or unless he breaches a duty by making the contract. Creditors of the estate and not of the personal representative thus face a special limitation that runs four months after performance is due from the personal representative. Tort claims normally will involve casualty insurance of the decedent or of the personal representative, and so will fall within the exception of sub-paragraph (c). If a personal representative is personally at fault in respect to a tort claim arising after the decedent's death, his personal liability would not be affected by the running of the special short period provided here.

The limitation stated in sub-paragraph (2) of (a) dovetails with the three-year limitation provided in section 3-233 to eliminate most questions of succession that are controlled by state law after three years from death have elapsed. Questions of interpretation of any will probated within such period, or of the identity of heirs in intestacy are not barred, however.

SECTION 3-505. [Manner of Presentation of Claims.] Claims against a decedent's estate may be presented in the following manners:

(1) To the personal representative. The claimant may deliver or mail to the personal representative a written statement of the claim indicating its basis, the name and address of the claimant and the amount claimed. If the claim is not yet due, the date when it will become due shall be stated. If the claim is contingent, the nature of the contingency shall be stated. If the claim is secured, the security shall be described and the intention of the claimant to (i) surrender the security, (ii) exhaust the security, or (iii) accept payment of the claim reduced by the value of the security, should be stated. Omission of matters mentioned in the three preceding sentences does not invalidate the presentation but the failure of the claimant to comply with the personal representative's reasonable requests for additional information is a basis for disallowance of a claim.

(2) Filing in [probate] court. The claimant may file a written statement of the claim, in the form prescribed by rule, with the clerk of the [probate] court and deliver or mail a copy of the statement to the personal representative.

(3) Action against personal representative. The claimant may revive against the personal representative any action or suit pending against the decedent at the time of his death based on a cause of action which survives death or commence an action against the personal representative in any court where the personal representative

notice of allowance. Failure of the personal representative to mail notice to a claimant of action on his claim for thirty (30) days after the time for original presentation of the claim has expired shall have the effect of a notice of disallowance.

(b) By the [probate] court. Upon the petition of the personal representative or of a claimant in a special proceeding for the purpose, the probate court may allow in whole or in part any claim or claims presented to the personal representative or filed with the clerk of the [probate] court in due time and not barred by subsection (a) of this section. Notice in this proceeding shall be given to the claimant, the personal representative and those other persons interested in the estate as the court may direct by order entered at the time the proceeding is commenced.

(c) In an action against the personal representative. A judgment in an action against a personal representative to enforce a claim against a decedent's estate is an allowance of the claim to the extent that it directs payment from the estate.

(d) Interest on allowed claims. Unless otherwise provided in any judgment in a court other than the [probate] court entered in an action against the personal representative, allowed claims bear interest at the legal rate for the period commencing thirty (30) days after the time for original presentation of the claim has expired unless based on a contract making a provision for interest, in which case they shall bear interest in accordance with that provision.

may be subjected to jurisdiction, to obtain payment of his claim against the estate, but the revival or commencement of action must occur within the time limited for presenting the claim. If a claim against the estate is presented under subsection (1) or (2), no action or suit thereon may be revived or commenced more than thirty (30) days after the personal representative has mailed a notice of disallowance or more than sixty (60) days after the time for original presentation of the claim has expired. This does not bar an action against the personal representative individually for breach of his fiduciary duty to the claimant.

Comment

The filing of a claim with the probate court under (2) of this section does not serve to initiate a proceeding concerning the claim. Rather, it serves merely to protect the claimant who may anticipate some need for evidence to show that his claim is not barred. The probate court acts simply as a depository of the statement of claim, as is true of its responsibility for an inventory filed with it under section 3-406.

In reading this section it is important to remember that a regular statute of limitation may run to bar a claim before the non-claim provisions run. See section 3-503.

SECTION 3-506. [Classification of Claims.] If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

(1) costs and expenses of administration;

(2) reasonable funeral expenses;

(3) debts and taxes with preference under federal law;

(4) reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him;

(5) debts and taxes with preference under the laws of this state; but no personal representative shall be required to pay taxes on property of the decedent unless they are due and payable before any possession which has been taken by the personal representative pursuant to this Code has been delivered by him to another;

(6) all other claims.

No preference shall be given in the payment of any claim over any other claim of the same class, nor shall a claim due and payable be entitled to a preference over claims not due.

SECTION 3-507. [Allowance of Claims.]

(a) By the personal representative. As to claims presented in the manner described in section 3-504 (a) and (b) within the time limit prescribed above, the personal representative may mail a notice to any claimant stating (i) that the claim has been allowed in a stated amount; (ii) that the claim has been disallowed: or (iii) that the personal representative will petition the [probate] court to determine whether the claim should be allowed. If, after notifying a claimant of allowance of a claim, the personal representative rescinds the allowance, he shall notify the claimant of the rescission and of the new response. Every claim which is disallowed in whole or in part by the personal representative is forever barred so far as not allowed unless the claimant files a petition for allowance in the [probate] court or commences an action against the personal representative not later than thirty (30) days after the mailing of the notice of disallowance or partial allowance and the notice shall warn the claimant to this effect. For purposes of the preceding sentence, a notice under (iii) above shall be treated as

SECTION 3-508. [Payment of Claims.]

(a) Upon the expiration of four months from the date of the first published notice to creditors, the personal representative shall, after making provision for homestead, family and support allowances, for claims already presented which have not yet been allowed or whose allowance has been appealed, and for claims wh ich may yet be presented, including costs and expenses of administration, proceed to pay the claims allowed against the estate in the order of priority hereinbefore prescribed. A claimant whose claim has been allowed but not paid as provided herein may, by petition to the [probate] court in a special proceeding for the purpose, secure an order directing the personal representative to pay the claim to the extent that funds of the estate are available for such payment.

(b) The personal representative may, at any time, pay any just claim which has not been barred, with or without formal presentation, but he is personally liable to any other claimant whose claim is allowed and who is injured by such payment if

(1) the payment was made before the expiration of the time limit stated in (a) of this section and the personal representative failed to require the payee to give adequate security to refund any of the payment necessary to pay other claimants; or

(2) the payment was made, due to the negligence or wilful fault of the personal representative, in such manner as to deprive the injured claimant of his priority.

SECTION 3-509. [Individual Liability of Personal Representative.]

(a) A personal representative is individually liable on contracts properly entered into in his fiduciary capacity in the course of administration of the estate only if he expressly agrees to be.

(b) A personal representative is individually liable for obligations arising from possession or control of property of the estate or for torts committed in the course of administration of the estate only if he is personally at fault.

(c) Claims based upon contracts, obligations and torts of the types described in (a) and (b) may be allowed against the estate whether or not the personal representative is individually liable therefor.

(d) The individual liability of the personal representative to third parties arising from the administration of the estate may be determined in the same action, suit or [probate] court proceeding in which a claim against the estate is considered.

(e) When there is doubt whether a claim should be allowed against the estate or against the personal representative as an individual, or both, a court in which a proceeding or action to enforce the claim is pending shall direct that notice be given to distributees or major creditors whose interests will be affected by the result and give them an opportunity to be heard.

(f) When the [probate] court allows a claim against the personal representative in his individual capacity, the allowance has the same effect as a judgment against him individually.

Comment

In the absence of statute a fiduciary owner of property is personally liable on contracts entered into in his fiduciary capacity unless he expressly excludes personal liability in the contract. He is commonly personally liable for obligations stemming from ownership or possession of the property (e.g., taxes) and for torts committed by servants employed in the management of the property. The claimant ordinarily can reach the fiduciary property only after exhausting his remedies against the fiduciary as an individual and then only to the extent that the fiduciary is entitled to indemnity from the property. This and the following sections are designed to make the estate a quasi-corporation for purposes of such liabilities. The personal representative would be personally liable only if an agent for a corporation would be under the same circumstances, and the claimant has a direct remedy against the quasi-corporate property.

SECTION 3-510. [Claims Not Due.] A claim which will become due at a future time is allowable and payable at its discounted value.

Comment

If the obligation upon which a claim not yet due was founded arose before the enactment of legislation with the effect of this section it may be necessary, for constitutional reasons, to arrange for future full payment of the claim by creating a trust, giving a mortgage, securing a bond from a distributee, or otherwise.

SECTION 3-511. [Secured Claims.] Payment of a secured claim shall be upon the basis of the amount allowed if the creditor shall surrender his security; otherwise payment shall be upon the basis of one of the following:

(1) if the creditor exhausts his security before receiving payment, then upon the amount of the claim allowed less the fair value of the security; or

(2) if the creditor does not have the right to exhaust his security or has not done so, then upon the amount of the claim allowed less

the value of the security determined by converting the same into money according to the terms of the agreement pursuant to which the security was delivered to the creditor, or by the creditor and personal representative by agreement, arbitration, compromise or litigation.

SECTION 3-512. [Contingent Claims.] If a contingent claim becomes absolute before the distribution of the estate, it shall be paid in the same manner as absolute claims of the same class. In other cases the personal representative or, on petition of the personal representative or the claimant in a special proceeding for the purpose, the [probate] court, may provide for payment in either of the following ways:

(1) if the claimant consents, he may be paid the present value of the claim, taking the contingency into account;

(2) future full payment on the happening of the contingency may be arranged by creating a trust, giving a mortgage, securing a bond from a distributee or otherwise.

SECTION 3-513. [Counterclaims.] In allowing a claim the personal representative may deduct any counterclaim which the estate has against the claimant. In determining a claim against an estate a court (including a [probate] court) shall reduce the amount allowed by the amount of any counterclaims and, if the counterclaims exceed the claim, render a judgment against the claimant in the amount of the excess. A counterclaim, liquidated or unliquidated, may arise from a transaction other than that upon which the claim is based. A counterclaim may give rise to relief

exceeding in amount or different in kind from that sought in the claim.

SECTION 3-514. [Execution and Levies Prohibited.] No execution shall issue upon nor shall any levy be made against any property of the estate under any judgment against a decedent or a personal representative, but the provisions of this section shall not be construed to prevent the enforcement of mortgages, pledges or liens upon real or personal property in an appropriate proceeding.

SECTION 3-515. [Compromise of Claims.] When a claim against the estate has been presented in any manner, the creditor and personal representative may, if it appears for the best interests of the estate, compromise the claim, whether due or not due, absolute or contingent, liquidated or unliquidated.

SECTION 3-516. [Encumbered Assets.] When any assets of the estate are encumbered by mortgage, pledge or other lien, the personal representative may pay the encumbrance or any part thereof, renew or extend any obligation secured by the encumbrance or may convey or transfer the assets to the creditor in satisfaction of his lien, in whole or in part, whether or not the holder of the encumbrance has filed a claim, if it appears to be for the best interest of the estate. Payment of an encumbrance shall not increase the share of the distributee entitled to the encumbered assets unless the distributee is entitled to exoneration under section 2-251.

ARTICLE III

Part 6

Special Provisions Relating to Distribution

SECTION 3-601. [Successors' Rights Where No Administration.] In the absence of administration, the heirs and devisees are entitled to the assets of the decedent's estate in accordance with the terms of a probated will or the laws of intestate succession. Devisees may establish title by the probated will to devised property. Persons entitled to property by homestead allowance, exemption or intestacy may establish title thereto by proof of the decedent's ownership, his death, and their relationship to the decedent. Successors take subject to all charges incident to administration, including the claims of creditors, allowances of surviving spouse and dependent children, and subject to the rights of others resulting from abatement, retainer, advancement and ademption.

Comment

Title to a decedent's property passes to his heirs and devisees at the time of his death. See section 3-101. This section indicates how successors may establish record title in the absence of administration.

SECTION 3-602. [Distribution; Order in Which Assets Appropriated; Abatement.]

(a) General rules. Except as provided in subsection (b) and except as provided in section 2-301 dealing with the shares of pretermitted heirs and in section 2-207 dealing with the share of the surviving spouse who elects to take an elective share, shares of distributees abate, without any preference or priority as between real and personal property, in the following order:

(1) property not disposed of by the will;

(2) residuary devises;

(3) general devises;

(4) specific devises.

A general devise charged on any specific property or fund is, for purposes of abatement, deemed property specifically devised to the extent of the value of the thing on which it is charged. Upon the failure or insufficiency of the thing on which it is charged, it is deemed a general devise to the extent of this failure or insufficiency. Abatement within each classification is in proportion to the amounts of property each of the beneficiaries would have received, had full distribution of the property been made in accordance with the terms of the will.

(b) Contrary provisinns, plan or purpose. If the will expresses an order of abatement, or if the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (a), the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

(c) Abatement; sales, contribution. When the subject matter of a preferred devise is sold or used incident to administration, abatement shall be achieved by appropriate adjustments in, or contribution from, other interests in the remaining assets.

Comment

A testator may determine the order in which the assets of his estate are applied to the payment of his debts. If he does not, then the provisions of this section lay down rules which may be regarded as approximating what testators generally may be deemed to want. The statutory order of abatement is designed to aid in resolving doubts concerning the intention of a particular testator, rather than to defeat his purpose. Hence, subsection (b) directs that consideration be given to the purpose of a testator. This may be revealed in many ways. Thus, it is commonly held that, even in the absence of statute, general legacies to a wife, or to persons with respect to which the testator is in loco parentis, are

to be preferred to other legacies in the same class because this accords with the probable purpose of the legacies.

[SECTION 3-602A. [Distribution; Order in Which Assets Appropriated; Abatement.] (addendum for adoption in community property states)

[(a) and (b) as above.]

(c) Mixed estates; Apportionment of debts and expenses of administration. When an estate of a decedent consists partly of separate property, of community property, and of quasi-community property, or of any two kinds thereof, the debts and expenses of administration shall be apportioned and charged against the different kinds of property in proportion to the value thereof.

[(d) same as (c) in common law state.]]

Comment

(c) is suggested for inclusion in section 3-602 in a community property state. Its inclusion causes (c) as drafted for common law states to be redesignated (d). As is the case with other insertions suggested in the Code for community property states, the specific language of this draft is to be taken as illustrative of coverage that is desirable. The exact content of the insertion suggested here would vary, for example, if the adopting state did not accept the quasi-community property concept.

SECTION 3-603. [Right of Retainer.] The amount of the indebtedness of a distributee to the estate if due, or its present worth, if not due, shall be offset against the distributee's interest; but the distributee shall have the benefit of any defense which would be available to him in a direct proceeding for recovery of the debt.

SECTION 3-604. [Interest on General Pecuniary Devise.] General pecuniary devises bear interest at the legal rate for a period beginning one year from the first appointment of a personal representative until payment, unless a contrary intent is indicated by the will.

SECTION 3-605. [Penalty Clause for Contest Void.] A provision in a will purporting to penalize any interested person for contesting the will or instituting other proceedings relating to the estate is void if probable cause exists for instituting proceedings.

SECTION 3-606. [Distribution in Kind; Valuation; Method.] Subject to contrary terms of any will and the needs of administration, the assets of a decedent's estate shall be distributed in kind to the extent possible through application of the provisions herein.

(a) A specific devisee shall receive distribution of the thing devised to him.

(b) Any homestead or family allowance or devise payable in money may be satisfied by value in kind provided

(1) the person entitled to the payment has not demanded payment in cash;

(2) the property distributed in kind is valued at fair market value as of the date of its distribution, and

(3) no residuary devisee has requested that the asset in question remain a part of the residue of the estate.

(c) For the purpose of valuation under subsection (b) securities regularly traded on recognized exchanges, when distributed in kind, shall be valued at the price for the last sale of like securities traded on the business day prior to distribution or if no sale on that day at the median between amounts bid and offered at the close of that day. Assets consisting of sums owed the decedent or the estate by solvent debtors as to which there is no known dispute or defense, shall be valued at the sum due with accrued interest, or discounted to the date of

distribution. For assets which do not have readily ascertainable values, a valuation as of a date not more than 30 days prior to the date of distribution, if otherwise reasonable, controls. For purposes of facilitating distribution, the personal representative may ascertain the value of the assets as of the time of the proposed distribution in any reasonable way, including, the employment of qualified appraisers, even though the assets may have been previously appraised.

(d) The residuary estate shall be distributed in kind when there is no objection to the proposed distribution, or when it is practicable to distribute undivided interests. In other cases, residuary property may be converted into cash for distribution.

After the probable charges against the estate are known, the personal representative may mail or deliver a proposal for distribution to all persons who have a right to object to the proposed distribution. The right of any distributee to object to the proposed distribution if not waived in writing, terminates if he fails to object in writing received by the personal representative within 30 days after mailing or delivery of the proposal.

Comment

This section establishes a preference for distribution in kind. It directs a personal reprsentative to make distribution in kind whenever feasible and to convert assets to cash only where there is a special reason for doing so. It provides a reasonable means for determining value of assets distributed in kind.

SECTION 3-607. [Distribution in Kind; Evidence.] When distribution in kind is made, the personal representative shall execute an instrument or deed of distribution assigning, transferring or releasing the assets to the distributee as evidence of the distributee's title to the property.

Comment

This and sections following should be read with section 3-409 which permits the personal representative to leave certain assets of a decedent's estate in the possession of the person presumptively entitled thereto. The "release" contemplated by this section would be used as evidence that the personal representative had determined that he would not need to disturb the possession of an heir or devisee for purposes of administration.

SECTION 3-608. [Distribution in Kind; Title of Distributees.] The title of the distributee who shall receive from the personal representative an instrument or deed of distribution of assets in kind is conclusive against all persons interested in the estate, except that the personal representative may recover the assets or their value upon a finding that the distribution was improper.

Comment

The purpose of this section is to channel controversies that may arise among successors of a decedent because of improper distributions through the personal representative who made the distribution, or a successor personal representative.

SECTION 3-609. [Improper Distribution; Liability of Distributee.] A distributee of property improperly distributed or a claimant who was improperly paid, is liable to return the property received if he has it or its value unless the distribution or payment can no longer be questioned because of adjudication or limitation. If a distributee has disposed of any property improperly distributed to him his liability shall be the lower of the value of the property on the date of distribution or the value on the date of disposition.

Comment

The term "improperly" as used in this section must be read in light of section 3-403 and the manifest purpose of this and other sections of the Code to shift questions concerning the propriety of various distributions from the fiduciary to the distributees in order to prevent every administration from becoming a matter that must involve adjudications. Thus, a distributinn may be "authorized

at the time" as contemplated by section 3-403, and still be "improper" under this section. Section 3-403 is designed to permit a personal representative to distribute without risk in some cases, even though there has been no adjudication. When an unadjudicated distribution has occurred, the rights of persons to show that the basis for the distribution (e.g., an informally probated will, or informally issued letters of administration) is incorrect, or that the basis was improperly applied (erroneous interpretation, for example) is preserved against distributees by this section.

SECTION 3-610. [Purchasers from Distributees Protected.] If property distributed in kind is sold to a purchaser for value by a distributee who has received an instrument or deed of distribution from the personal representative, the purchaser takes good title free of any claims of the estate and incurs no personal liability to the estate irrespective of whether the distribution was proper. To be protected under this provision, a purchaser need not inquire whether a personal representative acted properly in respect to a distribution in kind.

Comment

The words "instrument or deed of distribution" are explained in section 3-607. The effect of this section may be to make an instrument or deed of distribution a very desirable link in a chain of title involving succession of land. Cf. Section 3-601.

SECTION 3-611. [Partition for Purpose of Distribution.] When two or more heirs or devisees are entitled to distribution of undivided interests in any real or personal property of the estate, the personal representative or one or more of the heirs or devisees may petition the [judge] prior to the formal or informal closing of the estate, to make partition. After notice to the interested heirs or devisees, the [judge] shall partition the property in the same manner as provided by the law for civil actions of partition. The [judge] may direct the personal representative to sell any property which cannot be partitioned without prejudice to the owners and which cannot conveniently be allotted to any one party.

Comment

Ordinarily heirs or devisees desiring partition of a decedent's property will resolve the issue by agreement without resort to the courts. (See section 3-801.) If court determination is necessary, the court with jurisdiction to administer the estate has jurisdiction to partition the property.

SECTION 3-612. [Disposition of Unclaimed Assets.]

(a) Heirs unknown. If there is no known heir of the decedent, all of his net estate not disposed of by will shall be paid to the [state treasurer] to become a part of the [state escheat fund].

(b) Unclaimed property or money. If any distributee or claimant cannot be found, the personal representative shall distribute the share of the absentee to his conservator-trustee, if any, otherwise to the [state treasurer] to become a part of the [state escheat fund].

(c) Refund of money so paid. The money received by [state treasurer] shall be paid to the person entitled on proof of his right thereto or, if the [state treasurer] refuses or fails to pay, the person may petition the [judge] which appointed the personal representative, whereupon the [judge] upon notice to the [state treasurer] may determine the person entitled thereto and order the [treasurer] to pay the same to him. No interest shall be allowed thereon and the distributee or claimant shall pay all costs and expenses incident to the proceeding. If no petition is made to the [judge] within eight years after payment to the [state treasurer], the right of recovery is barred.

SECTION 3-613. [Distribution to Person Under Disability.] A personal representative may discharge his obligation to distribute to any person under legal disability by distributing to his conservator-trustee, or any other person authorized to give a valid receipt and discharge for the distribution.

Comment

Section 5-103 is especially important as a possible source of authority for a valid discharge for payment or distribution made on behalf of a minor.

SECTION 3-614. [Apportionment of Estate Taxes.]

(a) Definitions. For purposes of this section:

(1) "estate" means the gross estate of a decedent as determined for the purpose of federal estate tax and the estate tax payable to this state;

(2) "person" means any individual, partnership, association, joint stock company, corporation, government, political subdivision, governmental agency, or local governmental agency;

(3) "person interested in the estate" means any person entitled to receive, or who has received, from a decedent or by reason of the death of a decedent any property or interest therein included in the decedent's estate. It includes a personal representative, curatelic trustee, guardian of property and trustee;

(4) "state" means any state, territory, or possession of the United State, the District of Columbia, and the Commonwealth of Puerto Rico;

(5) "tax" means the federal estate tax and the additional inheritance tax provided by_____and interest and penalties imposed in addition to the tax;

(6) "fiduciary" means executor, administrator of any description, or trustee.

(b) Apportionment among interested persons; valuations; testamentary apportionment. Unless the will otherwise provides, the tax shall be apportioned among all persons interested in the estate. The apportionment shall be made in

the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values used in determining the tax shall be used for that purpose. In the event the decedent's will directs a method of apportionment of tax different from the method described in this act, the method described in the will shall control.

(c) Apportionment proceedings; jurisdiction; equitable apportionment; penalties and interest; charging fiduciary; court determination of amount of tax.

(1) the [probate] court where venue over the administration of the estate of a decedent lies, may on petition for the purpose determine the apportionment of the tax;

(2) if the [probate] court finds that it is inequitable to apportion interest and penalties in the manner provided in subsection (b), because of special circumstances, it may direct apportionment thereof in the manner it finds equitable;

(3) if the [probate] court finds that the assessment of penalties and interest assessed in relation to the tax is due to delay caused by the negligence of the fiduciary, the court may charge the personal representative with the amount of the assessed penalties and interest;

(4) in any suit or judicial proceeding to recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this act, the determination of the [probate] court in respect thereto shall be prima facie correct.

(d) Withholding of tax; recovery from estate; bond of distributee.

(1) the personal representative or other person in possession of

the property of the decedent required to pay the tax may withhold from any property distributable to any person interested in the estate, upon its distribution to him, the amount of tax attributable to his interest. If the property in possession of the personal representative or other person required to pay the tax and distributable to any person interested in the estate is insufficient to satisfy the proportionate amount of the tax determined to be due from the person, the personal representative or other person required to pay the tax may recover the deficiency from the person interested in the estate. If the property is not in the possession of the personal representative or the other person required to pay the tax, the personal representative or the other person required to pay the tax may recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this act;

(2) if property held by the personal representative is distributed prior to final apportionment of the tax, the distributee shall provide a bond or other security for the apportionment liability in the form and amount prescribed by the personal representative.

(e) Exemptions; allowance; relationship of donee; foreign taxes; tax credits; property includable in computation.

(1) in making an apportionment, allowances shall be made for any exemptions granted, any classification made of persons interested in the estate and for any deductions and credits allowed by the law imposing the tax;

(2) any exemption or deduction allowed by reason of the relationship of any person to the decedent or by reason of the purposes of the gift shall

inure to the benefit of the person bearing such relationship or receiving the gift; except that when an interest is subject to a prior present interest which is not allowable as a deduction, the tax apportionable against the present interest shall be paid from principal;

(3) any deduction for property previously taxed and any credit for gift taxes or death taxes of a foreign country paid by the decedent or his estate shall inure to the proportionate benefit of all persons liable to apportionment;

(4) any credit for inheritance, succession or estate taxes or taxes in the nature thereof in respect to property or interests includable in the estate shall inure to the benefit of the persons or interests chargeable with the payment thereof to the extent that, or in proportion as the credit reduces the tax;

(5) to the extent that property passing to or in trust for a surviving spouse or any charitable, public or similar gift or bequest does not constitute an allowable deduction for purposes of the tax solely by reason of an inheritance tax or other death tax imposed upon and deductible from the property, the property shall not be included in the computation provided for in section (b) hereof, and to that extent no apportionment shall be made against the property. The sentence immediately preceeding shall not apply to any case where the result will be to deprive the estate of a deduction otherwise allowable under section 2053 (d) of the Internal Revenue Code of 1954 of the United States, relating to deduction for state death taxes on transfers for public, charitable or religious uses.

(f) Income interests; life or temporary interests; charging corpus. No interest in income and no estate for years or for life or other temporary interest in any property or fund shall be subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remainder shall be chargeable against the corpus of the property or funds subject to the temporary interest and remainder.

(g) Proceedings for recovery of tax; commencement; liability of fiduciary; apportionment of amount recovered. Neither the personal representative nor other person required to pay the tax shall be under any duty to institute any suit or proceeding to recover from any person interested in the estate the amount of the tax apportioned to the person until the expiration of the three months next following final determination of the tax. A personal representative or other person required to pay the tax who institutes the suit or proceeding within a reasonable time after the three months' period shall not be subject to any liability or surcharge because any portion of the tax apportioned to any person interested in the state was collectable at a time following the death of the decedent but thereafter became uncollectable. If the personal representative or other person required to pay the tax cannot collect from any person interested in the estate the amount of the tax apportioned to the person, the amount not recoverable shall be equitably apportioned among the other persons interested in the estate, who are subject to apportionment.

(h) Foreign fiduciaries and estates; tax credits.

(1) a personal representative acting in another state or a person required to pay the tax domiciled in another state may institute an action in the courts of this state and may recover a proportionate

amount of the federal estate tax, of an estate tax payable to another state or of a death duty due by a decedent's estate to another state, from a person interested in the estatewho is either domiciled in this state or who owns property in this state subject to attachment or execution. For the purposes of the action the determination of apportionment by the court having jurisdiction of the administration of the decedent's estate in the other state shall be prima facie correct.

(i) Construction. This section embodies the Uniform Estate Tax Apportionment Act and shall be so construed as to effectuate its geneal purpose to make uniform the law of those states which enact it.

Comment

Section 3-614 copies the Uniform Estate Tax Apportionment Act without change.

ARTICLE III

Part 7

Closing Estates

SECTION 3-701. [Formal Proceedings Terminating Administration; Testate or Intestate; Order of General Protection.] A personal representative or any interested person may petition for an order of complete settlement of the estate. The personal representative may petition after the time has passed for presenting claims which arose prior to the death of the decedent and any other interested person may petition after one year from the appointment of the original personal representative. The petition may request the [judge] to determine testacy, if not previously determined, to consider the final account or compel or approve an accounting and distribution, to construe any will or determine heirs and adjudicate the final settlement and distribution of the estate. After notice to all interested persons and hearing, the [judge] may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate, and, as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any interested person.

SECTION 3-702. [Formal Proceedings Terminating Testate Administration; Order of Limited Protection.] A personal representative administering an estate under an informally probated will or any devisee under an informally probated will may petition for an order of limited settlement of the estate. The personal representative may petition after five months, and a devisee may petition after one year, from the appointment of the original

personal representative. The petition may request the [judge] to consider the final account or compel or approve an accounting and distribution, to construe any will and adjudicate final settlement and distribution of the estate. After notice to all devisees and the personal representative and hearing, the [judge] may enter an order or orders, on appropriate conditions, determining the persons entitled to distribution of the estate under the will, and, as circumstances require, approving settlement and directing or approving distribution of the estate and discharging the personal representative from further claim or demand of any devisee who is a party to the proceeding and those he represents. If it appears that a part of the estate is intestate, the proceedings shall be dismissed or amendments made to meet the provisions of section 3-701.

Comment on Sections 3-701 and 3-702

Section 3-702 permits a final determination of the rights between each other and against the personal representative of the devisees under a will when there has been no formal proceeding in regard to testacy. Section 3-701 permits a final determination of the rights between each other and against the personal representative of all persons interested in an estate.

SECTION 3-703. [Closing Estates; By Sworn Statement of Personal Representative.]

(a) Unless prohibited by order of the [probate] court and except for estates being administered by supervised personal representatives, a personal representative may close an estate by filing with the court no earlier than 6 months from the date of original appointment of a general personal representative for the estate, a verified statement stating that the personal representative has:

(1) published notice to creditors as provided by section 3-502 and that the first publication occurred more than 5 months prior to the date of the statement.

(2) fully administered the estate of the decedent by making payment, settlement or other disposition of all claims which were presented, expenses of administration and estate, inheritance and other death taxes, except as specified in the statement, and that the assets of the estate have been distributed to the persons entitled. If certain claims remain undischarged, it shall state whether the personal representative has distributed the estate subject to possible liability with the agreement of the distributees, or has established a trust for the benefit of claimants and distributees, as their interests may appear, or state in detail other arrangements which have been made to accommodate outstanding liabilities.

(3) sent a copy thereof to all distributees of the estate and to all creditors or other claimants of whom he is aware whose claims are neither paid nor barred, and has furnished a full account in writing of his administration to the distributees whose interests are affected thereby.

(b) After one year has elapsed from the filing of a statement closing administration, and if no actions or proceedings involving the personal representative are then pending in the probate court the appointment of the personal representative terminates.

Comment

Section 3-311 (a) makes express reference to subsection (b) of this section. Section 3-309 describes the significance of "termination."

SECTION 3-704. [Liability of Distributees to Claimants.] After an estate has been closed and subject to section 3-706, a claim not barred may be prosecuted in an action against one or more distributees. No distributee shall be liable to claimants for amounts in excess of the value of his distribution. Any distributee who shall have notified other distributees of the demand made upon him by the claimant in sufficient time to permit them to join in any proceeding in which the claim was asserted against him shall have a right of contribution against other distributees. As between distributees, each shall bear the cost of satisfaction of unbarred claims as if the claim had been satisfied before distribution.

SECTION 3-705. [Limitations on Proceedings Against Personal Representative.] Unless previously barred by adjudication, the rights of successors and of creditors whose claims have not otherwise been barred shall be forever barred, except as provided in the closing statement, against the personal representative for breach of fiduciary duty unless a proceeding or action to assert the same is commenced within 6 months after the filing of the closing statement. The rights thus barred do not include rights to recover from a personal representative for fraud, misrepresentation or non-disclosure related to the settlement of the decedent's estate.

Comment

This and the preceding section make it clear that a claimant whose claim has not been barred may have alternative remedies when an estate has been distributed subject to his claim. Under this section, he has six months to prosecute an action against the personal representative if the

latter breached any duty to the claimant. For example, the personal representative may be liable to a creditor if he violated the provisions of section 3-508. The preceding section describes the fundamental liability of the distributees to unbarred claimants to the extent of the value received. The last sentence emphasizes that a personal representative who fails to disclose matters relevant to his liability in his closing statement and in the account of administration he furnished to distributees, gains no protection within the period described here. A personal representative may, however, use section 3-701, or, where appropriate, 3-702 to secure greater protection.

SECTION 3-706. [Limitations on Actions and Proceedings Against Distributees.] Unless previously adjudicated in a formal testacy proceeding or in a proceeding settling the accounts of a personal representative or otherwise barred, the right of any person claiming as heir or devisee of the decedent or as a creditor of the decedent or of his estate, to recover from the distributees, property improperly distributed or the value thereof, shall be forever barred at the later of:

(1) three years from the decedent's death;

(2) one year from the time of distribution thereof.

This section shall not bar recovery of property or value received as the result of fraud.

Comment

This section describes an ultimate time limit for recovery by creditors, heirs and devisees of a decedent from distributees. It is to be noted: (1) Section 3-233 imposes a general limit of three years from death on one who must set aside an informal probate in order to establish his rights, or who must secure probate of a late-discovered will after an estate has been administered as intestate. Hence the time limit of 3-233 may bar one who would claim as an heir or devisee sooner than this section, although it would never cause a bar prior to three years from the decedent's death. (2) This section would not bar recovery by a supposed decedent whose estate has been probated. See section 3-231. (3) The limitation of this section ends the possibility of appointment of a personal representative to correct an erroneous distribution as mentioned in sections 3-705 and 3-708. If there have been no adjudications under section 3-230, or possibly 3-701 or 3-702, estate of the decedent which is discovered after administration has been closed may be the subject of different distribution than that attending the estate originally administered.

The last sentence excepting actions or suits to recover property kept from one by the fraud of another may be unnecessary in view of the blanket provision concerning fraud in Article I.

SECTION 3-707. [Certificate Discharging Liens Securing Fiduciary Performance.] After his appointment has terminated, the personal representative, his sureties, or any successor of either, upon filing of a verified application that, so far as is known by the applicant, no action concerning the estate is pending in any court, is entitled to receive a certificate from the [probate] court that the personal representative has fully administered the estate in question and is finally discharged from any and all claims and demands relating thereto. The certificate shall, upon proper filing or registration, discharge any lien on any property given to secure the obligation of the personal representative in lieu of bond or any surety, but shall not foreclose possible action against the personal representative or the surety for fraud, misrepresentation or nondisclosure.

Comment

This section does not affect the liability of the personal representative, or of any surety, but merely permits a release of security given by a personal representative, or his surety, when, from the passage of time and other conditions, it seems highly unlikely that there will be any liability remaining undischarged. See section 3-307.

SECTION 3-708. [Subsequent Administration.] If, after an estate has been settled and the personal representative discharged or after one year after a closing statement has been filed, other property of the estate shall be discovered, or for other proper cause, the [judge] upon the petition of any interested person and upon notice as it may direct, may appoint the same or a successor personal representative, or make other appropriate order. If a new appointment is made and unless the [judge] shall otherwise

order, the provisions of this Code shall apply as appropriate; but no claim previously barred can be asserted in the reopened administration.

ARTICLE III

Part 8

Compromise of Controversies

SECTION 3-801. [Private Agreements Among Successors to Decedent Binding on Personal Representative.] Subject to the rights of creditors and taxing authorities, competent successors may agree among themselves to alter the interests, shares or amounts to which they are entitled under the will of the decedent, or under the laws of intestacy, in any way that they provide in a written contract executed by all who are affected by its provisions. A personal representative shall abide by the terms of the agreement subject to his obligation to administer the estate for the benefit of creditors, to pay all taxes and costs of administration, and to carry out the responsibilities of his office for the benefit of any successors of the decedent who are not parties. Personal representatives of decedents' estates are not required to see to the performance of trusts when the trustee thereof is another person who is willing to accept the trust. Accordingly, devisee-trustees are successors for the purposes of this section. Nothing herein shall relieve trustees of any duties owed to beneficiaries of trusts.

Comment

Differing from a pattern that is familiar in many states, this Code does not subject testamentary trusts and trustees to special statutory provisions, or supervisory jurisdiction. A testamentary trustee is treated as a devisee with special duties which are of no concern to the personal representative. It is contemplated that future drafts of provisions for Article VI, or for a separate article that has not yet been identified may contain optional procedures which will extend the safeguards available to personal representatives to trustees of both inter vivos and testamentary trusts.

SECTION 3-802. [Proceeding for Approval of Agreements Involving Inalienable Interests, or Interests of Persons Unable to Contract.] Notwithstanding the nonconcurrence or disapproval of any testamentary trustee, a compromise of any controversy as to admission to probate of any instrument offered for formal probate as the will of a decedent; the construction, validity or effect of any probated will; the rights or interests in the estate of the decedent, of any successor; or the administration of the estate; whether or not there is any trust or inalienable interest, present or future, which may be affected by the compromise, shall, if approved in a formal proceeding in the probate court for that purpose, be binding on all the parties thereto, including those unborn, unascertained or who could not be located. No compromise shall in any way impair the rights of creditors or of taxing authorities who are not parties thereto. The procedure for securing court approval is as follows:

(1) Execution of compromise agreement by competent persons. The terms of the compromise shall be set forth in an agreement in writing which shall be executed by all competent persons having beneficial interests whether or not alienable, or claims which will or may be affected by the compromise. But execution by any person whose identity cannot be ascertained or whose whereabouts is un known and cannot after diligent search be ascertained is not required.

(2) Submission to court for execution by fiduciaries. Any interested person may then submit the agreement to the court for its approval and for the purpose of directing the execution thereof by the personal representative, by the trustee of every testamentary trust

which will be affected by the compromise, and by the conservator-trustee of the estates of disabled persons and by the guardians ad litem of unborn and unascertained persons and of persons whose present existence or whereabouts is unknown and cannot after diligent search be ascertained, who might be affected by the compromise.

(3) Appointment of guardian ad litem. The court shall appoint a guardian ad litem to represent any person who has or may have an interest which may be affected by the compromise but whose present existence or whereabouts cannot after diligent search be ascertained, or who is unborn or who is a minor or otherwise disabled and has no conservator-trustee.

(4) Order approving agreement and directing execution by fiduciaries. Upon due notice, in the manner directed by the court, to all interested persons in being, or to their conservator trustees, and to the guardians ad litem of all unborn or missing persons, and to the personal representative of the estate and to all trustees of trusts which will be affected by the compromise, the court shall, if it finds that the contest or controversy is in good faith and that the effect of the agreement upon the interests of persons represented by fiduciaries is just and reasonable, make an order approving the agreement and directing all fiduciaries to execute the agreement. Upon the making of the order and the execution of the agreement, all further disposition of the estate shall be in accordance with the terms of the agreement.

ARTICLE III

Part 9

Collection of Personal Property by Affidavit and Summary Administration Procedure for Small Estates

SECTION 3-901. [Collection of Personal Property by Affidavit.]

(a) Thirty days after the death of a decedent, any person indebted to the decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action belonging to the decedent shall make payment of the indebtedness or deliver the tangible personal property or the instrument evidencing the debt, obligation, stock or chose in action to the successor or successors of the decedent upon an affidavit made by or on behalf of the successor or successors stating:

(1) the value of the entire estate, wherever located, less liens and encumbrances, does not exceed $5,000; and

(2) thirty days have elapsed since the death of the decedent; and

(3) no application or petition for the appointment of a personal representative is pending or has been granted in any jurisdiction; and

(4) the claiming successor or successors are entitled to the property.

(b) A transfer agent of any security shall change the registered ownership on the books of a corporation from the decedent to the successor or successors upon the presentation of an affidavit as provided in (a).

Comment

This section provides for an easy method for collecting the personal property of a decedent by affidavit prior to any formal disposition. Existing legislation generally permits the surviving widow or children to collect

wages and other small amounts of liquid funds. Section 3-901 goes further in that it allows the collection of personal property as well as money and permits any devisee or heir to make the collection. Since the appointment of a personal representative may be obtained easily under the Code, it is unnecessary to make the provisions regarding small estates applicable to realty.

SECTION 3-902. [Effect of Affidavit.] The person paying, delivering, transferring, or issuing personal property or the evidence thereof pursuant to affidavit shall be discharged and released to the same extent as if he dealt with a personal representative of the decedent, and he shall not be required to see to the application of the personal property or evidence thereof or to inquire into the truth of any statement in the affidavit. If any person to whom an affidavit is delivered refuses to pay, deliver, transfer, or issue any personal property or evidence thereof, it may be recovered or its payment, delivery, transfer, or issuance compelled in an action brought for the purpose by or on behalf of the persons entitled thereto upon proof of their right. Any person to whom payment, delivery, transfer or issuance is made shall be answerable and accountable therefor to any personal representative of the estate or to any other person having a superior right.

Comment

Sections 3-901 and 3-902 apply to any personal property located in this state whether or not the decedent died domiciled in this state, to any successor to personal property located in this state whether or not a resident of this state, and, to the extent that the laws of this state may control the succession to personal property, to personal property wherever located of a decedent who died domiciled in this state.

SECTION 3-903. [Small Estates; Summary Administrative Procedure.] If it appears from the inventory and appraisement that the value of the entire estate, less liens and encumbrances, does not exceed homestead allowance, exempt property, family allowance, costs and expenses of administration,

reasonable funeral expenses, and reasonable and necessary medical and hospital expenses of the last illness of the decedent, the personal representative may, without giving notice to creditors, immediately disburse and distribute the estate to the persons entitled thereto, and file a closing statement as described in section 3-904.

Comment

This section makes it possible for the personal representative to make a summary distribution of a small estate without the necessity of giving notice to creditors. Since the probate estate of many decedents will not exceed the amount specified in the statute, this section will prove useful in many estates.

SECTION 3-904. [Small Estates; Closing by Sworn Statement of Personal Representative.]

(a) Unless prohibited by order of the [probate] court and except for estates being administered by supervised personal representatives, a personal representative may close an estate administered under the summary procedures of section 3-903 by filing with the court, at any time after disbursement and distribution of the estate, a verified statement stating that:

(1) to the best knowledge of the personal representative, the value of the entire estate, less liens and encumbrances, did not exceed homestead allowance, exempt property, family allowance, costs and expenses of administration, reasonable funeral expenses, and reasonable necessary medical and hospital expenses of the last illness of the decedent;

(2) the personal representative has fully administered the estate by disbursing and distributing it to the persons entitled thereto; and

(3) the personal representative has sent a copy of the closing

statement to all distributees of the estate and to all creditors or other claimants of whom he is aware whose claims are neither paid nor barred, and has furnished a full account in writing of his administration to the distributees whose interests are affected thereby.

(b) After one year has elapsed from the filing of a statement closing administration, and if no actions or proceedings involving the personal representative are then pending in the [probate] court the appointment of the personal representative terminates.

(c) A closing statement filed under this section shall have the same effect as provided in sections 3-704 and 3-706.

Comment

The personal representative may elect to close the estate under section 3-702 in order to secure the greater protection offered by that procedure.

ARTICLE IV OF THE UNIFORM PROBATE CODE

Foreign Personal Representatives; Ancillary Administration

(Professor Allan D. Vestal)

This Article presents the law applicable in estate problems which involve more than a single state. It covers the powers and responsibilities in the adopting state of personal representatives appointed in foreign states, that is, those personal representatives named in domiciliary administrations. It should be noted that Article IV applies only to personal representatives appointed in the United States and in certain countries, listed in Part 1, which have common law backgrounds.

The approach of the entire Article is to attempt to unify and simplify estate administration in spite of the involvement of more than one state.

The second part of Article IV deals with the powers of foreign personal representatives in a jurisdiction adopting the Uniform Probate Code. There are different types of power which may be exercised. First, a foreign personal representative has the power under section 4-201 to receive payments of debts owed to the decedent or to accept delivery of property belonging to the decedent. The foreign personal representative provides an affidavit indicating the date of death of the non-resident decedent, that no local administration has been commenced and that the foreign personal representative is entitled to payment or delivery. Payment under this provision can be made any time more than three months after the death of the decedent. When made in good faith the payment operates as a discharge of the debtor. A protection for local creditors of the decedent is provided in section 4-203 under which local debtors of the non-resident decedent can be notified of the claims which local creditors have against the estate. This notification will prevent payment under this provision.

A second type of power is provided in section 4-204 to 206. Under these provisions a foreign personal representative can file with the appropriate court a copy of his appointment and official bond if he has one. Upon so filing, the foreign personal representative has all of the powers of a personal representative appointed by the local court. This would be all of the powers provided for in an unsupervised administration as provided in Article III of the Code.

The third type of power which may be obtained by a foreign personal representative is provided for in section 4-208. Under this section, ancillary letters of administration can be granted in a formal proceeding. These can be granted either to a foreign personal representative, who then would become a foreign and local personal representative, or to one theretofore not connected with the estate. Section 4-210 provides for preference for the foreign representative in appointing the local representatives and thus promotes unified administration. Ancillary administration under Article IV is supervised administration as provided for in Section 3-109 and the personal representative is limited as provided in Section 3-110.

Several different sections of Article IV provide for transfer of assets and funds to the domiciliary administration in the foreign state. Provision is made for the filing of claims in an ancillary administration. Section 4-214 provides for a barring of claims in the ancillary administration if they are barred by a non-claim statute or a statute of limitations in the state where the creditor is domiciled.

The ancillary nature of the proceeding in the non-domiciliary jurisdiction is clearly recognized in section 4-217 which provides that, "Any valid action taken in a proceeding at the decedent's domicile may be implemented by a proceeding in this state at any time." This indicates that local limitations will not bar the local implementation of actions taken in the domiciliary jurisdiction.

Part 3 provides for power in the local court over ancillary and foreign personal representatives. In the case of ancillary administration letters will be issued only upon the filing of an irrevocable power of attorney for the acceptance of service of process. This establishes the jurisdiction of the court over the ancillary representative in all actions or proceedings related to the administration of the estate in the local state. It is also provided that a foreign personal representative submits himself to the jurisdiction of the local court by filing a copy of his appointment to get the powers provided in section 4-205 or by doing any act which would give the state jurisdiction over him as an individual. In addition, the collection of funds as provided in section 4-201 gives the court quasi-in-rem jurisdiction over the foreign personal representative to the extent of the funds collected.

Finally, section 4-303 provides that the foreign personal representative is subject to the jurisdiction of the local court "to the same extent that his decedent was subject to jurisdiction immediately prior to death." This is similar to the typical non-resident motorist provision that provides for jurisdiction over the personal representative of a deceased non-resident motorist, see Note, 44 Iowa L. Rev. 384 (1959). It is, however, a much broader provision. Section 4-304 provides for the mechanical steps to be taken in serving the foreign personal representatives.

Part 4 of the Article deals with the res judicata effect to be given adjudications for or against a foreign personal representative. Any such adjudication is to be conclusive on the local or the local and foreign personal representative "unless it resulted from fraud or collusion . . . to the prejudice of the estate." This provision must be read with section 3-227 which deals with a finding concerning succession to the estate.

In conclusion it can be said that Article IV is designed to simplify the administration of multiple state estates, through unifying the administration and emphasizing the domiciliary administration insofar as possible.

ARTICLE IV

FOREIGN PERSONAL REPRESENTATIVES: ANCILLARY ADMINISTRATION

Comment

Part 1 includes definitions.

Part 2 establishes the power of foreign representatives in jurisdictions adopting the Probate Code. The Part provides three types of power. (1) the foreign personal representative has the power to receive payment of debts owed to the decedent or accept delivery of personal property belonging to the decedent. The payment or delivery discharges the debtor or person having possession of the personal property. There is a provision protecting the local creditors of the decedent if this is necessary. (2) The foreign personal representative can file copies of his papers in a court in the state under the probate code and he then has the powers of a local personal representative. (3) There is a provision for ancillary administration of the decedent's estate in the local state should this prove desirable. The foreign personal representative is to be preferred in the appointment of the local personal representative. This is to promote the unitary concept of administration of estates as far as possible.

In Part 2 are also found provisions dealing with the transfer of funds from the local administration to the domiciliary administration. Payment of claims in case of insolvency is also covered.

Part 3 deals with the power of the local jurisdiction over foreign personal representatives. The foreign personal representative who becomes the local personal representative in ancillary administration submits himself to the jurisdiction of the local courts. Additionally, it is provided that the foreign personal representative becomes subject to the jurisdiction of the local courts by filing copies of his papers in the local court, by collecting any money or property belonging to the decedent (jurisdiction here being limited to the assets collected), or by doing any act as a personal representative which would give the state jurisdiction over him as an individual. It is also provided that the personal representative is subject to the jurisdiction of the courts to the same extent that his decedent was immediately prior to death. (This is analogous to the typical non-resident motorist provision which reaches out and gets jurisdiction over the personal representative of the deceased non-resident motorist. See Note, 44 Iowa L. Rev. 402 (1959)). A comparable provision is found in Article 3, Part 4, dealing with Duties and Powers of Personal Representatives.

Part 3 also provides the mechanical steps of service to be used.

Part 4 provides that a judgment for or against a personal representative in another jurisdiction will be binding on the local personal representative unless it results from fraud or collusion.

ARTICLE IV

FOREIGN PERSONAL REPRESENTATIVES: ANCILLARY ADMINISTRATION

Part 1

Definitions

SECTION 4-101. [Definitions.] In this Article

(1) "foreign personal representative" means any personal representative not appointed by a court of this state who has been appointed by the court of another jurisdiction, in which the decedent was domiciled at the time of his death, included in the following list: jurisdictions of the United States, its states, territories and possessions, Puerto Rico, England, Wales, Northern Ireland, the Republic of Ireland, the states of the Commonwealth of Australia, New Zealand, provinces of the Dominion of Canada other than Quebec, and the present or former British Colonies located on islands near the American continents.

(2) "local personal representative" means any personal representative who has been appointed as ancillary personal representative by a court of this state and who has not been appointed by the domiciliary court.

(3) "local and foreign personal representative" means any personal representative who has been appointed by both the domiciliary court and by a court of this state.

Comment

Adapted from the Uniform Ancillary Administration of Estates Act.

Part 2

Powers of Foreign Personal Representatives

SECTION 4-201. [Payment of Debt and Delivery of Property to Foreign Personal Representative Without Local Administration.] Three months after the death of a nonresident decedent, any person indebted to the estate of the nonresident decedent or having possession of tangible personal property or an instrument evidencing a debt, obligation, stock or chose in action belonging to the estate of the nonresident decedent may make payment of the indebtedness, in whole or in part, or deliver the tangible personal property or the instrument evidencing the debt, obligation, stock or chose in action to the foreign personal representative of the nonresident decedent upon an affidavit made by or on behalf of the representative stating:

(1) the date of the death of the nonresident decedent,

(2) that no local administration or application therefor is pending in this state,

(3) that the foreign personal representative is entitled to payment or delivery.

Comment

Section 3-204 refers to the location of tangible personal estate and intangible personal estate which may be evidenced by an instrument. The instant section includes both categories. Transfer of securities is not covered by this section since that is adequately covered by Section 3 of the Uniform Act for Simplification of Fiduciary Security Transfers.

SECTION 4-202. [Payment or Delivery Discharges.] Payment or delivery made in good faith on the basis of the affidavit is discharge of the debtor or person having possession of the personal property.

SECTION 4-203. [Resident Creditor Notice.] Payment or delivery under Section 4-201 may not be made if a resident creditor of the nonresident decedent has notified the debtor of the nonresident decedent or the person having possession of the personal property belonging to the nonresident decedent that the debt should not be paid nor the property delivered to the foreign personal representative.

Comment

Similar to provision in Colorado Revised Statute, 153-6-9.

SECTION 4-204. [Proof of Authority-Bond.] When no local administration or application therefor is pending in this state, a foreign personal representative may file with a [probate] court in a [county] in which property belonging to the decedent is located, authenticated copies of his appointment and of his official bond if he has given a bond.

SECTION 4-205. [Powers.] A foreign personal representative who has met the requirements of Section 4-204 may exercise all powers of a local personal representative, and may maintain actions and proceedings in this state subject to any conditions imposed upon nonresident suitors generally.

SECTION 4-206. [Bond.] Any person apparently entitled to a share of the residue, or to a devise of personal property estimated to be worth in excess of $500, or any creditor having a claim in excess of $500, may make a written demand that the personal representative give bond or additional bond. The demand must be filed with the domiciliary court and a copy mailed to the personal representative. Thereupon, bond or additional bond shall be required.

From the time of receipt of notice and until the filing of the bond or additional bond, the personal representative shall refrain from exercising any powers in this state except as necessary to preserve the estate.

Comment

This is similar to section 3-306. For the amount of bond required, see section 3-305. For order restraining personal representative, see section 3-308.

SECTION 4-207. [Power of Representatives in Transition.] The power of a foreign personal representative shall be exercised only when there is no administration or application therefor pending in this state. An application for local administration of the estate terminates the power of the foreign personal representative to act under section 4-205, however, the local [judge] may allow the foreign personal representative to exercise limited powers to preserve the estate. No person who before receiving actual notice of local administration or application therefor, has changed his position by relying on the powers of a foreign personal representative shall be prejudiced by reason of the application for, or grant of, local administration. The local personal representative or the local and foreign personal representative shall be subject to all duties and obligations which have accrued by virtue of the exercise of the powers by the foreign personal representative and may be substituted for him in any action or proceedings in this state.

SECTION 4-208. [Application for Ancillary Letters and Notice Thereof.]

(a) Granting of Ancillary Letters. Subject to the provisions in (b), ancillary letters of administration may be granted in formal proceedings in the same manner as provided for the appointment of personal representatives in

Section 3-234, and subject to the requirement of bond as provided in sections 3-304 to 3-306.

(b) Qualification of and Preference for Foreign Personal Representative.

(1) Any foreign personal representative upon the filing of an authenticated copy of the domiciliary letters and the power of attorney required by section 4-301 with the [probate] court may be granted ancillary letters in this state notwithstanding that the representative is a nonresident or is a foreign corporation.

(2) If the foreign personal representative is a foreign corporation, it need not qualify under any other law of this state to authorize it to act as local and foreign personal representative.

(3) If application is made for the issuance of ancillary letters, any interested person may intervene and pray for the appointment of any person who is eligible to act as personal representative.

(c) Notice to foreign representative. When application is made for issuance of ancillary letters to any person other than the foreign personal representative, the applicant shall send notice of the application by registered or certified mail to the foreign personal representative if the latter's name and address are known and to the court which appointed him if the court is known. These notices shall be mailed upon filing the application if the necessary facts are then known, or as soon thereafter as the facts are known. If notices are not given prior to the appointment of the local personal representative, he shall give similar notices of his appointment as soon as the necessary facts are known to him. Notice by ordinary mail is sufficient if registered or certified mail service to the addressee is unavailable.

Comment

The provision for ordinary mail as a substitute for registered or certified mail is provided because, under the present postal regulations, registered mail may not be available to reach certain addresses, 39 C.F.R. Sec. 51.3 (c), and also certified mail may not be available as a process for service because of the method of delivery used, 39 C.F.R. Sec. 58.5 (c) (rural delivery) and (d) (star route delivery). Adapted from Uniform Ancillary Administration of Estates Act, sections 2 and 4.

SECTION 4-209. [Denial of Application.] The [probate] court may deny the application for ancillary letters if it appears that the estate may be settled conveniently without ancillary administration. The denial is without prejudice to any subsequent application if it later appears that ancillary administration is needed.

Comment

Uniform Ancillary Administration of Estates Act, section 3.

SECTION 4-210. [Substitution of Foreign for Local Personal Representative.]

(a) Application and procedure. If any other person has been appointed local personal representative, the foreign person representative, not later than [twenty] days after the mailing of notice to him under section 4-208 (c), unless this period is extended by the court for cause which the court deems adequate, may apply for revocation of the appointment and for grant of ancillary letters to himself. [Ten] days written notice of hearing shall be given to the local personal representative. If the court finds that it is for the best interests of the estate, it may grant the application and direct the local personal representative to deliver all assets, documents, books and papers pertaining to the estate in his possession and make a full report of his administration to the local and foreign personal representative as soon as the letters are issued and he is qualified. The local personal representative shall also account to the court.

Upon compliance with the court's directions, the local personal representative shall be discharged.

(b) Effect of Substitution. Upon qualification, the local and foreign personal representative shall be substituted in all actions and proceedings brought by or against the local personal representative in his representative capacity, and shall have all of the authority and be entitled to all of the rights and be subject to all of the duties and obligations arising out of the uncompleted administration in all respects as if it had been continued by the local personal representative. If the latter has served or been served with any process or notice or delivered any statement of claim, no further service or delivery shall be necessary nor shall the time within which any steps may or must be taken be extended unless the court in which the action or proceedings are pending so order.

Comment

Adapted from Uniform Ancillary Administration of Estates Act, section 6.

SECTION 4-211. [Ancillary Administration; Powers andLimitations; Supervised Administration.] Ancillary administration shall be supervised administration as provided in Section 3-107, and, except as provided otherwise in this Article, the personal representative in ancillary administration shall have the powers and be subject to the limitations of a supervised personal representative as provided in Section 3-108.

SECTION 4-212. [Preliminary Transfer of Assets.]

(a) Application. Prior to the final disposition of the estate in ancillary administration and upon giving written notice to interested persons, a personal

representative may apply for leave to transfer all or any part of the assets from this state to the domiciliary jurisdiction for the purpose of administration and distribution.

(b) Prerequisite to Granting Application. Before granting the application the court, if it finds that additional security is necessary, may require the representative to furnish a bond or additional bond in the domiciliary jurisdiction.

(c) Granting application -- terms and consequences. Upon compliance with this section, the court shall grant the application upon any conditions as it sees fit unless it finds cause for denial or postponement. The granting of the application shall not terminate any proceedings in this state unless the court finds that further proceedings are unnecessary, in which case it may order the administration in this state closed.

Comment

Adapted from Uniform Ancillary Administration of Estates Act, section 7.

SECTION 4-213. [Liability of Local Assets.] All local assets are subject to the payment of all claims, allowances and charges, whether they are established or incurred in this state or elsewhere. For this purpose local assets may be sold in this state and the proceeds forwarded to the personal representative in the jurisdiction where the claim was established or the charge incurred.

SECTION 4-214. [Limitations.] Any claim which is barred by nonclaim statute or the statute of limitations in the state where the creditor, if an individual, is domiciled, or where the claim arose in the case of claims due corporate claimants or their assignees, is barred in an ancillary administration in this state.

SECTION 4-215. [Payment of Claims in Case of Insolvency.]

(a) Equality subject to preferences and security. If the estate either in this state or as a whole is insolvent, it shall be disposed of so that, as far as possible, each creditor whose claim has been allowed, either in this state or elsewhere, shall receive payment of an equal proportion of his claim subject to preferences and priorities and to any security which a creditor has as to particular assets. If a preference, priority or security is allowed in another jurisdiction but not in this state, the creditor so benefited shall receive dividends from local assets only upon the balance of his claim after deducting the amount of such benefit. Creditors who have secured claims upon property not exempt from the claims of general creditors and who have not released or surrendered them shall have the value of the security determined according to the terms of the security agreement, or by agreement, arbitration, or litigation as the court may direct, and the value so determined shall be credited upon the claim, and dividends shall be computed and paid only on the unpaid balance.

(b) Procedure. In case of insolvency and if local assets permit, each claim allowed in this state shall be paid its proportion, and any balance of assets shall be disposed of in accordance with section 4-216. If local assets are not sufficient to pay all claims allowed in this state the amount to which they are entitled, local assets shall be marshalled so that each claim allowed in this state shall be paid its proportion as far as possible, after taking into account all dividends on claims allowed in this state from assets in other jurisdictions.

SECTION 4-216. [Final Transfer of Residue to Domiciliary Representative.] After the payment of all claims allowed in this state and of all taxes and charges

levied or incurred in this state, the moveable assets remaining on hand shall be transferred to the personal representative in the domiciliary jurisdiction unless the court shall order distribution in this state for good cause shown. The court, if it finds that additional security is necessary, may require the representative to furnish a bond or additional bond in the domiciliary jurisdiction.

SECTION 4-217. [Implementation.] Any valid action taken in a proceeding at the decedent's domicile may be implemented by a proceeding in this state at any time.

ARTICLE IV

Part 3

Jurisdiction Over Ancillary and Foreign Representatives

SECTION 4-301. [Service of Process in Ancillary Administration.] Ancillary letters of administration shall be granted only if the personal representative shall file in the [probate] court an irrevocable power of attorney constituting the [clerk of the court] as his agent for the acceptance of service of process in any action or proceeding relating to the administration of the estate in this state. Any process received by the [clerk of the court] shall be forwarded to the local or local and foreign personal representative at his last known address by registered or certified mail. Notice by ordinary mail is sufficient if registered or certified mail service to the addressee is unavailable.

Comment

The provision for ordinary mail as a substitute for registered or certified mail is provided because, under the present postal regulations, registered mail may not be available to reach certain addresses, 39 C.F.R. Sec. 51.3 (c), and also certified mail may not be available as a process for service because of the method of delivery used, 39 C.F.R. Sec. 58.5 (c) (rural delivery) and (d) (star route delivery).

SECTION 4-302. [Jurisdiction by Act of Foreign Personal Representative.] A foreign personal representative submits himself to the jurisdiction of the courts of this state by (1) filing authenticated copies of his appointment as provided in Section 4-204, (2) collecting money or personal property under Section 4-201, or (3) doing any act as a personal representative in this state which would have given the state jurisdiction over him as an individual. Jurisdiction under (2) is limited to the money or value of personal property collected.

Comment

The words "courts of this state" are sufficient under federal legislation to include a federal court having jurisdiction in the adopting states.

SECTION 4-303. [Jurisdiction by Act of Decedent.] In addition to jurisdiction conferred by Section 4-302, a foreign personal representative shall be subject to the jurisdiction of the courts of this state to the same extent that his decedent was subject to jurisdiction immediately prior to death.

SECTION 4-304. [Service on Foreign Personal Representative.]

(a) Manner. Service may be made upon the foreign personal representative by registered or certified mail, addressed to his last known address, requesting a return receipt signed by addressee only. Notice by ordinary mail is sufficient if registered or certified mail service to the addressee is unavailable.

Service may be made upon a foreign personal representative in the manner in which service could have been made under other laws of this state on either the foreign personal representative or his decedent immediately prior to death.

(b) Time to answer. When service is made upon a foreign personal representative as provided in subsection (a), he shall be given at least 30 days within which to answer or move.

Comment

The provision for ordinary mail as a substitute for registered or certified mail is provided because, under the present postal regulations, registered mail may not be available to reach certain addresses, 39 C.F.R. Sec. 51.3 (c), and also certified mail may not be available as a process for service because of the method of delivery used, 39 C.F.R. Sec. 58.5 (c) (rural delivery) and (d) (star route delivery).

ARTICLE IV

Part 4

Judgments and Personal Representative

SECTION 4-401. [Effect of Adjudication for or Against Personal Representative.] A prior adjudication rendered in any jurisdiction for or against any personal representative of the estate shall be as conclusive as to the local or the local and foreign personal representative as if he were a party to the adjudication unless it resulted from fraud or collusion of the personal representative to the prejudice of the estate.

Comment

Adapted from Uniform Ancillary Administration of Estates Act, Section 8.

ARTICLE V OF THE UNIFORM PROBATE CODE

(The following is a summary of Article V based largely on Professor Fratcher's comments on August 4, 1967.)

Article V entitled "Protection of Persons Under Disability and Their Property" embodies separate systems of guardianship to protect persons of minors and mental incompetents.[5] It also includes provisions for a type of power of attorney that does not terminate on disability of the principal which may be used by adults approaching senility or incompetence to avoid the necessity for other kinds of protective regimes. Finally, Part 5 of the Article offers a system of protective proceedings to provide for the management of substantial aggregations of property of persons who are, for one reason or another, including minority and mental incompetence, unable to manage their own property.

It should be emphasized that the Article contains many provisions designed to minimize or avoid the necessity of guardianship and protective proceedings, as well as provisions designed to simplify and minimize such arrangements as may become necessary for care of persons or their property. The power of attorney which confers authority notwithstanding later incompetence is one example of the former. Another is a facility of payment provision which permits relatively small sums owed to a minor to be paid whether or not there is a guardian or other official who has been designated to act for the minor. For an example of a new idea tending to simplify necessary protective proceedings, one could note that in Part 5 the new draft contains provisions permitting a judge to make appropriate orders concerning the property of one whose property needs management or disposition without appointing a fiduciary.

of a conservator-trustee, provided notation of the restriction appears on his letters of appointment. Unless restricted, the fiduciary may be able to distribute and end the arrangement without court order if he can meet Section 5-520. Among other kinds of expenditures and disbursements authorized by this section, payments for the support and education of the protected person as determined by a guardian of the protected person, if any, or by the conservator-trustee, if there is no guardian, are approved. Gifts of not to exceed twenty percent (20%) of any year's income to charity or other objects as the protected person might have been likely to make are approved. Also, certain payments for the support of dependents of the protected person are approved by the Code and hence would require no special approval.

f) Other provisions in Part 5 round out the relationship of protective proceedings to creditors of the protected person and persons who deal with a conservator-trustee. Claims are handled by the conservator-trustee who is given a fiduciary responsibility to claimants and suitable discretion concerning allowance. If questions arise, the appointing court has all needed power to deal with disputes with creditors. The draft changes the common law rule that contracts of a guardian are his personal responsibility. A conservator-trustee is not liable personally on contracts made for the estate unless he agrees to such liability. Section 5-529 buttresses the managerial powers given to conservator-trustees by protecting all persons who deal with them.

g) Section 5-532 should be noted. It seeks to reduce the importance of state lines in respect to the authority of conservator-trustees by permitting appointees of foreign courts to act locally. Also, it follows the pattern of Article IV dealing with ancillary administration of decedents' estates by giving the conservator-trustee

appointed at the domicile of the protected person priority for appointment locally in case local administration of a protected person's assets becomes necessary.

h) The many states which have adopted the Uniform Veterans Guardianship Act now have two systems for protection of the property of minors and mental incompetents, one of which applies if the property was derived, in whole or in part, from benefits paid by the Veterans Administration and its minor or incompetent owner is or has been a beneficiary of the Veterans Administration, and the other of which applies to all other property. It is sometimes difficult to ascertain whether a person has ever received a benefit from the Veterans Administration and commonly impossible to determine whether property was derived in part from benefits paid by the Veterans Administration. Part 5 would provide a single system for the protection of property of minors and others unable to manage their own property, thus superseding the Uniform Veterans Guardianship Act. It would preserve the right of the Veterans Administration to appear in protective proceedings involving the property of its beneficiaries and would permit the imposition of the same safeguards provided by the superseded Uniform Veterans Guardianship Act.

Redraft of Oct. 22, 1967

(Not approved by all reporters)

ARTICLE V

PROTECTION OF PERSONS UNDER DISABILITY AND THEIR PROPERTY

Part 1

General Provisions

SECTION 5-101. [Definitions and Use of Terms.] When used in Article V, unless otherwise apparent from the context:

(1) a "minor" is a person who has not reached his twenty-first birthday;

(2) a "minor ward" is a minor for whom a guardian has been named by will of his parent;

(3) a "minor's guardian" or "guardian of a minor" is one who has qualified as testamentary guardian of a minor;

(4) a "guardian ad litem" is one appointed by a court, in which particular litigation is pending, to represent a minor, incompetent, unborn or unascertained person in that particular litigation;

(5) a "disabled person" is one who, for reasons other than minority, has been adjudged to be unable to manage his property and affairs effectively, and for whose estate a conservator-trustee has been appointed, or other protective order entered;

(6) a "protected person" is a disabled person or a minor for whose estate a conservator-trustee has been appointed, or other protective order entered;

(7) a "conservator-trustee" is one appointed by a court to manage the property and affairs of a protected person;

(8) "estate" is the property of a protected person which is, or might be, subject to a protective proceeding;

(9) a "protective proceeding" is a proceeding to determine that a person who has an estate cannot effectively manage or apply the same to necessary ends, either because he lacks the ability or is otherwise inconvenienced, or because he is a minor, and to secure administration of such person's estate by a conservator-trustee, or other appropriate relief;

(10) a "conservator-trusteeship proceeding" is a protective proceeding wherein a conservator-trustee is appointed to manage or apply the estate of a protected person.

Comment

There is need for a precise, yet familiar, terminology in dealing with the problems of caring for the person and managing property of those who are not sui juris. When dealing with the care of the person, the terms "minor" and "incompetent" are used when a fiduciary has not been appointed. The fiduciary appointed by will to care for the person of a minor is known as a testamentary "guardian". Once a guardian has been appointed, the term "minor ward" is used to describe the person in his care.

The problems of managing the property of minors and disabled persons, whether or not incompetent, are the same. The sections of the Code dealing with these problems have been placed in Part 4. Before the appointment of a fiduciary to manage the property of a person, the terms "minor" and "alleged disabled person" are used to refer to persons for whom protection is sought. The term "protected person" is a generic term referring to either a minor or disabled person who has received the protection of the probate court either through the appointment of a fiduciary to manage his property or the issuance of a protective order.

The term "conservator-trustee" is used to describe the fiduciary appointed by the court to manage the property of a protected person. While this term may at first seem cumbersome, it is fully descriptive of the functions of this fiduciary. Its use emphasizes that the fiduciary is a trustee who holds legal title to the property of the protected person, conserves his property, and acts as a statutory trustee independent of the probate court once he has been appointed.

A "protective proceeding" is a generic term used to describe both a "conservator-trusteeship proceeding" and a proceeding to obtain a protective order for a disabled person where the full conservator-trusteeship is unnecessary.

SECTION 5-102. [Jurisdiction of Subject Matter; Consolidation of Proceedings.]

(a) Jurisdiction. The [probate] court has exclusive jurisdiction over guardianship and protective proceedings.

(b) Other forms of guardianship of estate abolished. All forms of guardianship of property or estate not provided for in this Code are abolished. Nothing in this section affects guardians ad litem.

SECTION 5-103. [Facility of Payment.] Any person under a duty to pay or deliver money or tangible chattels to a minor may perform such duty, in amounts not exceeding $5,000 per annum, by paying or delivering the money or chattels to, (i) the minor, if he has attained the age of 18 years or is married; (ii) a parent or grandparent of the minor with whom the minor resides; or (iii) a testamentary guardian of the minor; or (iv) a financial institution in a federally insured account in the sole name of such minor and without retaining power to withdraw. This section does not apply if the person making such payment or delivery has actual knowledge that protective proceedings with respect to the estate of the minor are pending. The persons, other than the minor, receiving such payments are obligated to apply the same

to the support and education of the minor, excluding any payments to themselves except by way of reimbursement for out-of-pocket expenses for goods and services furnished by third persons which were necessary for the minor's support. Any excess sums shall be preserved for future support of the minor and any balance not so used shall be turned over to the minor when he attains majority. Persons owing money or property to minors who pay or deliver it in accordance with provisions (ii) and (iii) above shall not be responsible for the proper application thereof.

Comment

Where a minor or incompetent has only a small amount of property, it would be wasteful to require that a conservator-trustee be appointed to deal with the property. This section makes it possible for other persons, such as any testamentary guardian, to handle the less complicated property affairs of the ward, whether minor or adult. Protective proceedings, including the possible establishment of a conservator-trusteeship, will be sought where substantial property is involved. Disabled persons, for whom such protective proceedings are sought, may or may not be incompetent.

ARTICLE V

Part 2

Testamentary Guardians of Minor

Foreword

Part 2 deals primarily with custody of the person of a minor, although the testamentary guardian has some limited powers concerning property of the minor under section 5-203. If the minor has substantial property, separate proceedings under Part 4 to protect the property would be necessary.

This part has the following principal features:

(1) Parents may appoint, by will, a testamentary guardian for a minor child; no court action is required in such case.

(2) The powers and duties of a minor's testamentary guardian--a vague area under present law in most states--are carefully delineated.

(3) There is a new provision permitting a parent as well as a guardian to execute a power of attorney delegating his powers for a temporary period, as where parents must be out of the country.

(4) Guardianship status arising from appointment of a testamentary guardian will follow the minor regardless of location.

SECTION 5-201. [Status of Testamentary Guardian; General.] A testamentary guardian is a person who accepts a testamentary appointment under section 5-202 and thereby acknowledges that he has accepted responsibility, as defined and limited in this Part, for the care, custody and education of a minor in place of the minor's parent or parents. The relationship continues until terminated, without regard to the location, from time to time, of the guardian and minor ward.

Comment

A testamentary guardian has the rights and duties provided in section 5-203; he is subject to all other provisions of part 2 of this Article. The purpose of these sections is to facilitate a continued family relationship

as desired by deceased parents, without the necessity of court intervention. The relationship so created exists wherever the parties to it may be located. Accordingly, a court in any state where the parties are which has jurisdiction of matters relating to the custody of children could deal with the relationship without disturbing any continuing jurisdiction of a court of the state where the status originated.

SECTION 5-202. [Testamentary Appointment of Guardian of Minor.] The parent of a minor who has not been deprived of the power to make a testamentary appointment by order of a competent court made in connection with a divorce or separate maintenance action, or in a proceeding affecting the custody of the child, may by will appoint a guardian of an unmarried minor. Subject to any pending judicial proceedings concerning the custody or welfare of the minor, a testamentary appointment becomes effective upon filing written acceptance in the court in which the will is informally or formally probated, if both parents are dead or the surviving parent is adjudged incompetent. If both parents are dead appointment by the parent who died later has priority. The person appointed testamentary guardian may be a resident or nonresident. Appointment under an informally probated will terminates if the will is later denied probate in formal proceedings. This state shall recognize a testamentary appointment effected by filing acceptance under a will probated at the testator's domicile in another state.

Comment

In the preparation of wills, it is common practice even now for parents to attempt to name a guardian of the person of their children. Most courts recognize the wisdom of the parent's choice and appoint the individual nominated; but the present law treats the will as merely a nomination and requires a court appointment.

This section provides that the appointment is made by the will, without any necessity for court appointment. The appointment must be accepted by the guardian by filing with the probate court a written acceptance; this is informal, however, since no notice or court hearing or order is contemplated. Acceptance carries consent to service under section 5-207. In the unusual case where circumstances have changed since the will was executed, so that the appointed person is unsuitable if the appointed person insists on accepting the appointment, a formal proceeding to remove the testamentary guardian could be brought under section 5-206, or other legislation.

SECTION 5-203. [Powers and Duties of Testamentary Guardian of Minor.] A testamentary guardian of a minor has the powers and duties of a natural parent who has not been deprived of custody, in respect to the care, custody and education of the minor ward except that a guardian shall not be legally obligated to provide from his own funds for the ward and shall not be liable to third persons for acts of the minor ward solely by reason of the parental relationship. In particular, and without qualifying the foregoing, a testamentary guardian has the following powers and duties:

(1) He shall take reasonable care of his ward's effects and commence protective proceedings if necessary to protect other property of the ward.

(2) He may receive money and property deliverable to the ward's parent, guardian or custodian under the terms of any statutory benefit or insurance system, or any private contract, devise, trust or custodianship, for the support of the minor. Any sums so received shall be applied to the ward's current needs for support, care, and education; any excess shall be conserved by the t estamentary guardian for the ward's future needs unless a

conservator-trustee has been appointed for the estate of the ward, in which case excess shall be paid over at least annually to the conservator-trustee. Sums so received by the testamentary guardian shall not be used for compensation for his services or for room and board which he personally furnishes the ward, except as approved by order of court or as determined by a duly appointed conservator-trustee other than the testamentary guardian. He may institute proceedings to compel the performance by any person of a duty to support the ward or to pay sums for the welfare of the ward.

(3) If a conservator-trustee has been appointed, the testamentary guardian shall determine the extent to which funds shall be paid from the ward's estate by the conservator-trustee to third persons to provide educational and training opportunities for the ward. If there is no guardian, the determination shall be made by the conservator-trustee.

(4) He may, but need not except as otherwise ordered by court, give consent to facilitate the ward's participation in education, social or other activities or to enable him to receive medical or other professional care, treatment, or advice. He shall not be liable by reason of this consent for injury to the ward resulting from the negligence or acts of third persons unless it would have been illegal for a parent to have consented. He may consent to the marriage of his ward.

(5) He shall be liable for losses of a ward's estate or for injury to his person only as follows:

(i) for losses or damage to the ward's estate to the extent he fails to comply with this section;

(ii) for injury to the ward's person to the extent that a parent would be liable under similar circumstances.

(6) He shall report the condition of his ward and of the ward's estate which has been subject to his possession or control, as ordered by court on petition of any person interested in the minor's welfare.

Comment

The powers and duties of testamentary guardians are governed by this section. Also, if section 5-204 applies, guardians of minors appointed under other legislation may have the powers and duties described herein, and if section 5-419(a) applies, the powers and duties described here may be applicable to a conservator-trustee of a minor's estate. The first sentence is intended to give the guardian broad powers and responsibilities. The following provisions deal with specific problems. In general the testamentary guardian is treated the same as a parent, except that he does not have the parent's duty of support out of personal funds nor is he liable to third persons for acts of the minor (as a parent may be for torts of his child), unless of course the guardian himself is at fault or undertakes liability.

The testamentary guardian has limited property control. He must take reasonable care of the minor's personal effects (clothing and other tangible personalty). If the minor has investment property which requires protection, the guardian must initiate protective proceedings under Part 4. The guardian may receive and expend funds for the support, care and education of the minor. To prevent any conflict of interest, the guardian must obtain a court order approving expenditure of sums as compensation for his own services or room and board furnished by him to the minor. The education of the minor is the primary responsibility of the guardian and not a conservator-trustee if both have been appointed; hence the guardian may determine the amount of funds to be spent on education out of the minor's property held by a conservator-trustee.

Whenever consent of a parent is customarily or legally necessary in order to enable a minor to participate in various activities (school sponsored trips, for example) or to receive medical or other care, the guardian may give consent; however, he is not required to do so unless ordered by court. If consent by a parent would be illegal (such as consent to performance of an abortion on a minor female under local law), the guardian may incur liability for giving such consent; but in other cases he is not liable by reason of consent if the minor is injured by third persons.

Basically the guardian's liability to his minor ward is limited to loss or damage to the ward's property by reason of failure to comply with this section 5-203, and injury to the ward's person to the extent the parent would be liable. Thus a guardian would be liable if he failed to commence prote ctive proceedings when necessary to protect investments of the minor, as required by section 5-203(1); or if he misapplied funds of the minor under section 5-203(2). He would be liable for damages to the minor if he negligently or intentionally caused injury to the person of the minor under circumstances such that a parent would be liable. Thus if a minor riding in a car driven by the guardian is injured and the guardian's negligence were a cause of the injury, the guardian could be held liable.

SECTION 5-204. [Court Appointed Guardian of Minor to Have Same Powers and Duties as Testamentary Guardian; Exceptions.] Any guardian of a minor appointed by court order has the same powers and duties as a testamentary guardian unless otherwise expressly provided by court order or the legislation under which the appointment is made.

SECTION 5-205. [Delegation of Powers by Parent or Testamentary Guardian.] A parent or testamentary guardian entitled to custody of a minor may, by a properly executed power of attorney, delegate to another person, for a period not exceeding six months, any of his powers regarding custody, consent or property except pow er to consent to marriage or adoption of the minor ward.

Comment

This section is broader than guardianship as such, because the section applies to parents as well as guardians. It permits a temporary delegation of powers. For example, parents (or a guardian) of a minor plan to be out of the country for several months. They wish to empower a close relative (an uncle, e.g.) to take any necessary action regarding the child while they are away. They could execute an appropriate power of attorney giving the uncle custody and power to consent. Then if an emergency operation were required, the uncle could consent on behalf of the child; as a practical matter he would of course attempt to communicate with the parents before acting.

SECTION 5-206. [Termination of Appointment of Testamentary Guardian.] A testamentary guardian's powers and duties terminate upon the death, resignation or removal of the guardian or upon the minor's death, adoption, emancipation or attainment of majority. A testamentary guardian may resign by petition to the court in which his acceptance of appointment is filed or to any court having jurisdiction over appointment of guardians for minors. A testamentary guardian may be removed for good cause, upon petition of a person interested in the minor ward's welfare, either by the court in which the acceptance of testamentary appointment is filed or by any court having jurisdiction over appointment of guardians for minors. After notice and hearing, the court may terminate the testamentary guardianship and make such further order as may be appropriate.

Comment

Resignation or removal of a testamentary guardian requires court action under this section. Local law determines emancipation of a minor [or attainment of majority].

SECTION 5-207. [Consent to Service by Acceptance of Testamentary Appointment.] By filing acceptance of a testamentary appointment, a testamentary guardian irrevocably constitutes the clerk of court receiving acceptance as his agent to receive service of process or notice relating to any proceeding commenced in any court of this state relating to the guardianship. A copy shall also be sent by the petitioner by regular mail to the guardian at his address as listed in the court records and to his address as then known to the petitioner.

Comment

The "long-arm" principle behind this section is well established. It seems desirable that the court in which acceptance is filed be able to serve its process on the guardian wherever he has moved. The continuing interest of that court in the welfare of the minor is ample to justify this provision. The consent to service is real rather than fictional in the guardianship situation, where the guardian acts voluntarily in filing acceptance. It is probable that the form of acceptance will expressly embody the provisions of this section, although the statute does not expressly require this.

ARTICLE V

Part 3

Powers of Attorney

SECTION 5-301. [When Power of Attorney Not Terminated by Disability.] When a principal designates another his attorney in fact or agent by a power of attorney in writing and the writing contains the words "This power of attorney shall not terminate on disability of the principal" or similar words showing the intent of the principal that the power shall not terminate on his disability, then the powers of the attorney in fact or agent shall be exercisable by him on behalf of the principal notwithstanding later disability or incompetence of the principal at law. All acts done by the attorney in fact or agent, pursuant to the power during any period of disability or incompetence shall have the same effect and shall inure to the benefit of and bind the principal as if the principal were not disabled or incompetent. If a conservator-trustee shall thereafter be appointed for the principal, the attorney in fact or agent shall, during the continuance of the appointment, account to the conservator-trustee rather than the principal. The conservator-trustee shall have the same power, which the principal would have but for his disability or incompetence, to revoke, suspend, or terminate all or any part of the power of attorney or agency.

Comment

This section permits a person who is sui juris to execute a power of attorney which will remain effective in the event he should later become disabled. If the court should subsequently appoint a conservator-trustee, the latter may either permit the attorney in fact to continue to act or revoke the power of attorney. The section is based on Code of Va. (1950), Sec. 11-9.1.

SECTION 5-302. [Powers of Attorney Not Revoked Until Notice of Death or Disability.]

(a) Powers of Attorney not revoked. The death, disability, or incompetence of any principal who has executed a power of attorney in writing shall not revoke or terminate the agency as to the attorney in fact, agent or other person who, without actual knowledge of the death, disability, or incompetence of the principal, acts in good faith under the power of attorney or agency. Any action so taken, unless otherwise invalid or unenforceable, shall bind the principal and his heirs, devisees, and personal representatives.

(b) Proof of nonrevocation. An affidavit, executed by the attorney in fact or agent stating that he did not have, at the time of doing an act pursuant to the power of attorney, actual knowledge of the revocation or termination of the power of attorney by death, disability or incompetence, shall, in the absence of fraud, be conclusive proof of the nonrevocation or nontermination of the power at such time. If the exercise of the power requires execution and delivery of any instrument which is recordable, the affidavit when authenticated for record shall likewise be recordable.

(c) Provisions for revocation unaffected. This section shall not be construed to alter or affect any provision for revocation or termination contained in the power of attorney.

Comment

This section adopts the civil law rule that powers of attorney are not revoked on death or disability until the attorney in fact has actual knowledge of the death or disability. Provision is made for proving lack of knowledge by affidavit and the recordation of the affidavit to protect transactions that might otherwise be invalidated at common law. The section is based on Code of Va. (1950), Sec. 11-9.2.

ARTICLE V

Part 4

Protection of Property of Disabled Persons and Minors

SECTION 5-401. [Protective Proceedings.] Upon petition and after notice and hearing, in accordance with the provisions of this Part, the [probate] court may appoint a conservator-trustee or make other protective order for cause as follows:

(1) Minors. Appointment of a conservator-trustee or other protective order shall be made in relation to the estate and affairs of a minor if the court determines that the alleged minor is a minor, that he owns or is entitled to money or property that requires management or protection pending the time when he attains majority which he is unable adequately to provide, or that funds are needed for his support and education and that protection is necessary or desirable to obtain or provide funds.

(2) Disability other than minority. Appointment of a conservator-trustee or other protective order shall be made in relation to the estate and affairs of a person if the court determines that (i) the person is unable to manage his property and affairs effectively because of physical or mental disability, senility, disease, habitual drunkenness, addiction to drugs, imprisonment, compulsory hospitalization, confinement, detention by a foreign power, disappearance, or other reason or combination of reasons; and (ii) the person has property which will be wasted or dissipated unless proper management is provided, or that funds are needed

for the support, care and welfare of the person or those entitled to be supported by him and that protection is necessary or desirable to obtain or provide funds.

Comment

This is the basic section of this part providing for protective proceedings for minors and disabled persons. "Protective proceedings" is a generic term used to describe proceedings to establish conservator-trusteeships and obtain protective orders. "Disabled persons" is used in this section to include a broad category of persons who, for a variety of different reasons, may be unable to manage their own property. Since the problems of property management are generally the same for minors and disabled persons, it was thought undesirable to treat these problems in two separate parts. Where there are differences, these have been separately treated in specific sections.

SECTION 5-402. [Venue.] Venue for proceedings under this Part shall be:

(1) Resident. In the county in this state where the alleged disabled person or minor resides whether or not a guardian has been appointed in another county;

(2) Non-resident. If the alleged disabled person or minor does not reside in this state, in any county where he has property.

(3) Proceedings in more than one county. If proceedings are commenced in more than one county, they shall be stayed except in the county where first commenced until final determination of venue is made there. In the case of a non-resident the protective proceeding first commenced in a proper county shall extend to all of the property of the estate of the protected person in this state.

(4) Transfer of proceeding. Upon petition of any interested person, if it appears to the court at any time after the adjudication of need for protection that it would be for the best interest of the protected person and

his estate, the court, in its discretion, may order the proceedings with files therein transferred to the equivalent court of another county in this state, which court shall proceed as if originally commenced therein.

Comment

Venue for protective proceedings lies in the county of residence (rather than domicile) or, in the case of the non-resident, where his property is located. Unitary management of the property is obtainable through easy transfer of proceedings (section 5-402 (4)) and easy collection of assets by foreign conservator-trustees (section 5-432).

SECTION 5-403. [Protective Proceedings; Jurisdiction of Affairs of Protected Persons.] From the service of notice in a proceeding seeking the appointment of a conservator-trustee or other protective order until termination of the proceeding, the jurisdiction of [probate] court in which the petition is filed over the property and affairs of the alleged disabled person or minor is as follows:

(1) exclusive jurisdiction to determine the need for a conservator-trustee or other protective order until the proceedings are terminated;

(2) exclusive jurisdiction of questions concerning how the assets or income of the protected person which are subject to the laws of this state shall be managed, expended or distributed to or for the use of the protected person or any of his dependents;

(3) concurrent jurisdiction of questions concerning the validity of claims against the person or estate of the protected person, and of questions concerning his title to any property or claim.

Comment

While the bulk of all judicial proceedings involving the conservator-trustee will be in the court supervising the conservator-trusteeship, third parties may bring suit against the conservator-trustee or the protected person

on some matters in other courts. Claims against the conservator-trustee after his appointment are handled in accordance with Section 5-425.

SECTION 5-404. [Permissible Court Orders.] The [probate] court shall have the following powers in respect to the estate and affairs of alleged disabled persons and minors:

(1) Preliminary order. While a petition for appointment of a conservator-trustee or other protective order is pending, the court, after preliminary hearing and without notice to others, shall have power to preserve and apply the property of the alleged disabled person or minor as may be required.

(2) Orders warranted by minority. After hearing and upon determining that grounds for an appointment or other protective order exist in respect to a minor without other disability, the court shall have all those powers over the estate and affairs of the minor which are or might be necessary to secure the maximum advantage of the estate for the benefit of the minor and his dependents.

(3) Orders warranted for disability. After hearing and upon determining that grounds for an appointment or other protective order exist in respect to a disabled person, the court shall have all the powers over the estate and affairs of the disabled person which he could exercise if not disabled and present. These powers include, but are not limited to, power to make gifts, to convey or release the disabled person's contingent and expectant interests in property including inchoate dower, curtesy initiate, and the right of survivorship incident to joint tenancy and tenancy by the entirety, to exercise or release his powers as trustee, personal

representative, custodian for minors, conservator-trustee, or donee of a power of appointment, to enter into contracts, to create revocable or irrevocable trusts of property of the estate which may last longer than his disability or life, to sue for divorce or annulment of his marriage, to exercise the options of the disabled person to purchase securities or other property, to exercise his rights to elect options and change beneficiaries under insurance and annuity policies and to surrender the policies for their cash value, to exercise his right to elect to take against the will of his deceased spouse and to renounce any interest by testate or intestate succession or by inter vivos transfer.

(4) Exercise of powers; manner; limitations upon. The powers of the court enumerated in subsections (2) and (3) may be exercised in response to petition, directly by the court or through a conservator-trustee. The court shall exercise, or direct the exercise of, its authority to exercise or release powers of appointment of which the protected person is donee, to renounce interests, to make gifts exceeding 20 percent of any year's income of the estate of a protected person, or to create trusts of property of the estate of a protected person, and to sue for dissolution of his marriage, only if satisfied, after notice and hearing, that it is in the best interests of the protected person.

Comment

The court, which is supervising a conservator-trusteeship, is given all the powers which the individual would have if he were of full capacity. These powers are given to the court that is managing the protected person's property since the exercise of these powers have important consequences with respect to the protected person's property.

It seems desirable to give the court power to authorize the conservator-trustee to sue for divorce or annulment. An estate plan may become very much

out-of-date due to changes in the family and property of a person who is under disability for an extended period. Changes in tax legislation may also make an old estate plan disadvantageous. It should be possible for the conservator-trustee by express court authorization to sue for divorce of the spouse of a protected person who has abandoned or maltreated a minor or disabled person. Such divorce would cut off the spouse's right to support, forced share and other marital rights in property.

SECTION 5-405. [Notice Requirements Applicable to Various Kinds of Requests.] Unless the court orders additional notice, or unless a request has been filed under Section 5-406, the only persons who need to be notified of hearings on petitions seeking orders, relating to the estate and affairs of an alleged disabled person or minor, other than orders for temporary support, are:

(1) on a petition requesting original determination that grounds as described in Section 5-401 exist for appointment of a conservator-trustee or other protective order: (i) the alleged disabled person or minor, if he has attained the age of 14 years; (ii) his spouse and at least one of his parents if one or more are living; (iii) any guardian; (iv)if there is no guardian, any person who is actually furnishing care for him, or with whom he resides; (v) any governmental agency which is paying him benefits; and (vi) his children or, if none, at least two persons who would be his devisees or heirs if he were dead if so many can be found;

(2) on matters relating to the dissolution of the marriage of the protected person: the person, his spouse, parents and children, his guardian and his conservator-trustee;

(3) on matters relating to the making of gifts exceeding 20 per cent of one year's income of the estate, the creation or modification of trusts of property of the estate of a protected person which may last longer than his minority, disability or life, the exercise or release of general

powers of appointment of which the protected person is donee, and the renunciation of interests: the person, his spouse and children, the persons who would be his devisees and heirs if he were dead, the takers in default of exercise of the power of appointment who are in being and ascertainable, his guardian and his conservator-trustee;

(4) on matters relating to the exercise or release of a special power of appointment of which the protected person is donee: the possible appointees and takers in default of appointment who are in being and ascertainable, his guardian and his conservator-trustee;

(5) on matters relating to the affairs of a protected person as trustee, personal representative, custodian for minors, of conservator-trustee or another: his guardian, his conservator-trustee, any co-fiduciaries of the protected person as to any trust or estate involved and, to the extent directed by the court, persons beneficially interested under the trust, estate, custodianship or conservator-trusteeship involved;

(6) on matters relating to claims against the protected person, or the estate, other than a suit brought by his spouse for dissolution of their marriage: his guardian his conservator-trustee and the claimant;

(7) on a request for allowance of intermediate accounts of the conservator-trustee, questions concerning allowances for the care, support and education of the protected person and his dependents, and questions relating to the administration, investment and disposition of property of the estate: his guardian, his conservator-trustee and, to the extent directed by the court, other interested persons;

(8) on matters relating to the transfer of property of the estate to

another state, termination of a conservator-trusteeship and other matters not enumerated elsewhere in this section: (i) if a minor's estate is involved and the minor is alive and under 21, or if the estate of a disabled person is involved and the cessation of his disability has not been determined, the persons entitled to notice under subsection (1); (ii) if the protected person has died, his personal representative, his guardian, and his conservator-trustee; and (iii) if the former minor has attained majority or the formerly disabled person has been adjudicated to be able to handle his estate and affairs, the formerly protected person, his guardian and his conservator-trustee.

Comment

This section sets out all of those persons who should receive notice with respect to a variety of matters relating to the property of protected persons.

SECTION 5-406. [Protective Proceedings; Request for Notice.] Any interested person who desires to be notified before any order is made in a protective proceeding may file a request for notice together with any fee required by court rule, with the [registrar]. A request is not effective unless it contains a statement showing the interest of the person making it and his address, or that of his attorney, and is effective only as to matters occurring thereafter. Any governmental agency paying or planning to pay benefits to the alleged disabled person or survivor to an interested person in protective proceedings.

Comment

A provision is made for any interested person to obtain notice in a manner similar to that provided for in the administration of decedents' estates. See section 3-207.

SECTION 5-407. [Manner of Giving Notice.]

(a) Initial proceedings. On a petition under section 5-405 (1), the alleged disabled person or minor, his spouse and parents, shall be served personally at least 7 days before the date of hearing if they can be found within the state. Notice to the alleged disabled person or minor, his spouse and parents, if outside the state, and to all other persons may be by registered or certified mail, mailed at least 14 days before the date of hearing. Notice by ordinary mail is sufficient if registered or certified mail service to the addressee is unavailable. If the location of any person entitled to notice is unknown or he cannot be notified by personal service or by mail, the court may authorize service by publication once each week for three consecutive weeks in a newspaper circulating in the county, the first day of publication to be at least 30 days before the date of hearing. Notice of hearing may be waived in writing and is deemed to be waived by any person who signs the petition, except that a waiver by the alleged disabled person or minor, if he is within the state, is not effective unless he attends the hearing or his waiver of notice is confirmed in an interview with the visitor as described in section 5-409. Representation of the alleged disabled person or minor by a guardian ad litem is not necessary if the court has appointed a lawyer to represent him or sent a visitor to interview him.

(b) Subsequent proceedings. A person who has once been served with notice of any hearing in the manner prescribed by subsection (a), has participated in any hearing, or is serving as conservator-trustee may be notified of any subsequent hearing by ordinary mail, or, if his location is unknown or he cannot be notified by personal service or by mail, by publication once in a newspaper circulating in the county, the mailing or publication to be at least 14 days before the date of hearing. Other persons may be notified of any subsequent hearing in the manner prescribed in subsection (a).

Comment

Once a person has been given legal notice or has otherwise participated in protective proceedings, a more informal procedure is provided for subsequent notifications.

SECTION 5-408. [Protective Arrangements and Single Transactions Authorized.] When it has been established in a proper proceeding that a basis exists as described in section 5-401, for affecting the property and affairs of a protected person, the court, without appointing a conservator-trustee, may authorize or direct any transaction necessary or desirable to achieve any security, service, or care arrangement meeting the foreseeable needs of the protected person. Protective arrangements include, but are not limited to, payment, delivery, deposit or retention of funds or property, sale, mortgage, lease or other transfer of property, entry into an annuity contract, a contract for life care, a deposit contract, a contract for training and education, or addition to or establishment of a suitable trust. Before approving a protective arrangement under this section, the court shall consider the interests of creditors and dependents of the protected person and, in view of his disability, whether the protected person needs the continuing protection provided by the conservator-trustee.

Comment

It is important that the provision be made for the approval of single transactions or the establishment of protective arrangments as alternatives to full conservator-trusteeship. Under present law, a guardianship often must be established simply to make possible a valid transfer of land or securities. This section eliminates the necessity of the establishment of long-term arrangements in this situation.

SECTION 5-409. [Original Petition for Appointment or Protective Order.] (a) The alleged disabled person or minor, any person who is interested in his estate, affairs or welfare including his guardian or custodian, or any person

who would be adversely affected by lack of effective management of his property and affairs may petition for the appointment of a conservator-trustee or for other appropriate protective order.

(b) The petition shall set forth to the extent known, the interest of the petitioner; the name, age, residence and address of the alleged disabled person or minor; the name and address of his guardian, if any; a general statement of his property with an estimate of the value thereof, including any compensation, insurance, pension or allowance to which he is entitled; and the reason why appointment of a conservator-trustee or other protective order is necessary.

(c) If the appointment of a conservator-trustee is proposed, the petition also shall set forth the name and address of the person whose appointment is sought and the basis of his priority for appointment.

Comment

The petition in a protective proceeding will normally be a simple document.

SECTION 5-410. [Procedure Concerning Hearing and Order on Original Petition.]

(a) For minor. Upon receipt of a petition for appointment of a conservator-trustee or other protective order because of minority, the court shall set a date for hearing on the matters alleged in the petition. Unless the minor has counsel of his own choice, or counsel chosen by a natural or adoptive parent with whom he resides, the court shall appoint a lawyer to represent him who shall have the powers and duties of a guardian ad litem. All persons entitled to notice are entitled to attend the hearing and to be heard, but the hearing may be conducted

informally unless a person entitled to be heard requests that a full record be made. After hearing, the court, upon finding that grounds for the appointment of a conservator-trustee or other protective order have been established, shall make an appointment or other appropriate protective order.

(b) For disabled persons.

(1) Date for hearing. Upon receipt of a petition for appointment of a conservator-trustee or other protective order for an alleged disabled person, the court shall set a date for hearing on the matters alleged in the petition.

(2) Persons appointed. Unless the alleged disabled person has counsel of his own choice, the court shall appoint a lawyer to represent him who shall have the powers and duties of a guardian ad litem. If the alleged disability is physical or mental disability, senility, disease, habitual drunkenness, addiction to drugs, or spendthrift tendencies, the alleged disabled person, if within the state, shall be examined by a physician appointed by the court, preferably a physician who is not connected with any institution in which the alleged disabled person is a patient or is detained. If the disabled person can be found within the state and is not expected to attend the hearing, the court shall send a visitor to interview him; in other cases it may do so. The visitor shall be a lawyer and one who is a judge, officer, employee or a special appointee of the court. He may be the lawyer appointed by the court to represent the alleged disabled person, but not counsel retained by or for him privately.

SECTION 5-411. [Significance of Adjudication Concerning Need for Protection.] Adjudications under this Part shall have no bearing on the issue of competence of the alleged disabled person to care for his own person.

Comment

Many persons who are in need of a conservator-trusteeship or other protective arrangement may be completely competent insofar as the care of their own person is concerned.

SECTION 5-412. [Conservator-trustees.] The court may appoint a natural person or a corporation with general power to serve as trustee, as conservator-trustee of the property and affairs of the protected person. The appointment of a conservator-trustee vests in him title to all property, money and choses in action of the protected person, presently held or thereafter acquired, including title to any property theretofore held for the protected person by custodians or attorneys in fact. The appointment of a conservator-trustee is not a transfer or alienation within the meaning of the provisions of any federal or state statute or regulation, insurance policy, pension plan, contract, will or trust instrument, imposing restrictions upon or penalties for transfer or alienation by the protected person of his rights or interest. A conservator-trustee holds title to property under a statutory power and shall utilize powers conferred by this Part to perform the services, exercise the discretion and discharge the duties herein described for the best interests of the protected person and his dependents. In addition to filing fiduciary tax returns for the trust, the conservator-trustee shall be deemed to be the statutory agent of the protected person for the purpose of filing his individual tax returns.

Comment

This section permits independent administration of the property of protected persons once the appointment of a conservator-trustee has been obtained. Any interested person may require the conservator-trustee to account in accordance with section 5-416. The term conservator-trustee is used in order to emphasize that this fiduciary is indeed a trustee. As such, he holds title to the property of the protected person. The appointment of a conservator-trustee is a serious matter and the court must select him with great care. Once appointed, he is free to carry on his fiduciary responsibilities. If he should default in these in any way, he may be made to account to the court.

SECTION 5-413. [Priorities for Appointment as Conservator-trustee.] The following, in the order listed, are entitled to priority for appointment as conservator-trustee for a protected person:

(1) a conservator-trustee, guardian of property or other like fiduciary appointed by the appropriate court of any jurisdiction listed in section 4-101 (1) in which the protected person resides;

(2) a person or corporation nominated by the protected person if he has passed his eighteenth birthday and has, in the opinion of the court, sufficient mental capacity to make an intelligent choice;

(3) his spouse;

(4) his parents;

(5) a person or corporation nominated by the will of a deceased parent;

(6) his children;

(7) the persons who would be his devisees or heirs if he were dead;

(8) a person or corporation nominated by a person who, or institution, organization, or public agency which, is caring for him;

(9) a person or corporation nominated by a governmental agency which is paying benefits to him.

A person in priorities (1), (3), (4), (6), or (7) may nominate in writing a person or corporation to serve in his stead. As among persons with equal priority, the court shall select the one who is best qualified of those willing to serve. The court may, for good cause, pass over a person with priority and appoint a person with less priority or no priority.

Comment

A flexible system of priorities for appointment as conservator-trustee has been provided. A parent may name a conservator-trustee for his minor children in his will if he deems this desirable.

SECTION 5-414. [Bond.] The court may require a natural person appointed conservator-trustee to furnish a bond conditioned upon faithful discharge of all duties of the trust according to law, with sureties as it shall specify. The bond will, unless otherwise directed, be in the amount of the aggregate capital value of the property of the estate in his control plus one year's estimated income but less the value of securities deposited with a bank under arrangements requiring an order of the court for their removal, and the value of any land which the fiduciary, by express limitation of power, lacks power to sell or convey without court authorization. The court may, in lieu of sureties on a bond, accept other security for the performance of the bond, including a pledge of securities or a mortgage of land.

Comment

The bond requirements for conservator-trustees are somewhat more strict than the requirements for personal representatives. Cf. Section 3-304.

SECTION 5-415. [Terms and Requirements of Bonds.] The following requirements and provisions shall apply to any bond required under section 5-414:

(1) Joint and several liability. Unless otherwise provided by the terms of the approved bond, sureties shall be jointly and severally liable with the conservator-trustee and with each other.

(2) Enforcing liability of surety.

(i) Execution of bond is consent to suit. By executing an approved bond of a conservator-trustee, the surety consents to the jurisdiction of the court which issued letters to the primary obligor in any proceeding pertaining to the fiduciary duties of the conservator-trustee and naming the surety as a party defendant, provided that notice of the proceeding is delivered to the surety or mailed to him by ordinary mail at his address as listed with the court where the bond is filed.

(ii) Proceeding on bond. On petition of a successor conservator-trustee or any interested person, a proceeding may be initiated against a surety for breach of the obligation of the bond of the conservator-trustee.

(iii) Bond not void upon first recovery. The bond of the conservator-trustee is not void after the first recovery but may be proceeded upon from time to time until the whole penalty is exhausted.

(3) Limitation of action on bond. No action or proceeding shall be commenced against the surety on any matter as to which an action or proceeding against the primary obligor is barred by adjudication or limitation.

Comment

Once a bond has been required, its terms are much the same as those for a bond of a personal representative. Cf. Section 3-307.

SECTION 5-416. [Inventory and Accounting.] Every conservator-trustee shall prepare and file with the appointing court a complete inventory of the estate of the protected person together with his oath or affirmation that it is complete and accurate so far as he is informed. He shall provide a copy thereof to the protected person if he can be located, has reached his fourteenth birthday and has sufficient mental capacity to understand these matters, and to any parent or guardian with whom the protected person resides. The conservator-trustee shall keep suitable records of his administration and exhibit the same on request of any interested person. Every conservator-trustee shall account to the court for his administration of the trust upon his resignation or removal, upon the termination of the protected person's disability and at other times as the court may direct. On termination, in lieu of accounting to the court, he may account to the former protected person or his personal representative. Subject to appeal or vacation within the time permitted, an order, after notice and hearing, allowing an intermediate account of a conservator-trustee is conclusive as to his liabilities concerning the matters considered in connection therewith and an order, after notice and hearing, allowing a final account is conclusive as to all previously unsettled liabilities of the conservator-trustee to the protected person or his successors relating to the conservator-trusteeship. The court may require, at the time of making or filing any account, a conservator-trustee to submit to a physical check of the property of the estate in his control, to be made in any manner the court may specify.

Comment

Interested persons are entitled to copies of the inventory of the estate of the protected person. They may appeal to the court if there is any question as to the management of the trust. A final accounting is required upon termination.

The last sentence of the section is included specifically to comply with regulations of the Veterans' Administration.

SECTION 5-417. [Petitions for Orders Subsequent to Appointment.]

(a) Any person interested in the welfare of a person for whom a conservator-trustee has been appointed may file a petition in the appointing court for an order (i) requiring bond or security or additional bond or security, (ii) requiring an accounting for the administration of the trust, (iii) directing distribution, (iv) removing the conservator-trustee and appointing a temporary or successor conservator-trustee, or (v) granting other appropriate relief.

(b) A conservator-trustee may petition the appointing court for instructions concerning his fiduciary responsibility.

(c) On hearing after notice, the court may give appropriate instructions or make any order needed.

Comment

Once a conservator-trustee has been appointed, the court supervising the trust acts only upon the request of some moving party.

SECTION 5-418. [Duties of Conservator-trustee in Administration.] In the administration of the trust and the exercise of his powers, a conservator-trustee is under a duty to exercise the care and skill of a man of ordinary prudence. If the conservator-trustee has, or procures his appointment as a conservator-trustee by representing that he has, greater skill than a man of ordinary prudence, he is under a duty to exercise that skill. He shall supervise carefully the conduct of agents to whom he delegates the performance of acts of administration and he shall not delegate to others matters which the conservator-trustee can reasonably be required to perform personally. A breach of any duty

imposed by this Code, including the duty to refrain from transactions involving a division of his loyalties without approval of the court, shall not impair the effectiveness of any act of a conservator-trustee to the detriment of a third party who relies upon the effectiveness of the act without actual knowledge of the breach.

Comment

The conservator-trustee owes the same duties to the protected person that a trustee of a private trust owes to his beneficiary.

SECTION 5-419. [Powers of Conservator-trustee in Administration.]

(a) In general. A conservator-trustee has all of the powers enumerated herein and any additional powers conferred by law on trustees in this state, except as limited under section 5-421. In addition, unless a testamentary or other guardian has been appointed, a conservator-trustee of the estate of an unmarried minor under the age of 18 years, who has no parent whose rights as parent have not been terminated, has the duties and powers of a testamentary guardian described in section 5-203.

(b) Investment power. A conservator-trustee has power, notwithstanding statutes restricting investments by fiduciaries, without court authorization or confirmation, to invest and reinvest funds of the estate as would a prudent man of discretion and intelligence who is seeking a reasonable income and the preservation and prudent growth of his capital.

(c) Other powers in administration. A conservator-trustee, acting reasonably in efforts to accomplish the purpose for which he was appointed, may act without court authorization or confirmation, as indicated in the following subsections:

(1) to collect, hold and retain assets of the estate until, in the judgment of the conservator-trustee, disposition of the assets should be made;

(2) to receive additions to the assets of the estate;

(3) to continue or participate in the operation of any business or other enterprise, and to effect incorporation, dissolution, or other change in the form of the organization of the business or enterprise;

(4) to acquire an undivided interest in an estate asset in which the conservator-trustee, in any trust capacity, holds an undivided interest;

(5) to invest and reinvest trust assets in accordance with subsection (b);

(6) to deposit estate funds in a bank;

(7) to acquire or dispose of an asset, for cash or on credit, at public or private sale; and to manage, develop, improve, exchange, partition, change the character of, or abandon an estate asset or any interest therein; and to encumber, mortgage or pledge an estate asset for a term within or extending beyond the term of the conservator-trusteeship in connection with the exercise of any power vested in the conservator-trustee;

(8) to make ordinary or extraordinary repairs or alterations in buildings or other structures, to demolish any improvements, to raze existing or erect new party walls or buildings;

(9) to subdivide, develop, or dedicate land to public use; to make or obtain the vacation of plats and adjust boundaries; or to adjust differences in valuation on exchange or to partition by giving or receiving considerations; or to dedicate easements to public use without consideration.

(10) to enter for any purpose into a lease as lessor or lessee with or without option to purchase or renew for a term within or extending beyond the term of the conservator-trusteeship;

(11) to enter into a lease or arrangement for exploration and removal of minerals or other natural resources or enter into a pooling or unitization agreement;

(12) to grant an option involving disposition of an estate asset, or to take an option for the acquisition of any asset;

(13) to vote a security, in person or by general or limited proxy;

(14) to pay calls, assessments, and any other sums chargeable or accruing against or on account of securities;

(15) to sell or exercise stock subscription or conversion rights; to consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise;

(16) to hold a security in the name of a nominee or in other form without disclosure of the conservator-trusteeship so that title to the security may pass by delivery, but the conservator-trustee is liable for any act of the nominee in connection with the stock so held;

(17) to insure the assets of the estate against damage or loss, and the conservator-trustee against liability with respect to third persons;

(18) to borrow money to be repaid from estate assets or otherwise; to advance money for the protection of the estate or the protected person, and for all expenses, losses, and liability sustained in the administration of the trust or because of the holding or ownership of any estate assets, for which advances with any interest the conservator-trustee has a lien on the estate as against the protected person;

(19) to pay or contest any claim; to settle a claim by or against the estate or the protected person by compromise, arbitration, or otherwise; and to release, in whole or in part, any claim belonging to the estate to the extent that the claim is uncollectible;

(20) to pay taxes, assessments, compensation of the conservator-trustee, and other expenses incurred in the collection, care, administration and protection of the estate;

(21) to allocate items of income or expense to either estate income or principal, as provided by law, including creation of reserves out of income for depreciation, obsolescence, or amortization, or for depletion in mineral or timber properties;

(22) to pay any sum distributable to a protected person or a dependent of the person who is a minor or incompetent, without liability to the conservator-trustee, by paying the sum to the distributee or by paying the sum for the use of the distributee either to his guardian or if none, to a relative or other person with custody of his person;

(23) to effect distribution of property and money in divided or undivided interests and to adjust resulting differences in valuation;

(24) to employ persons, including attorneys, auditors, investment advisors, or agents, to advise or assist the conservator-trustee in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary;

(25) to prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of estate assets and of the conservator-trustee in the performance of his duties; and

(26) to execute and deliver all instruments which will accomplish or facilitate the exercise of the powers vested in the conservator-trustee.

Comment

Subsection (b) is a paraphrase of section 4 (e) of the Uniform Gifts to Minors Act. The clause in that section relating to retention of securities is included in subsection (c).

Subsection (c) is Section 3 of Uniform Trustee's Powers Act, modified to reflect the peculiar situation of the conservator-trustee.

SECTION 5-420. [Duties and Powers of Conservator-trustee in Distribution.]

(a) In general. A conservator-trustee may distribute or disburse funds or properties of the estate without court authorization or confirmation in accordance with this section.

(b) Support of minor with guardian. A conservator-trustee of the estate of a minor ward shall pay income and principal as needed from the estate (i) to the guardian for his expenses incurred on behalf of the minor ward, including the reasonable value of room and board furnished personally by the guardian; and (ii) to third persons, the amount of their charges for clothing, room and board, professional care, training, education or articles provided by them to the minor ward by order of the guardian. The conservator-trustee shall not be surcharged for sums paid to the guardian or third persons unless (i) the conservator-trustee has reason to know that the guardian is receiving undisclosed personal financial benefit as a result of the payments; or (ii) the amount of the payments is clearly

in excess of the amount reasonably needed for the minor ward's support and education considering the size of the estate.

(c) Support of minor without guardian. A conservator-trustee of the estate of a minor who has no guardian shall apply sums as needed from income and principal of the estate to provide necessary or desirable support, social and other training, and education for the minor which cannot be made available to the minor by other persons legally obligated to provide for him. The conservator-trustee may initiate actions or proceedings to compel persons legally obligated to support the minor, to perform their duty and to secure reimbursement to the estate of sums expended to support the minor.

(d) Support of disabled person. A conservator-trustee of the estate of a disabled person shall apply sums from income and principal to provide necessary support, care, protection and rehabilitation for the disabled person, giving consideration to the following: (i) the support and care of the disabled person during the probable period of the trust; (ii) the opinion of a duly appointed guardian concerning his ward's needs; and (iii) the needs of persons dependent upon the disabled person.

(e) Support for dependents of protected persons. To the extent the estate of a protected person is adequate to meet his probable needs for the year next ensuing, income and principal of the estate not needed for his support during the period may be paid or applied for the maintenance and support of persons legally dependent upon the protected person and, with the approval of the court, for the maintenance and support of other persons who had been maintained and supported in whole or in part by the protected person prior to the appointment of a conservator-trustee.

(f) Small gifts. If the estate is ample to provide for the purposes implicit in the distributions authorized by the proceding subsections, a conservator-trustee for a protected person has power to make gifts to charity and other objects as the protected person might have been expected to make, in amounts which do not exceed in total for any year 20 percent of the income from the estate.

(g) Other distributions.

(1) On attainment of majority. When a protected minor who has not been adjudged unable properly to manage his property and affairs for reasons other than his minority attains his majority, his conservator-trustee, after meeting all prior claims and expenses of administration, including reasonable compensation for his services and payment of sums due any guardian, shall pay over and distribute all funds and properties to the former protected person as soon as possible. The distribution normally shall be in kind.

(2) On cessation of disability. When the conservator-trustee is satisfied that the disability of the disabled person has ceased or when the court has found in a proceeding under section 5-531 that the disability has ceased, the conservator-trustee, after meeting all prior claims and expenses of administration, including reasonable compensation for his services and payment of sums due any guardian, shall pay over and distribute all funds and properties to the former protected person as soon as possible. The distribution normally shall be in kind.

(3) On death. When a protected person dies, the conservator-trustee shall deliver to the [probate] court any will of the deceased protected person which may have come into his possession, inform the executor or a

beneficiary named therein that he has done so, and retain the estate for delivery to a duly appointed personal representative of the decedent.

(4) On other termination. If a conservator-trusteeship is terminated for reasons other than the attainment of majority, cessation of disability, or death of the protected person, the conservator-trustee shall distribute the estate in accordance with the order of the court terminating the conservator-trusteeship.

Comment

This section sets out those situations wherein the conservator-trustee may distribute property or disburse funds during the continuance of or on termination of the trust.

SECTION 5-421. [Enlargement or Limitation of Powers of Conservator-trustee.] Subject to the restrictions in sections 5-404 (4), the court may confer on a conservator-trustee at the time of appointment or later, in addition to the powers conferred on him by sections 5-419 and 5-420, any power which the court itself could exercise under sections 5-404 (2) and 5-404 (3). The court may, at the time of appointment or later, limit the powers of a conservator-trustee otherwise conferred by sections 5-419 and 5-420, or previously conferred by the court, and may at any time relieve him of each limitation. If the court limits any power conferred on the conservator-trustee by section 5-419 or section 5-420, the limitation shall be endorsed upon his letters of appointment.

Comment

This section makes it possible to appoint a fiduciary whose powers are limited to part of the estate or who may conduct important transactions, such as sales and mortgages of land, only with special court authorization. In the latter case, a conservator-trustee would be in much the position of a guardian of property under the law currently in force in most states, except that he would

have title to the property. The purpose of giving conservator-trustees title as trustees is to ensure that the provisions for protection of third parties made in section 5-420 have full effect. Probably the Veterans Administration will insist that, when it is paying benefits to a minor or disabled, the letters of conservator-trusteeship limit powers to those of a guardian under the Uniform Veterans' Guardianship Act and require the conservator-trustee to file annual accounts.

The court may not only limit the powers of the conservator-trustee but may expand his powers so as to make it possible for him to act as the court itself might act.

SECTION 5-422. [Liability for Breach of Fiduciary Duty.] The liability of a conservator-trustee to the protected person or his estate for breach of fiduciary duty is compensatory only. He is not liable for losses or failure to make profits which are not caused by the breach of fiduciary duty.

Comment

Under a good many decisions a trustee or guardian who fails to invest is liable to the beneficiary or ward for interest at a rate in excess of that which could have been earned by proper investment. It is usually held that a fiduciary who fails to earmark trust property, wrongfully delegates control over it, or purchases his own property for the trust is liable for losses which occur to that property even though there is no casual connection between the breach of duty and the loss. This section would overrule both lines of decision.

SECTION 5-423. [Recording of Letters and Orders.] Letters of conservator-trusteeship may be recorded in the land records of the county of residence of the protected person and of any other county where there is land in which the estate has an interest and, when so recorded, shall have the same effect as notice as would recording of a conveyance from the protected person to the conservator-trustee. Orders of the court modifying or terminating letters of conservator-trusteeship or authorizing the making of a conveyance or the doing of any other act with respect to interests in land constituting part of the estate may be recorded in like manner and with like effect.

Comment

In order to protect the chain of title to land of a protected person provision is made for recordation of letters and court orders affecting the conservator-trusteeship.

SECTION 5-424. [Transactional Disabilities of Person for Whom Conservator-trustee is Appointed.]

(a) During Conservator-trusteeship. After appointment of conservator-trustee and until termination of the conservator-trusteeship, the protected person is incapable of making a gift, conveyance, encumbrance or charge on his property by any contract, other than a contract for necessaries for himself or his dependents, unless the gift, conveyance, encumbrance, charge or contract is confirmed by the court or the conservator-trustee who has power to make the gift, conveyance, encumbrance, charge or contract. The protected person lacks capacity to sue or be sued, to exercise,except by will, or release a power of appointment to exercise powers as trustee, conservator-trustee, personal representative, custodian for a minor or attorney in fact, and to create, modify or terminate a trust, without authorization or confirmation by the court. The existence of a conservator-trusteeship has no bearing on the capacity of the protected person to marry.

(b) Incident to protective arrangement. Action by the court under section 5-408 without appointment of a conservator-trustee does not restrict the capacity of the protected person, except insofar as restriction is imposed by the order.

(c) Confirmation and ratification by protected person. After the removal of disability or the attainment of majority the former protected person may ratify or confirm his own previous acts.

(d) Confirmation and ratification by court. The court may ratify or confirm

any transaction entered into or act done by a protected person, after his death or other termination of his minority or disability, as well as before.

Comment

There is a considerable confusion in the cases over the extent to which an adjudication of disability deprives the disabled person of capacity to bind himself and his property during a lucid interval. It is desirable that the law be definite on this point. As the grounds for an appointment set forth in section 5-401, contemplate that there may be a conservator-trusteeship for persons who are perfectly sane and who may have no knowledge of their adjudication (e.g., missing persons and persons imprisoned or detained in a foreign country) it is necessary to make provision for validation by confirmation at any time of acts done by them.

SECTION 5-425. [Claims.] The conservator-trustee shall perform all contracts and pay or compromise all obligations entered into or incurred by the protected person prior to the appointment under section 5-410, and all claims for torts committed by the protected person before or after the appointment, unless there appears to be a defense. The conservator-trustee shall be substituted for the protected person as defendant in any action or suit commenced prior to appointment and pending at the time of appointment, and shall defend or compromise the same. After appointment, any proceeding for annulment or divorce, or to enforce a contract, obligation or claim against the protected person, the estate or the conservator-trustee in his fiduciary capacity shall be, by claim, filed in the conservator-trusteeship proceeding unless the court in which that proceeding is pending authorizes prosecution of a separate action or suit. If the conservator-trustee is a claimant or otherwise interested in a claim the court may remove him or appoint a special conservator-trustee for the purpose of defending the claim. The court may, in its discretion, authorize a jury trial of the claim if the claimant would have been entitled to a jury trial in the absence of

conservator-trusteeship proceedings. Writs of execution and garnishment may not be levied on property of the estate and it may not be reached by judicial process issued other than in the conservator-trusteeship proceeding. When the court allows the claim in a conservator-trusteeship proceeding or a judgment is rendered against the protected person or the conservator-trustee in his fiduciary capacity, the court may direct the conservator-trustee to perform the contract or pay the obligation or judgment unless to do so would reduce the estate to an amount insufficient to support the protected person and his dependents. In this event, the court may defer payment and may direct the conservator-trustee to give the claimant a mortgage or other security on the estate or part of it to secure payment of the claim at some future date.

Comment

This section establishes the procedure for enforcing a claim against the conservator-trustee in his fiduciary capacity with reference to the estate of the protected person. The conservator-trustee's personal liability is provided for in section 5-426.

SECTION 5-426. [Individual Liability of Conservator-trustee.]

(a) In general. The individual liability of a conservator-trustee to third parties, as distinguished from his fiduciary accountability to the estate arising from the administration of the estate, is that of an agent for a disclosed principal.

(b) Contract liability. A conservator-trustee is not individually liable on any contract property entered into in his fiduciary capacity in the course of administration of the estate unless he expressly agrees to be.

(c) Tort liability. The conservator-trustee is not individually liable for obligations arising from possession or control of property of the estate or for torts committed in the course of administration of the estate unless he is personally at fault.

(d) Liability of estate. Claims based upon contracts, obligations and torts of the types described in subsections (b) and (c) may be allowed against the estate whether or not the conservator-trustee is individually liable therefor.

(e) Consolidation of suits. The individual liability of the conservator-trustee to third parties arising from the administration of the estate may be determined in the same action, suit or court proceeding in which a claim against the estate is considered.

(f) Notice. When there is doubt whether a claim should be allowed against the estate or against the conservator-trustee as an individual, or both, a court in which a proceeding or action to enforce the claim is pending shall direct that notice be given to dependents or major creditors of the protected person whose interests will be affected by the result and give them an opportunity to be heard.

(g) Individual liability. When the court allows a claim against the conservator-trustee in his individual capacity, the allowance has the same effect as a judgment against him individually.

Comment

In the absence of statute a fiduciary owner of property is personally liable on contracts entered into in his fiduciary capacity unless he expressly excludes personal liability in the contract. He is commonly personally liable for obligations stemming from ownership or possession of the property (e.g., taxes) and for torts committed by servants employed in the management of the property. The claimant ordinarily can reach the fiduciary property only after exhausting his remedies against the fiduciary as an individual and then only to the extent that the fiduciary is entitled to indemnity from the property. This and the following sections are designed to make the estate a quasi-corporation for purposes of such liabilities. The conservator-trustee would be personally liable only if an agent for a corporation would be under the same circumstances, and the claimant has a direct remedy against the quasi-corporate property.

SECTION 5-427. [Advertising for Claims.] A conservator-trustee may give notice by advertisement, in the manner prescribed in section 5-402, to

claimants against the protected person and the estate. All claims existing when the advertisement is first published will be barred unless presented to the conservator-trustee or filed in the conservator-trusteeship proceeding within four months after the first publication. The provisions of the part of this Code relating to administration of decedents' estates govern types of claims barred, counterclaims, and presentation of claims to the conservator-trustee or court under this section and shall be read for this purpose with any changes in terminology as are appropriate to their application to conservator-trusteeship proceedings.

Comment

Notice with regard to claims is in accordance with the procedure established for claims against decedents' estates.

SECTION 5-428. [Compensation and Expenses.] If he is not otherwise compensated for his services in any of these capacities, the court may allow reasonable compensation from the estate to any visitor, lawyer, physician, temporary conservator-trustee or special conservator-trustee appointed in a conservator-trusteeship proceeding. A conservator-trustee is entitled to indemnity from the estate for his actual and necessary expenses, including fees paid to attorneys, in managing the estate and the affairs of the protected person. A conservator-trustee who is a spouse, parent or child of the protected person is not entitled to compensation for his services. Any other conservator-trustee is entitled to reasonable compensation.

Comment

As in the case of other fiduciaries under the Code compensation is based on what is reasonable.

SECTION 5-429. [Protection of Third Parties.]

(a) Transactions ordered by court. Notwithstanding that the alleged disabled person or minor was not in fact disabled or a minor, that the form, content or verification of any petition was defective, or that any notice required by law was omitted or defectively served, every disposition and encumbrance of any interest, and every exercise of any power, made or directed by the court while it has jurisdiction of the estate and affairs as described in section 5-403, shall bind the alleged disabled person or minor and all persons claiming through him, to the same extent as if it had been done by him while an adult and not disabled. As between a purchaser who relies on the record and the protected person, and all persons who claim through them, the recording of letters of conservator-trusteeship or of an order of the court authorizing or confirming a transaction, creates a conclusive presumption that the court had jurisdiction to issue the letters or orders.

(b) Parties dealing with conservator-trustee. With respect to a third party dealing with or assisting a conservator-trustee while the court appointing the fiduciary has jurisdiction as described in section 5-403, the existence of all powers conferred on conservator-trustees by sections 5-419 and 5-420 and their proper exercise by the conservator-trustee may be assumed without inquiry. The third party is not bound to inquire whether the conservator-trustee has power to act or is properly exercising the power; and a third party, without knowledge that the conservator-trustee is exceeding his powers or improperly exercising them is fully protected in dealing with the conservator-trustee as if the conservator-trustee possessed and properly exercised the powers he purports to exercise. A third person is not bound to assure the proper application of money or assets paid or delivered to a conservator-trustee.

Comment

Subsection (b) is section 7 of the Uniform Trustees' Powers Act, modified to fit the situation of the conservator-trustee. It is not incumbent upon third parties to check the scope of the powers of the conservator-trustee. As to land, recordation provides the necessary knowledge of any limitations on the conservator-trustee's powers. As to securities, the Uniform Commercial Code makes it clear that third parties need not inquire as to any limitations on the powers of the fiduciary. Subsection (b) makes it possible for the third parties to deal with the conservator-trustee with respect to tangible personal property without having to investigate the extent of his powers.

SECTION 5-430. [Death, Resignation or Removal of Conservator-trustee.] The court may, after notice and hearing, accept the resignation of a conservator-trustee or remove him for good cause. After his death, resignation or removal, the court may appoint another conservator-trustee. A conservator-trustee so appointed has the same title and powers as one originally appointed for the protected person.

Comment

Self-explanatory.

SECTION 5-431. [Termination of Proceeding.] The protected person, his personal representative, the conservator-trustee or any other interested person may petition the court to terminate the conservator-trusteeship proceeding. The court, upon determining, after notice and hearing, that the minority or disability of the protected person has ceased, that he is presumptively dead, or that he has died, shall terminate the conservator-trusteeship proceeding. Upon termination, title to the estate property shall pass to the former protected person or to his successors. A protected person seeking termination is entitled to the same rights, protections, and procedures as in an original proceeding for a protective order or appointment of a conservator-trustee. If a protected person

resides in or changes his residence to another jurisdiction, the court may authorize the conservator-trustee to transfer all movable property of the estate to a conservator-trustee, guardian of property or like fiduciary appointed by the appropriate court of the state of residence of the protected person. The transfer will terminate the proceedings if the estate does not include any interest in land in this state.

Comment

Any interested person may seek the termination of a conservator-trusteeship when there is some question as to whether the trust is still needed. In some situations (e.g., the individual who returns after being missing) it may be perfectly clear that he is no longer in need of a conservator-trusteeship.

SECTION 5-432. [Powers of Foreign Fiduciaries.] When no conservator-trusteeship proceeding is pending in this state, a conservator-trustee, guardian of property or other like fiduciary appointed by the appropriate court of another jurisdiction listed in section 4-101 to manage the property of a protected person who is a resident of that jurisdiction may collect, receipt for, and take possession of money due, tangible personal property, or an instrument evidencing a debt, obligation, stock or chose in action, the estate, located in this state, and remove it to the other jurisdiction. No person who, before receiving actual notice of the pendency of a conservator-trusteeship proceeding in this state, has changed his position by relying on the powers herein granted shall be prejudiced by the pendency of the proceeding. Nothing in this section shall be deemed to derogate from the powers conferred by Article IV of this Code.

Comment

Section 5-413(a) gives a foreign conservator-trustee or guardian of property, appointed by the state where the disabled person resides, first priority for appointment as conservator-trustee in this state. A foreign conservator-trustee may easily obtain any property located in this state and take it to the residence of the protected person for management.

ARTICLE VI

NON-PROBATE TRANSFERS

Part 1

Multiple-Party Accounts

SECTION 6-101. [Definitions.] As used in this part, unless the context otherwise requires:

(1) "account" means a contract of deposit of funds between depositors and financial institutions, and includes checking and savings accounts, certificates of deposit, share accounts and other like arrangements.

(2) "beneficiary" means any person named a beneficial owner when an account provides that it is payable to a trustee for the beneficial owner.

(3) "demand" means a request for withdrawal or for payment according to check or order in compliance with all conditions of the account and regulations of the financial institution.

(4) "financial institution" means any organization authorized to do business in this state under state or federal laws relating to financial institutions, including, without limitation, banks and trust companies, savings banks, building and loan associations, savings and loan companies or associations, and credit unions.

(5) A "multiple-party account" is an account in the names of two or more persons either or all of whom may make withdrawals or an account in the name of one or more parties as trustee for one or more beneficiaries even though no mention is made of a right of withdrawal by a beneficiary.

Accounts established for deposit of funds of a partnership, joint venture or other association for business purposes, or accounts controlled by two or more persons as the duly authorized agents or trustees for a corporation, unincorporated association, charitable or civic organization or any trust (except trusts of deposits evidenced only by the form of the deposit) are excluded from the meaning of the term and from the provisions of this part.

(6) "net contribution" of a party to a multiple-party account as of any given time is the sum of all deposits made by or for him, less all withdrawals made by or for him which have not been paid to or applied to the use of any other party, plus a pro rata share of any interest or dividends included in the current balance. It includes, in addition, any deposit life insurance proceeds added to the account by reason of the death of the party whose net contribution is in question.

(7) "party" means a person who, alone or in conjunction with another, by the terms of the account or as a surviving beneficiary of a trust account, has a present right of withdrawal in a multiple-party account. Unless the context indicates otherwise, it includes a guardian, conservator-trustee, personal representative, or assignee, including an attaching creditor, of a party. It also includes a person identified as a trustee of an account for another whether or not a beneficiary is named, but it does not include any named beneficiary unless he has a present right of withdrawal.

(8) "payment" of sums on deposit includes withdrawal and payment on check or other directive of a party.

(9) "proof of death" includes a death certificate or other statement issued by an appropriate official which indicates that a named person is dead.

(10) "sums on deposit" means the balance payable on a multiple-party account including interest, dividends, and in addition any deposit life insurance proceeds added to the account by reason of the death of a party.

(11) "withdrawal" includes payment to a third person pursuant to check or other directive of a party.

Comment

This and the sections which follow are designed to reduce certain questions concerning many forms of joint accounts and the so-called Totten trust account. No effort is made to deal with so-called "pay-on-death" accounts, for the purpose of persons desiring a pay-on-death account may be achieved by use of the trust account transaction described in this Part.

As may be seen from examination of the sections that follow, the "net contribution" concept defined by subsection (6) has no application to the financial institution-depositor relationship. Rather, it is relevant only to controversies that may arise between parties to a multiple-party account.

SECTION 6-102. [Presumptions of Ownership. Parties, Beneficiaries; General.] The presumptions created by sections 6-103 through 6-107 concerning beneficial ownership as between parties, or as between parties and beneficiaries of multiple-party accounts are relevant only to controversies between these persons and their creditors and other successors, and shall have no bearing on the rights of withdrawal of such persons as determined by the terms of account contracts. The provisions of sections 6-112 to 6-117 govern the liability of financial institutions who make payments pursuant thereto, and their set-off rights.

Comment

This section organizes the sections which follow into those dealing with the relationship between parties to multiple-party accounts, on the one hand, and those relating to the financial institution-depositor (or party) relationship, on the other. By keeping these relationships separate, it is possible to achieve the degree of definiteness that financial institutions must expect in order to be induced to offer multiple-party accounts for use by their customers, while preserving the opportunity for individuals involved in multiple-party accounts to show various intentions that may have attended the original deposit, or any unusual transactions affecting the account thereafter. The separation thus permits individuals using accounts of the type dealt with by these sections to do so without involving themselves in unconsidered and unwanted definiteness in regard to their relationship with each other. In a sense, the approach is to implement a layman's wish to "trust" a co-depositor by leaving questions that may arise between them essentially unaffected by the form of the account.

SECTION 6-103. [Presumption of Ownership During Lifetime; Proof of Net Contributions.] During the lifetime of all parties, a multiple-party account which provides that sums on deposit may be paid on the demand of either of two or more parties is presumed to belong to the parties in proportion to the net contributions by each to the sums on deposit.

Comment

This section reflects the assumption that a person who deposits funds in a multiple-party account normally does not intend to make an irrevocable gift of all or any part of the funds constituting the deposit. Rather, he usually intends no present change of beneficial ownership. The assumption may be disproved by proof that a gift was intended. Read with section 6-101 (6) which defines "net contributions," and with section 6-104 which applies when net contributions cannot be proved, the section permits parties to certain kinds of multiple-party accounts to be as definite, or as indefinite, as they wish in respect to the matter of how beneficial ownership should be apportioned between them. It is important to note that the section is limited to describe ownership of an account while all parties are alive. Section 6-105 and 6-106 prescribe what happens to individual rights of beneficial ownership on the death of a party. The section does not undertake to describe the situation between parties if one withdraws more than he is then entitled to as against the other party. Sections 6-111 and 6-114 protect a financial institution in such circumstances without reference to whether a withdrawing party is entitled to less than he withdraws as against another party. Presumably, overwithdrawal leaves the party making the excessive withdrawal liable to the beneficial owner, as a debtor or trustee. Of course, evidence of

intention by one to make a gift to the other of any sums withdrawn by the other in excess of his ownership should be effective.

SECTION 6-104. [Presumption of Ownership During Lifetime; Absence of Proof of Net Contributions.] In the absence of satisfactory proof of the net contributions, those who are parties from time to time shall be presumed to own a multiple-party account in equal undivided interests.

Comment

If the parties cannot, or do not wish to, prove net contributions, they occupy the position of tenants in common in relation to the value of the accounts. The basic relationship, however, is that of individual owners of whatever values are shown to have been attributable to their respective deposits and withdrawals. Hence, the right of survivorship which attaches unless negated by the form of the account really is a right which the survivor receives for the first time at the death of the owner. That is to say, the account operates as a valid disposition at death rather than as a present joint tenancy.

SECTION 6-105. [Ownership on Death; Non-Survivorship Account.] The death of any party to a multiple-party account shall have no effect on the beneficial ownership of the account (other than to transfer the decedent's right to his estate) unless the account is a survivorship account or trust account, as provided in section 6-106 and 6-108.

Comment

This section prescribes what happens on the death of an account owner when survivorship has been negated. It should be read with section 6-112 which protects a financial institution making payment to a party without regard to the equities between the parties and even though a party is then disabled or deceased. The two sections provide a safe and explicit arrangement for those who want the convenience of a withdrawal power in another, but who do not want the other party to be able to keep any balance remaining at his death. Unlike a power of attorney that may be used to provide some joint account advantages without risk that the surviving party will claim all, the device made possible by this section and section 6-112 permits a financial institution to be indifferent about whether the non-withdrawing party is competent or alive at the date of a withdrawal.

SECTION 6-106. [Presumption of Right of Survivorship.] A multiple-party account payable to two or more persons, jointly or severally, which does not expressly provide that there is no right of survivorship, though there be no mention of survivorship or joint tenancy, is presumed to be a survivorship account. At the death of a party, sums on deposit in a survivorship account belong to the surviving party or parties as against the estate of the decedent. Where there are two or more survivors, their respective ownerships shall be in proportion to their previous net contributions augmented by an equal share for each survivor of any interest the decedent may have owned in the account immediately before his death. The right of survivorship continues between survivors.

Comment

The assumption underlying this section is that most persons who use multiple-party accounts payable to either of two or more persons want the survivor or survivors to have all balances remaining at death. This assumption may be questioned in states like Michigan where existing statutes and decisions do not provide any safe and wholly practical method of establishing a joint account which is not survivorship. See Leib v. Genesee Merchants Bank, 371 Mich. 89, 123 N.W. (2d) 140 (1963). But, with sections 6-105 and 6-112 providing a safe non-survivorship account form, the presumption stated by this section should become increasingly defensible.

This section is designed to apply to various forms of multiple-party accounts which may be in use at the effective date of the legislation. The risk that it may turn non-survivorship accounts into unwanted survivorship arrangements is meliorated by various considerations. First of all, there is doubt that many persons using any form of joint account would not want survivorship rights to attach. Secondly, the survivorship incident described by this section is merely presumptive. Hence, it may be rebutted by evidence which should be available in the "hard" cases. Finally, it would be wholly consistent with the purpose of the legislation to provide for a delayed effective date so that financial institutions could get notices to customers warning them of possible changes in plans that may be desirable because of the legislation.

SECTION 6-107. [Trust Account; Presumed Rights of Trustees and Beneficiaries.] An account which states that a party is a "trustee" for one or

more other identified persons is a trust account. Except where there is evidence of a trust other than as provided by the form of the account, the account and any sums withdrawn therefrom are presumed to belong beneficially to the trustee until his death. At the death of the trustee or surviving trustee any sums remaining on deposit are presumed to belong to the person or persons named as beneficiaries, if living, or to the survivor of them if one or more have died before the trustee. The death thereafter of any beneficiary has no effect on the equal ownership of all who survived the trustee, as no right of survivorship is presumed to attend the relationship of several beneficiaries who survive a trustee. If no beneficiary survives the trustee, the sums are presumed to belong to the estate of the last trustee to die. If two or more parties are named as trustees on an account, and there is no evidence of trust except as provided by the form of the account, the account is presumed to be a survivorship account as between trustees. It is presumed to be owned between trustees as provided by this part.

Comment

This section accepts the New York view that an account opened by "A" in his name as "trustee for B" is usually intended by A to be an informal will of any balance remaining on deposit at his death. The section is framed so that accounts with more than one "trustee", or more than one "beneficiary" can be accommodated. Section 6-103 would apply to such an account during the lifetimes of "all parties". "Parties" is defined by 6-101 (7) so as to exclude a beneficiary who is not described by the account as having a present right of withdrawal. The result would be that a trust account with two or more trustees would be owned by the trustees as provided in sections 6-103 and 6-104.

In the case of a trust account for two or more beneficiaries, the section prescribes a presumption that all beneficiaries who survive the last "trustee" to die own equal and undivided interests in the account. This dovetails with section 6-113 which gives the financial institution protection only if it pays equally to all beneficiaries who show a right to withdraw by presenting appropriate proof of death. No further survivorship between surviving beneficiaries of a trust account is presumed because these persons probably have had no control over the form of the account prior to the death of the trustee and the gathering of approvals by all beneficiaries to withdrawal. The situation concerning further survivorship between two or more surviving parties to a non-trust, multiple-party account is different. See section 6-106.

SECTION 6-108. [Effect of Presumptions; Rebuttal by Contrary Evidence.] The presumptions stated herein are based upon inferences of the intention of parties to multiple-party accounts arising from the form of the account and the usual expectations of people using these accounts. The presumptions are rebuttable by clear and convincing evidence of a different intention. The presumptions of survivorship are not subject to change by will, but may be rebutted by a written order received by the financial institution to change the form of account or directing that payment not be made in accordance with the account which is signed by a party and is received by the financial institution during the party's lifetime.

Comment

This section applies to the presumptions stated in the preceding sections. It is to be noted that only a "party" may issue an effective "written order" to a financial institution. "Party" is defined by section 6-101 (7).

SECTION 6-109. [Accounts and Transfers Nontestamentary.] Where not rebutted by clear and convincing evidence, the presumptions provided herein are effective to establish beneficial ownership. Any transfers resulting from the application of these presumptions are effective by reason of the account contracts involved and this statute and are not to be considered as testamentary or subject to Articles I-IV of this Code.

Comment

The purpose of classifying the transactions contemplated by Article VI as non-testamentary is to bolster the explicit statement that their validity as effective modes of transfers at death is not to be determined by the requirements for wills. The section complements section 2-702 of the Code.

SECTION 6-110. [Rights of Creditors.] No survivorship or trust account will be effective against an insolvent estate of a deceased party to transfer to a

survivor sums needed to pay debts, taxes, and expenses of administration, including allowances to the surviving spouse and minor children. A surviving party or beneficiary who receives payment from any financial institution after the death of a deceased party which includes amounts the decedent owned immediately before his death shall be liable to account therefore to the personal representative of the deceased party to the extent necessary to discharge the claims and charges mentioned above after application of the decedent's estate. No action to assert this liability shall be commenced unless the personal representative has received a written demand by a surviving spouse, a creditor or one acting for a minor child of the decedent, and no action shall be commenced later than one year following the death of the decedent. Sums recovered by the personal representative shall be administered as part of the decedent's estate. This section shall not affect the rights of a financial institution to make payment on multiple-party accounts according to the terms thereof, or make it liable to the estate of a deceased party, unless the institution has been served with process in a proceeding by the personal representative before payment.

Comment

The sections of this Article authorize transfers at death which reduce the estate to which the surviving spouse, creditors and minor children normally must look for protection against a decedent's gifts by will. Accordingly, it seemed desirable to provide a remedy to these classes of persons which should assure them that the transactions authorized by Article VI cannot be used to reduce the essential protection they would be entitled to if the transactions were classified as a preferred form of specific devise. A surviving spouse does not need to assert a right to an elective share under section 2-201 et seq. in order to gain some protection against a multiple-party account under this section. At the same time, the rights of a surviving spouse that may be asserted by a personal representative under this section are limited to sums due as allowances under sections 2-401 and 2-404 that cannot be paid from the estate of the decedent.

SECTION 6-111. [Financial Institution Protection; Payment on Signature of One Party.] Financial institutions may enter into multiple-party accounts to the same extent that they may enter into single-party accounts. Any multiple-party account may be paid, on demand, to any one or more of the parties unless the terms of the account stipulate that joint signatures are required. No financial institution shall be required to inquire as to the source of funds received for deposit to a multiple-party account, or to inquire as to the proposed application of any sum withdrawn from an account for purposes of establishing net contributions.

SECTION 6-112. [Financial Institution Protection; Payment After Death or Disability.] Any sums in a multiple-party account which does not include a stipulation requiring joint sigantures for withdrawals may be paid, on demand, to any party without regard to whether any other party is disabled or deceased at the time the payment is demanded, except, if the account is one presumed to be a survivorship account under section 6-106 or 6-107, payment may not be made to the personal representative or heirs of a deceased party unless proofs of death are presented to the financial institution showing that the decedent was the last surviving party.

SECTION 6-113. [Financial Institution Protection; Payment of Trust Account.] Any account payable to a trustee for another person may be paid, on demand, to the trustee. Unless the financial institution has received written notice of the terms of any trust other than the form of the account, (1) payment may be made to the personal representative or heirs of a deceased trustee if proof of death is presented to the financial institution showing that his decedent

was the survivor of all other persons named on the account either as trustee or beneficiary; and (2) payment may be made, on demand, to the beneficiary upon presentation to the financial institution of proof of death showing that the beneficiary or beneficiaries survived all persons named as trustees.

SECTION 6-114. [Financial Institution Protection; Discharge.] Payment made pursuant to sections 6-111, 6-112 or 6-113 discharges the financial institution from all claims for amounts so paid whether or not the payment is consistent with the beneficial ownership of the account as between parties, or beneficiaries, or their successors. The protection here given does not extend to payments made after a financial institution has received written notice from any party who has a present right of withdrawal to the effect that withdrawals in accordance with the terms of the account should not be permitted. Unless the notice is withdrawn by the person giving it, the death of any party after notice has no effect on withdrawal rights, and the personal representative, or heirs, of the decedent must concur in any demand for withdrawal if the financial institution is to be protected under this section. No other notice or any other information shown to have been available to a financial institution shall affect its right to the protection provided here. The protection here provided shall have no bearing on the rights of parties in disputes between themselves or their successors concerning the beneficial ownership of funds in, or withdrawn from, multiple-party accounts.

SECTION 6-115. [Financial Institution Protection; Set-off.] Without qualifying any other statutory right to set-off or lien and subject to any contractual provision when a party to a multiple-party account is indebted to a financial

institution, the financial institution has a right of set-off against the account in which the party has or had, immediately before his death, a present right of withdrawal. The amount of the account subject to set-off is that proportion to which the debtor is, or was immediately before his death, beneficially entitled.

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
SALE, MORTGAGE AND LEASE OF PROPERTY
1st Draft
April 8, 1967

Section 1. Power of personal representative to sell, mortgage and lease. A personal representative to whom letters have been issued and whose letters are in effect has complete power to sell, mortgage or lease any property in the estate without notice, hearing or court order. The rights and title of any purchaser, mortgagee or lessee from the personal representative are in no way affected by any provision in a will of the decedent or any procedural irregularity or jurisdictional defect in the administration of the estate of a decedent. A transfer agent or a corporation transferring its own securities incurs no liability to any person by making a transfer of securities in an estate as requested or directed by a personal representative.

Section 2. Free of claims and creditors. If property of an estate is sold, mortgaged or leased by a personal representative a transfer is effective subject to the rights of creditors having a secured interest in the property sold. The property sold, mortgaged or leased shall be free and clear of any right in creditors which is based on the filing and allowances of a claim in the estate. The filing and allowance of a claim in an estate does not make one a secured creditor.

Section 3. Contract of decedent to sell or lease land.

(1) When any person legally bound to make a sale, mortgage or lease dies before making the same and the personal representative fails or refuses to perform in accordance with the contract of the decedent, any person claiming to be entitled to the sale, mortgage or lease may petition the probate court for specific performance of the contract. Upon satisfactory proof the court may order the personal representative to make a sale, mortgage or lease or may by its own order make a conveyance or lease to the person entitled thereto upon the performance of the contract.

(2) Except as provided in subsection 1 of this section, any sale, mortgage or lease of property by a personal representative shall be without express or implied warranties.

Section 4. Special provisions in will; duty of personal representative; penalties for breach of duty. (1) Except as otherwise provided in this section, a sale, mortgage or lease of property by the personal representative is in breach of duty. A sale, mortgage or lease is in breach of duty:

(a) If made contrary to the provisions of the will; or

(b) If made for a period of more than one year from

the date of issuance of letters of administration if the will contains a specific devise or bequest of the property sold, mortgaged or leased.

(2) The personal representative may make a sale, mortgage or lease, even though prohibited by the will, if:

(a) He is unable to pay claims and expenses of administration from other assets; and,

(b) The court authorizes the action.

(3) A personal representative may be enjoined from an act that threatens a breach of duty.

(4) If the personal representative breaches his duty as provided in this section he is liable to the persons affected because of the breach of duty:

(a) For their actual damages; or

(b) If there are no actual damages, the personal representative is liable for nominal damages; and

(c) For punitive damages if the action was taken with malice, ill will or evil motive.

(5) The personal representative does not breach his duty if he acts with the written consent of the persons affected by the action.

Section 5. Repeal of existing sections. ORS 116.705, 116.710, 116.715, 116.720, 116.730, 116.735, 116.740, 116.745, 116.750, 116.755, 116.760, 116.765, 116.770,

116.775, 116.780, 116.785, 116.790, 116.795, 116.800, 116.805, 116.811, 116.815, 116.820, 116.825, 116.830, 116.835, 116.840, 116.850, 116.860, 116.870, 116.880, 116.890, 116.900 and 116.910 are repealed.

References: Advisory Committee Minutes:
12/16,17/66 pp. 4 to 11
1/20,21/67 pp. 5 to 7

ORS 116.705 to 116.990

Proposed revised Oregon probate code
STATUS OF ADOPTED PERSONS FOR PURPOSES OF INHERITANCE, WILLS, AND CLASS GIFTS
Amended 3rd Draft
September 26, 1967

Prepared by

Stanton Allison

STATUS OF ADOPTED PERSONS FOR PURPOSES OF INHERITANCE, WILLS, AND CLASS GIFTS

Section 1. Adopted child treated as natural child. For all purposes of intestate succession, an adopted child shall be treated as a natural child of his adopting parents; and he shall cease to be treated as a child of his natural parents except:

(1) If a natural parent marries or remarries and the child is adopted by the stepfather or stepmother, the child shall continue to be treated as the child of the natural parent who is the spouse of the adopting parent.

(2) If a natural parent of a legitimate child dies and the other natural parent remarries and the child is adopted by the stepfather or stepmother, the child shall continue to be treated as the child of the deceased natural parent for all purposes of intestate succession through such parent.

Section 2. Effect of more than one adoption. For all purposes of intestate succession, a child who has been adopted more than once shall be treated as a child of the parents who have most recently adopted him and shall cease to be treated as a child of his previous adoptive parents. He shall be treated as the child of his natural parents only to the extent provided in subsection____ of ORS_____.

Section 3. Construction of gifts in wills, deed and trusts to accord with law of intestate succession. Unless a contrary intent is indicated by the instrument, gift by will, deed or other instrument to an individual or member of a class described generically in relation to a particular person as child, children, lawful issue, grandchildren, descendants, heirs, heirs of the body, next of kin, distributees, relatives, nieces, nephews or the like shall include any person who would be treated as so related for purposes of intestate succession, except that, for purposes of construction of an instrument, an adopted person must have been adopted as a minor or after having been a member of the household of the adopting parent while a minor.

Section 4. ORS 109.041 is amended to read:

109.041. (1) Effect of decree of adoption. The effect of a decree of adoption [heretofore or hereafter granted by a court of this state] shall be that the relationship, rights and obligations between an adopted person [and his descendants] and

(a) His adoptive parents, [their descendants and kindred,] and

(b) His natural parents, [their descendants and kindred] shall be the same to all legal intents and purposes after the entry to such decree as if the adopted person had been born in

lawful wedlock to his adoptive parents and had not been born to his natural parents.

(2) Where a person has been [or shall be] adopted [in this state] by his stepparent, this section shall leave unchanged the relationship, rights and obligations between such adopted person [and his descendants] and his natural parent, who is the spouse of the person who adopted him [and the descendants and kindred of such natural parent].

(3) This section does not affect intestate succession upon the death of natural or adoptive parents or adopted children.

Section 5. Repeal of existing statutes. ORS 111.210 and 111.212 are repealed.

References: Proposal #3

Advisory Committee Minutes
8/13,14/65, pp. 12 to 15
9/18/65, p. 6

Frohnmayer draft of 5/6/67

ORS 111.210, 111.212, 109.041 and 109.050.

(Draftsman's Note: Included in Definitions Section will be the following: The phrase "all purposes of intestate succession" as used in this code means succession by, through or from a person, both lineal and collateral.)

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
ADOPTION
1st Draft
January 11, 1967

This draft is based primarily on Proposal #3 and the action taken by the committee at the August and September meetings in 1965.

Section 1. Inheritance by, through and from an adopted child. For the purpose of inheritance by, through and from an adopted child, whether adopted in this state or elsewhere, the child is considered the natural child of the adopting parents and not the child of his natural parents; but if the spouse of a natural parent adopts the child, the child is considered the natural child of the natural parent and adopting parent.

References: Proposal #3

Advisory Committee Minutes:
8/13,14/65, pp. 12 to 15
9/18/65, p. 6
ORS 111.210, 111.212, 109.041 and 109.050

Comment: Should the first sentence read "For the purpose of inheritance by, through and from an adopted child, whether adopted in this state or elsewhere, the child is considered the natural child of the adopting parents and not the child of his natural or previous adoptive parents; ORS 109.041, relating to the spouse of a natural parent adopting a child, applies only to an adoption within the state of Oregon. Either that statute or this section should be amended so they are consistent.

Section 2. Repeal of existing sections; ORS 111.210 and 111.212 are repealed.

Prepared by
Mr. Frohnmayer

Proposed revised Oregon probate code
ADOPTION
1st Draft
May 6, 1967

Final Revised Draft of Proposal #3

Comment: This is the proposed revised draft of proposal #3.

INHERITANCE BY, THROUGH AND FROM AN ADOPTED CHILD

Section 1. For the purpose of inheritance by, through and from an adopted child, whether adopted in this state or elsewhere, the child is considered the natural child of the adopting parents and not the child of his natural or previous adoptive parents; but if the spouse of a natural parent adopts the child, the child is considered the natural child of the natural parent and adopting parent.

Section 2. Repeal of existing sections. ORS 111.210 and 111.212 are repealed.

References: Advisory Committee Minutes
8/13,14/65, pp. 12 to 15
9/18/65, p. 6

ORS 111.210, 111.212, 109.041 and 109.050

Comments: Unchanged from proposal #3 except for addition of "or previous adoptive parents". The legislative counsel suggest that the present ORS 109.041, relates to the spouse of a natural parent adopting a child, applies only to an adoption within the state of Oregon. Hence he argues that either that statute or this present section should be amended to be consistent with one another. The committee should also note that this present section deals with only one small part of the problem of rights

of succession of adopted children. The section refers specifically to inheritance, but does not deal with the status of adopted children for purposes of wills and class gifts. Both the Wisconsin code section 851.51 and the new tentative draft of the uniform probate code, section 209 attempt to deal with the status of adopted children regarding all forms of property succession, not just inheritance. It would seem advisable to complete this section by further subsections which treat the status of adopted children in a comprehensive manner.

Proposed revised Oregon probate code
ADOPTION
2nd Draft
August 16, 1967

Prepared by

Stanton Allison

INTESTATE SUCCESSION BY ADOPTED CHILD

Section 1. Adopted child treated as natural child. For all purposes of intestate succession, an adopted child shall be treated as a natural child of his adopting parents; and he shall cease to be treated as a child of his natural parents except that if a natural parent marries or remarries and the child is adopted by the stepfather or stepmother, the child shall continue to be treated as the child of the natural parent who is the spouse of the adopting parent.

Section 2. Effect of more than one adoption. For all purposes of intestate succession, a child who has been adopted more than once shall be treated as a child of the parents who have most recently adopted him and shall cease to be treated as a child of his previous parents.

Section 3. ORS 109.041 is amended to read:

109.041. (1) Effect of decree of adoption. The effect of a decree of adoption [heretofore or hereafter granted by a court of this state] shall be that the relationship, rights and obligations between an adopted person and his descendants and

(a) His adoptive parents, their descendants and kindred, and

(b) His natural parents, their descendants and kindred shall be the same to all legal intents and purposes after the

entry of such decree as if the adopted person had been born in lawful wedlock to his adoptive parents and had not been born to his natural parents.

(2) Where a person has been [or shall be] adopted [in this state] by his stepparent, this section shall leave unchanged the relationship, rights and obligations between such adopted person and his descendants and his natural parent, who is the spouse of the person who adopted him, and the descendants and kindred of such natural parent.

Section 4. Repeal of existing statutes. ORS 111.210 and 111.212 are repealed.

References: Proposal #3

Advisory Committee Minutes'
8/13,14/65, pp. 12 to 15
9/18/65, p. 6

Frohnmayer draft of 5/6/67

ORS 111.210, 111.212, 109.041 and 109.050.

[Draftsman's Note: Included in Definitions Section will be the following: The phrase "all purposes of intestate succession" as used in this chapter means succession by, through or from a person, both lineal and collateral.]

COMMENTS

The foregoing section is copied from the 1967 Uniform Probate Code (section 2-109). It would replace ORS 111.210 and 111.212. It would amend ORS 109.041 to make that section apply to adoptions both in this state and elsewhere as would the proposed section above.

I have been unable to find any legislative reason why ORS 111.212 would apply the laws of descent and distribution to adoptions irrespective of whether the adoption was consummated in Oregon, but the very general provisions of ORS 109.041 are limited to decrees of adoption granted by Oregon courts alone. ORS 109.050, the general statute on the relation of adopted child to adopting parents is not limited to adoption decrees granted by an Oregon court. Rather than perpetuate the seemingly artificial distinction of the present statute between laws of descent and distribution affecting adopted children and all other relationships between the adopted child, his descendants, etc., as spelled out in ORS 109.041, it would seem advisable to eliminate the distinction and make ORS 109.041 effective irrespective of where the adoption was consummated.

It seems quite clear, however, that so far as the rights of inheritance are concerned, the proposed section has not in any way changed the present Oregon statute law. It has, however, the very definite advantage of embodying the language of the Uniform Probate Code which in many ways clarifies the inheritance rights, covers the question of the rights of a child under a prior adoption, and makes clear by the adoption of the definition that by "all purposes of intestate succession" is meant succession by, through, or from a person both lineal and collateral.

Proposed revised Oregon probate code
STATUS OF ADOPTED PERSONS FOR PURPOSES OF INHERITANCE, WILLS AND CLASS GIFTS
3rd Draft
September 26, 1967

Prepared by:
Stanton Allison

COMMENTS

Section 1. Adopted child treated as natural child. This section would replace ORS 111.210 and 111.212. The proposed language is taken from the 1967 Uniform Probate Code, Section 2-109.

The section broadens the coverage of rights of inheritance although following the basic rule of the present Oregon statute that inheritance rights are derived from the adoptive parents rather than the natural parents. It should be noted that the proposed section uses the wording "for all purposes of intestate succession." This phrase will be defined in the definitions section as follows: "The phrase 'all purposes of intestate succession' as used in this code mean succession by, through or from a person, both lineal and collateral." This language thus gives the adopted person a status for purposes of inheritance from his adoptive relatives and his adoptive relatives for purposes of inheritance from the adopted person, and broadens the language to cover inheritance rights of those claiming through the adopted child.

There are as noted two exceptions to the general rule outlined.

The statute preserves the relationship to the natural parent in the limited situation where a natural parent marries

or remarries and the child is adopted by the stepparent. This latter exception is consistent with the result reached by the Oregon Supreme Court in the case of Hood vs. Hatfield, 235 Or 38, 383 P2d. 1021 (1963), commented upon in 43 Oregon Law Review 88. The second exception, in subsection (2), meets the situation which arose in the case of In re Estate of Topel, 32 Wis. 2d 223, 145 NW 2d 162 (1966). In that case the decedent had died intestate, survived by three children of his deceased son. Their mother had remarried and her husband had adopted the children. It was held that the former Wisconsin statute precluded inheritance by the children. The language of this subsection is adopted from subsection (2b) of Section 851.51 of the Wisconsin Probate Code introduced on March 1, 1967 in the Wisconsin assembly.

Section 2. The effect of more than one adoption. The language of this section is taken from Section 2-109 (b) of the 1967 Uniform Probate Code. This situation is not specifically covered by the present ORS sections and clarifies the rights of the adopted child under the latest adoption.

Section 3. Construction of gifts in wills, deeds and trusts to accord with law of intestate succession. The present Oregon Revised Statute does not have an equivalent section to that proposed here. However, a reading of the proposed section reveals the obvious utility of spelling out the rights of adopted children in class gifts. The language

has been taken from Section 851.51 (3) of the 1967 Wisconsin Probate Code referred to.

The comment in the proposed Wisconsin Code on the exception contained in the last sentence of Section 3 states that the exception "prevents a deliberate adoption of an adult to qualify the latter as a member of a class. In some states it has been possible to adopt one's own wife in order to make the latter a child within a class gift; the statute avoids such an absurd result."

Section 4. Effect of decree of adoption. Would amend ORS 109.041 to eliminate the limitation of this section to adoptions granted by the courts of Oregon. We have been unable to find any legislative reason why the very general provisions of ORS 109.041 are limited to decrees of adoption granted by Oregon courts alone while ORS 111.212 applies the laws of descent and distribution to adoptions irrespective of whether the adoption was consummated in Oregon. ORS 109.050, the general statute on the relation of adopted child to adopting parents, is not limited to adoption decrees granted by an Oregon court. Rather than perpetuate this seemingly artificial distinction between laws of descent and distribution affecting adopted children and all other relationships between the adopted child and his descendants,

as limited in ORS 109.041, it would seem advisable to eliminate the distinction and make ORS 109.041 effective irrespective of where the adoption was consummated.

It will be noted that the section has been further amended to restrict the operation of this statute to relationships other than the rights of intestate succession, since legislation covering rights of intestate succession belong properly in the probate code as embodied in Sections 1, 2 and 3 preceding.

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
TITLE TO PROPERTY
1st Draft
April 25, 1967

Title and Possession of Property. When a person dies intestate, title to his real and personal property passes at his death to his heirs; if a decedent dies testate, title to his real and personal property passes at his death to those to whom it is given by his Will. The title of the heirs or beneficiaries to the real or personal property of the deceased owner is subject to the rights of the surviving spouse and minor children and any claims for which the estate is liable. During administration the personal representative shall be entitled to possession of the real or personal property and shall have power to sell, mortgage, lease or otherwise dispose of the same as provided in this title.

References: Advisory Committee Minutes:
9/18/65 p. 2

Section 7. Information to devisees and heirs; notice to State Land Board. (1) Upon the appointment of a personal representative he shall deliver or send by ordinary mail the following information to the devisees and heirs named in the petition for appointment of personal representative at the addresses there shown. The information shall include:

(a) The title of the court where the proceeding is pending and the clerk's file number;

(b) The name of decedent and the place and date of his death;

(c) Whether or not a will has been admitted to probate;

(d) The name and address of the personal representative and his attorney, and;

(e) The date of his appointment.

A personal representative may inform other persons of his appointment by delivery or ordinary mail.

(2) The personal representative's failure to give this information shall be a breach of his duty to the persons concerned but shall not affect the validity of his appointment, powers or duties.

(3) If it appears from the petition for appointment of the personal representative that there is no known person to take by descent the net intestate estate, the personal representative shall mail to the Clerk of the State Land Board a copy of the petition and the information required by subsection (1).

(4) A personal representative shall file in the probate proceeding proof by an affidavit of the mailing required by this section. The affidavit shall include a copy of the information mailed and the names of the persons to whom it was sent.

Section 8. Publication of notice to creditors. (1) Upon his appointment a personal representative shall cause a notice to creditors to be published once in each of two successive weeks in:

(a) A newspaper published in the county in which the proceeding is pending; or

(b) If no newspaper is published in the county where the proceeding is pending, a newspaper designated by the court.

(2) The notice shall include:

(a) The name of the decedent;

(b) The name and address of the personal representative and his attorney;

(c) A statement requiring all persons having claims against the estate to present them, within four months from the date of first publication of the notice, to the personal representative at the address designated in the notice for the presentation of claims; and

(d) The date of the first publication of the notice.

(3) A personal representative shall file in the probate proceeding proof by an affidavit of the publication of notice required by this section. The affidavit shall include a copy of the published notice.

Section 9. Inventory and appraisement, when and how made. Within 60 days after the date of his appointment, unless a longer time shall be granted by the court, the personal representative shall file an inventory of all the property of the decedent which has come into his possession or knowledge. The inventory shall show the estimates of the personal representative of the respective true cash values of the properties described in the inventory as of the date of the decedent's death.

the factual situation that much of the real and personal property of an estate should remain, and rightfully so, in the possession of those to whom it is left by will or intestacy who were in actual possession at the time of the decedent's death. The proposed section recognizes this situation and specifies that the personal representative may recognize such possession and is only required to take actual possession where it is required for purposes of administration.

Section 4. Time of accrual and duties and powers. This section is taken from Section 3-401 of the 1967 Uniform Probate Code. We do not find an equivalent of this most useful section in the present Oregon Revised Statutes. The obvious value of spelling out this provision is evident.

Section 5. Duties of personal representative. The language is taken from Section 3-403 of the 1967 Uniform Probate Code. The section would include the provisions of ORS 116.105.

Section 6. Personal representative to proceed without court order; application for authority, approval or instructions. This section is taken from Sections 1-207 and 3-404 of the 1967 Uniform Probate Code. The thrust of this section was commented on in the introduction. It gives full authority to the personal representative to proceed without court order unless he desires the authority, approval or instructions of the court in particular situations.

Section 7. Information to devisees and heirs; notice to State Land Board. Subsections (1) and (2) of this section are taken generally from Section 3-405 of the 1967 draft Uniform Probate Code. In the case of an intestate estate, no provision is now contained in the present code for notice to the heirs of the institution of the probate and the appointment of the personal administrator. ORS 115.220, passed in 1963 and amended in 1965 provides that in a testate proceeding a copy of the will shall be mailed to each legatee and devisee. Your committees agreed that in general it seemed advisable that an informal notice be given to the heirs at law in an intestate situation and to the devisees in a testate estate, notifying them of the institution of the probate and the necessary information contained in this section. This seemed a more sensible provision than the present one for mailing a copy of the will. It is obvious that upon notification any party properly interested can procure a copy of the will. Your committees believe that from the standpoint of due process alone the notice provision is sensible. In addition, since the proposed code gives the personal representative broad powers to operate without specific court approval, notice on the part of interested persons seems desirable.

The opposition in the past to a notice requirement of this type has been the fear that technical failure to give notice to some party could be held a jurisdictional defect in the probate proceeding. The provision is, therefore, spelled out that

failure to give the notice is not jurisdictional and does not affect the validity of the appointment or the powers or duties involved.

Subsection (3) replaces and changes subsection (2) of ORS 115.310. ORS 115.310 provides that no order appointing a personal representative can be granted by the court in an escheat situation until there has been filed proof of service of the possible escheat upon the State Land Board. The proposed section provides for mailing the same information to the State Land Board by the personal representative as is given to the heirs at law. Since, in the case of escheated property, the State of Oregon is in the position of the heirs at law, it does not seem appropriate that a different procedure should be set up in such a case than if there were living heirs. Your committees felt that there is every advantage in having a prompt appointment of a personal representative who would give due notification to the State Land Board and with whom the State Land Board would be able to communicate. The change in this section would obligate the personal representative to send the State Land Board a copy of the petition, as now required, and also the information of his appointment otherwise required to be sent to heirs and devisees.

Section 8. Publication of notice by personal representative. This is a redraft of ORS 116.505. The first basic change is that the number of publications is cut from five to two. The committees considered that the first publication is the one most

likely to be seen by those who systematically check such notices, and that two publications would be adequate. The second substantial change is that the statute designates the information which must appear in the published notice. The committees felt that the notice should be kept as simple as possible and that the four items required gave adequate notice. Finally, it was felt that, in view of the present state of the technology of communications, the period for filing claims could reasonably be cut from six to four months, to attempt to shorten the time of probate. Beyond this the new section merely clarifies the language of the present section.

Section 9. Inventory and appraisement, when and how made. The proposed sections covering inventory and appraisement would supersede and replace ORS 116.405 to 116.465 inclusive. The background for these sections is taken principally from Sections 361 to 365 of the 1963 Iowa Probate Code. For other comparable sections see Chapter 11.44, 1965 Washington Code, Chapter 858 of the State of Wisconsin 1967 Probate Code, and Sections 3-406, 3-407 and 3-408 of the 1967 draft of the Uniform Probate Code.

Section 9 includes much of the language of ORS 116.405, with the following differences. The initial period is changed from one month to 60 days, which your committee felt was a more realistic period. The requirement of the oath was

Section 17. Right to file notice of and perfect lien. This section is ORS 16.120 with editorial changes.

Section 18. Power of personal representative to sell, mortgage, lease and deal generally with property. As noted in the introductory comment, this section would give the personal representative power to sell, mortgage, lease or otherwise deal with property of the estate without petition, notice, hearing or court order except as indicated hereafter. It gives not only full power to the personal representative in this area, but it gives the widest protection to those dealing with the personal representative, against procedural irregularity or jurisdictional defect in the administration. This is a wide protection not extended by our present code.

The philosophy of the proposed section is described in the comment to Section 860.01 of the proposed Wisconsin Code (Assembly Bill 280, March 1, 1967):

> "This section gives to all personal representatives the power that is given to executors in most wills. It is the power which all personal representatives have always had over personal property in Wisconsin. Though a personal representative is given unrestricted power to sell, mortgage or lease property he will be held financially responsible to the persons interested if he acts carelessly or unreasonably. He 'must act not only honestly or with good faith in the narrow sense but must also exercise the duty of loyalty toward the beneficiary for whose benefit the power of sale is to be exercised and with such care and skill as a man of ordinary prudence would exercise in dealing with his own property.'"

We call attention to the fact that this proposed short section

would replace some thirty-three sections of the present code, ORS 116.705 to 116.890 inclusive, covering 6 1/2 pages of the present Oregon Revised Statutes, which probably caused more practical difficulties and problems to attorneys representing estates than all of the other sections of the code combined. Yet, with the broad power given, adequate protection is provided in succeeding provisions, both to the parties dealing with the personal representative and to the parties interested as heirs, devisees and creditors.

Subsection (2), however, contains certain limits and safeguards on the unrestricted power to sell property, in that it requires notice, hearing and court order where the sale is made in contravention of specific provisions in the will or where the property is specifically devised and the will does not authorize its sale by the executor. Notice, hearing and court order is also required where the bond has not been increased by the amount of cash to be realized on the sale in cases where the value of the property sold exceeds $5,000. In the usual case the amount of the bond will probably be based upon the value of the liquid assets. If the bond is not made sufficient in amount to protect on the cash paid to the personal representative on the sale, such protection should be provided. The court in any case is given the right to direct what additional protection is required in this situation.

Section 19. Court order for sale, mortgage or lease. This section is taken from Section 860.11 of the 1967 Wisconsin Code. It would permit any interested person to apply to the court for an order of sale, mortgage or lease which would protect and justify the personal representative in proceeding.

Section 20. Title conveyed free of claims of creditors. This section is taken from Section 860.05 of the 1967 Wisconsin Probate Code. It is merely a statement of the present Oregon law, although its exact parallel is not now found in ORS.

Section 21. Non-liability of transfer agents. This section is taken from Section 860-01 of the 1967 Wisconsin Code. It may avoid some technical problems now raised by transfer agents in transferring securities sold by personal representatives.

Section 22. Persons dealing with personal representatives; protection. This section is a verbatim copy of Section 3-415 of the 1967 Uniform Probate Code. The effect of this section is to grant absolute protection to purchasers and other parties dealing with personal representatives. It is felt that such

Proposed revised Oregon probate code
TITLE AND POSSESSION OF PROPERTY; DUTIES AND POWERS OF PERSONAL REPRESENTATIVES
December 22, 1967
4th Draft

Prepared by
Stanton W. Allison

Section 1. No distinction between real and personal property. The provisions of this code shall apply without distinction between real and personal property.

Section 2. Devolution of estate at death; title to property. (1) Upon the death of a decedent title to his property vests:

(a) In the absence of testamentary disposition, in his heirs, subject to family allowance, rights of creditors, administration, and to being sold by the personal representative; or

(b) In the persons to whom it is devised by his will, subject to family allowance, rights of creditors, right of the surviving spouse to elect against the will, administration, and to being sold by the personal representative.

(2) The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to his property, are subject to the restrictions and limitations expressed or implicit in this Code to facilitate the prompt settlement of estates.

Section 3. Duty of personal representative; possession of estate. A personal representative has a right to and shall take possession and control of the decedent's estate, except that he shall not be required to take possession of or be accountable for property in the possession of an heir or devisee unless in his opinion possession by the personal representative is reasonably required for purposes of administration.

Section 4. Time of accrual of duties and powers. The duties and powers of a personal representative commence upon the issuance of his letters. The powers of a personal representative relate back in time to give his acts occurring prior to appointment the same effect as those occurring thereafter. A personal representative may ratify and accept acts on behalf of the estate done by others where such acts would have been proper for a personal representative.

Section 5. Duties of personal representative. A personal representative is a fiduciary who is under a general duty to and shall collect the income from property of the estate in his possession and preserve, settle and distribute the estate in accordance with the terms of the will and this code, as expeditiously and with as little sacrifice of value as is reasonable under the circumstances.

Section 6. Personal representative to proceed without court order; application for authority, approval or instructions. A personal representative shall proceed with the administration, settlement and distribution of the estate without adjudication, order or direction of the court, except as provided herein. However, he may apply to the court for authority, approval or instructions on any matter concerning the administration, settlement or distribution of the estate, and the court, without hearing or upon such hearing as it may prescribe, shall instruct the personal representative or rule on the matter as may be appropriate.

Section 7. Information to devisees and heirs. (1) Upon the appointment of a personal representative he shall deliver or send by ordinary mail information of his appointment to the devisees and heirs named in the petition for appointment of personal representative at the addresses there shown. Mailing or delivery to the personal representative is not required. The information shall include the title of the court where the proceeding is pending, the clerk's file number, the name of decedent and the place and date of his death, whether or not a will has been admitted to probate, the name and address of the personal representative and his attorney, and the date of his appointment.

(2) The personal representative's failure to give this information shall be a breach of his duty to the persons concerned but shall not affect the validity of his appointment, powers or other duties. A personal representative may inform other persons of his appointment by delivery or ordinary mail.

Section 8. Publication of notice to creditors. (1) Upon his appointment a personal representative shall cause a notice to creditors to be published once in each of two successive weeks in:

(a) A newspaper published in the county in which the proceeding is pending; or

(b) If no newspaper is published in the county where the proceeding is pending, a newspaper designated by the court.

(2) The notice shall include:

(a) The name of the decedent;

(b) The name and address of the personal representative and his attorney;

(c) A statement requiring all persons having claims against the estate to present them, within four months from the date of first publication of the notice, to the personal representative at the address designated in the notice for the presentation of claims; and

(d) The date of the first publication of the notice.

(3) A personal representative shall file in the probate proceeding proof by an affidavit of the publication of notice required by this section. The affidavit shall include a copy of the published notice.

Section 9. Inventory and appraisement, when and how made. Within 60 days after the date of his appointment, unless a longer time shall be granted by the court, the personal representative shall file an inventory of all the property of the decedent which has come into his possession or knowledge. The inventory shall show the estimates of the personal representative of the respective true cash values of the properties described in the inventory as of the date of the decedent's death.

Section 18. Power and authority of personal representative to sell, mortgage, lease and deal with property. (1) A personal representative has power to sell, mortgage, lease or otherwise deal with property of the estate without notice, hearing or court order.

(2) Exercise of the power of sale by the personal representative is improper, except after notice, hearing and order of the court, if:

(a) The sale is in contravention of the provisions of the will.

(b) The property is specifically devised and the will does not authorize its sale.

(c) The inventory value of the property to be sold exceeds $5,000, the bond has not been increased by the amount of cash to be realized on the sale, and the court has not directed otherwise.

Section 19. Court order for sale, mortgage or lease. Upon proof satisfactory to the court by an interested party that a sale, mortgage or lease of property of the estate is required for paying claims, family allowance, elective share of surviving spouse or administration expenses, or for distribution, and that the personal representative has failed or declined to act, the court may order the personal representative to make the sale, mortgage or lease.

Section 20. Title conveyed free of claims of creditors. Property sold, mortgaged or leased by a personal representative shall be subject

to liens and encumbrances against the decedent or his estate but shall not be subject to rights of creditors of the decedent or liens or encumbrances against his heirs or devisees. The filing and allowance of a claim in an estate does not make the claimant a secured creditor.

Section 21. Nonliability of transfer agents. A transfer agent or a corporation transferring its own securities incurs no liability to any person by making a transfer of securities in an estate as requested or directed by a personal representative.

Section 22. Persons dealing with personal representatives; protection. A person dealing with or assisting a personal representative without actual knowledge that the personal representative is improperly exercising his power is protected as if the personal representative properly exercised the power. The person is not bound to inquire whether the personal representative is properly exercising his power, and is not bound to inquire concerning the provisions of any will or any order of court that may affect the propriety of the acts of the personal representative. No provision in any will or order of court purporting to limit the power of a personal representative shall be effective except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative. The protection here expressed extends to instances where some procedural irregularity occurred in proceedings leading to the issuance of letters.

Section 23. Sale or encumbrance to personal representative voidable; exceptions. (1) Any sale or encumbrance to the personal representative, his spouse, agent or attorney, or any

corporation or trust in which he has more than a one-third beneficial interest, is voidable unless:

(a) The transaction was consented to by all interested persons affected thereby except any who were under legal disability for whom no guardian had been appointed; or

(b) The will expressly authorizes the transaction by the personal representative with himself.

(2) The title of a purchaser for value without notice of the circumstances of the transaction with the personal representative is not affected unless the purchaser should have known of the defect in the title of his seller.

Section 23. Improper exercise of power; breach of fiduciary duty. If the exercise of power by the personal representative in the administration of the estate is improper he shall be liable for breach of his fiduciary duty to interested persons for resulting damage or loss to the same extent as a trustee of an express trust. Exercise of power in violation of a court order is a breach of duty. Exercise of power contrary to the provisions of the will may be a breach of duty.

Section 23(a). Corepresentatives; when joint action required. When two or more persons are appointed corepresentatives, the concurrence of all is required on all acts connected with the administration and distribution of the estate, except:

(1) Any corepresentative may receive and receipt for property due the estate,

(2) When the concurrence of all cannot readily be obtained in the time reasonably available for emergency action,

(3) Where any others have delegated their power to act,

(4) Where the will provides otherwise, or

(5) Where the court shall otherwise direct.

Persons dealing with a corepresentative who are actually unaware that another has been appointed to serve with him shall be as fully protected as if the person with whom they dealt had been the sole personal representative.

Section 23(b). Personal liability of personal representative. (1) The personal liability of a personal representative to third parties, as distinguished from his fiduciary accountability to the estate, arising from the administration of the estate is that of an agent for a disclosed principal.

(2) A personal representative is not personally liable on contracts properly entered into in his fiduciary capacity in the course of administration of the estate unless he expressly agrees to be.

(3) A personal representative is not personally liable for obligations arising from possession or control of property of the estate or for torts committed in the course of administration of the estate unless he is personally at fault.

(4) Claims based upon contracts, obligations and torts of the types described in (2) and (3) may be allowed against the estate whether or not the personal representative is individually liable therefor.

Section 24. ORS 97.130 is amended to read:

97.130. Right to control disposition of remains. The right to control the disposition of the remains of a decedent, unless other directions have been given by him, vests in his surviving spouse, his surviving children, his surviving parents

TITLE AND POSSESSION OF PROPERTY;
DUTIES AND POWERS OF PERSONAL
REPRESENTATIVES
Amended 3rd Draft, 12/13/67

COMMENT

Section 23(a). Corepresentatives; when joint action required. This is Section 3-418 of the 1967 Draft Uniform Probate Code with subsection (5) added. There is no corresponding section in Oregon Revised Statutes. For a general discussion, see 31 Am Jur2d, Executors and Administrators, Sec. 625, p. 268. The editors' note to the Uniform Probate Code section states:

> "With certain qualifications, this section is designed to compel co-representatives to agree on all matters relating to administration when circumstances permit. Delegation by one to another representative is a form of concurrence in acts that may result from the delegation. A co-representative who abdicates his responsibility to co-administer the estate by a blanket delegation breaches his duty to interested persons as described by Section 3-403. Section 3-416(p) authorizes delegation, but only that which is reasonable and for the benefit of interested persons."

It is believed that this section will resolve uncertainties in an area apparently not specifically covered by Oregon statutory or case law.

Section 23(b). Personal liability of personal representative. There is no Oregon Revised Statutes section covering the subject matter of the proposed section. For a discussion of the case law in this area see Sections 638 and 646, Vol. 2, Oregon Probate Law and Practice, Jaureguy and Love.

The committees agreed that it would be of value to spell out in the proposed code a specific section delineating the areas in which personal liability would attach.

Section 9. Property discovered after invencory filed. Whenever any property not included in the inventory comes to the possession or knowledge of the personal representative, he shall either file a supplemental inventory within 30 days of receiving possession or knowledge, or include the property in his next accounting.

Section 10. Appraisement; employment and appointment of appraisers. The personal representative may employ a qualifed and disinterested appraiser to assist him in the appraisal of any asset the value of which may be subject to reasonable doubt. Different persons may be employed to appraise different kinds of assets included in the estate. The court also in its discretion may direct that all or any part of the property be appraised by one or more appraisers appointed by the court.

Section 11. Appraisal to be at true cash value at date of death. Property for which appraisement is required shall be appraised at its true cash value as of the date of the decedent's death. Each appraisement shall be in writing and shall be signed by the appraiser or appraisers making it.

Section 12. Fees of appraisers. Each appraiser shall be entitled to be paid from the estate a reasonable fee and necessary expenses.

Section 13. Naming of personal representative does not discharge claim against him. The naming or appointment of any one as personal representative shall not operate to discharge

the person from any claim which the decedent had against him, and the claim shall be included in the inventory. If he agrees to act as personal representative he shall be liable for such claim as for so much money in his hands at the time the claim became due and payable; otherwise he is liable for such claim as any other debtor of the deceased.

Section 14. Discharge or devise in will of claim of testator. The discharge or devise in a will of a claim of the testator against a personal representative or against any other person shall be of no effect as against creditors of the decedent. The claim shall be included in the inventory and for purposes of administration shall be regarded and treated as a specific legacy in that amount.

Section 15. Transactions authorized for personal representative. Except as restricted or otherwise provided by the will or by court order, a personal representative, acting reasonably for the benefit of interested persons, is authorized to:

(1) Direct and authorize disposition of the remains of the decedent pursuant to ORS 97.130 and incur expenses for the funeral, burial or other disposition of the remains in a manner suitable to his condition in life.

(2) Retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested or which are otherwise unsuitable for trust investment.

(3) Receive assets from fiduciaries, or other sources.

(4) Complete, compromise, or refuse performance of the decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other courses of action, may:

(a) Execute and deliver a deed upon satisfaction of any sum remaining unpaid, or upon receipt of the purchaser's note adequately secured; or

(b) Deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement.

(5) Satisfy written pledges of the decedent for contributions irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented as claims.

(6) Deposit funds not needed to meet currently payable debts and expenses, and not immediately distributable, in bank or saving and loan accounts, or invest the funds in short term United States government obligations.

(7) Abandon burdensome property when it is valueless, or is so encumbered or is in a condition that it is of no benefit to the estate.

(8) Vote stocks or other securities in person or by general or limited proxy.

(9) Pay calls, assessments, and other sums chargeable or accruing against or on account of securities.

(10) Sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(11) Hold a security in the name of a nominee or in other form without disclosure of the interest of the estate, but the personal representative shall be liable for any act of the nominee in connection with the security so held.

(12) Insure the assets of the estate against damage and loss and himself against liability to third persons.

(13) Advance or borrow money with or without security.

(14) Compromise, extend, renew or otherwise modify an obligation owing to the estate. If the personal representative holds a mortgage, pledge, lien or other security interest, accept a conveyance or transfer of the encumbered asset in lieu of foreclosure in full or partial satisfaction of the indebtedness.

(15) Accept other real property in part payment of the purchase price of real property sold by him.

(16) Pay taxes, assessments, and expenses incident to the administration of the estate.

(17) Employ qualified persons, including attorneys, accountants and investment advisors, to advise and assist the personal representative and to perform acts of administration, whether or not discretionary, on behalf of the personal representative.

(18) Prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties.

(19) Continue any business or venture in which decedent was engaged at the time of his death to preserve the value of the business or venture.

(20) Incorporate or otherwise change the business form of any business or venture in which decedent was engaged at the time of his death.

(21) Discontinue and wind up any business or venture in which the decedent was engaged at the time of his death.

(22) Provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate.

(23) Satisfy and settle claims and distribute the estate as provided in this Code.

(24) Perform all other acts required or permitted by law or by the will of decedent.

Section 16. Right to file notice of and perfect lien. The personal representative shall have the same rights to perfect a lien or security interest as the decedent would have had if he were living.

and the person in the next degree of kindred to him, in the order named. If disposition of the remains has not been directed and authorized within ten days after the death of decedent the special administrator or the personal representative of the deceased may direct and authorize disposition of the remains.

Section 25. ORS 116.115 is amended to read:

116.115. Authority of personal representative when will includes gift of body for scientific and medical purposes; nonliability for actions. The authority of a person named [executor] personal representative of a will which includes a gift pursuant to ORS 97.132 extends to performing acts necessary to carrying out the gift although [the] letters testamentary have not been issued. A person named [executor] personal representative who carries out the gift of the testator before issuance of letters testamentary or under a will which is not admitted to probate shall not be liable to the surviving spouse or next of kin for performing acts necessary to carry out the gift of the testator.

Section 26. Discovery of assets during procedure by personal representative. The court may order any person to appear and give testimony as provided in ORS chapter 45 if it appears probable:

(1) That he has concealed, secreted or disposed of any property of the estate of a decedent.

(2) That he has been intrusted with property of the estate of a decedent and refuses or neglects to account therefor to the personal representative.

(3) That he has concealed, secreted or disposed of any writing or other instrument or document relating or pertaining to the estate.

(4) That he has knowledge or information that is necessary to the administration of the estate.

(5) That officers or agents of a corporation refuse to allow examination of the books and records of the corporation which the decedent had the right to examine.

Section 27. Proceedings when person refuses to appear and give testimony. If the person cited as provided in ORS _____ refuses to appear, or to answer questions asked of him as authorized by the order of the court, he is in contempt and may be punished as for other contempts.

Section 28. Power to avoid transfers. The property liable for the payment of charges, administration expenses and claims against a decedent's estate shall include property transferred by him with intent to defraud his creditors or transferred by any means which is in law void or voidable as against his creditors; and the right to recover such property so far as necessary for the payment of charges, administration expenses and claims against the estate shall be in the personal representative, who shall take necessary steps to

recover it. Such property shall constitute general assets for the payment of creditors.

Section 29. ORS 93.420 is amended to read:

93.420. Execution of deed where personal representative, guardian or conservator is unable or refuses to act. If any person is entitled to a deed from [an executor, administrator,] a personal representative, guardian or conservator who has died or resigned, has been discharged, disqualified or removed or refuses to execute it, the deed may be executed by the judge [authorizing the sale,] before whom the proceeding is pending or by his successor.

Section 30. Repeal of existing sections. ORS 116.105, 116.110, 116.115, 116.120, 116.125, 116.130, 116.135, 116.170, 116.175, 116.180, 116.305, 116.310, 116.320, 116.325, 116.330, 116.340, 116.405, 116.410, 116.415, 116.420, 116.425, 116.430, 116.435, 116.440, 116.445, 116.450, 116.455, 116.460, 116.465, 116.505, 116.705, 116.710, 116.715, 116.720, 116.725, 116.730, 116.735, 116.740, 116.745, 116.750, 116.755, 116.760, 116.765, 116.770, 116.775, 116.780, 116.785, 116.790, 116.795, 116.800, 116.805, 116.811, 116.815, 116.820, 116.825, 116.830, 116.840, 116.850, 116.860, 116.870, 116.880, 116.890, 116.990 and ORS 121.060 are repealed.

Proposed revised Oregon probate code
TITLE AND POSSESSION OF PROPERTY; DUTIES AND POWERS OF PERSONAL REPRESENTATIVES
Amended 3rd Draft
November 9, 1967

Prepared by:
Stanton Allison

COMMENTS

The proposed chapter follows closely the format and language of the 1967 draft of the Uniform Probate Code. A reference to the corresponding Uniform Code sections will show that while much of the language has been adopted verbatim, a large part of the language is that of the combined committees.

The general approach of the Uniform Code is that the personal representative is given power to act without hearing, order, or adjudication of the probate court unless he may desire to secure such adjudication. This new approach will be most noticeable in the section covering sale, mortgage, lease, and other dealings with property of the estate. These powers of the personal representative are given without the requirement of petition, hearing, notice and court order and confirmation of these transactions. This concept does not seem so radical, however, if it is remembered that the Oregon courts have always recognized the right of a testator to give his executor exactly the same power to operate without court order as the proposed code would do in the absence of testamentary instructions. Logically and factually, there seems no reason why the personal representative in an intestate situation or in the absence of testamentary provisions should not be given the same power over the administration of the estate as now given by a testator by his will. It should be noted further that in the usual will where the executor is authorized to act

without court order or supervision in the sale of estate assets the executor is operating without bond. In the proposed code, in an intestate situation, a surety bond is required in all cases and the court is given a wider discretion to require a surety bond in testate situations where the court deems such protection advisable. Although persons dealing with a personal representative are protected in a much greater degree than provided in the present code, the proposed chapter imposes a liability upon the personal representative for a breach of his fiduciary duty "to the same extent as a trustee of an express trust." It would seem therefore that under the proposed code the actual protection to the estate is much greater than under our present probate code.

Separate comments with reference to the equivalent ORS section as well as the source of the new language will follow as to each section. However, comments should be made of certain fundamental differences between the present code and the proposed code. First, no distinction is made as between real and personal property, but they are included and treated identically in all the powers granted in the chapter.

Second, unlike the present probate code, the provisions concerning the title and the possession of property both real and personal are specifically spelled out in the proposed code. No such specific provisions occur in the present code. There is a fundamental distinction in this area from our present law. In the proposed code, title to both real

and personal property is vested in the heirs and/or devisees; under the present law title only to the real property is so vested.

The proposed chapter sets out in much greater detail not only the powers of the personal representative, but also his duties and authority in a good number of specific areas which are not covered by the present rather peacemeal approach of the ORS sections. We believe this feature will have particular value to attorneys who may not specialize in probate practice, many of whom have expressed the thought of the difficulty of finding code provisions covering specific duties, specific problems, and specific authorities.

Section 1. No distinction between real and personal property. The language is taken generally from Section 3-101 of the 1967 Uniform Probate Code. The rationale of this concept is described in the following comment in the 1967 Wisconsin Probate Code discussing intestate succession.

> This section makes one very substantial change in the legal structure of intestate succession in Wisconsin. Existing law treats real property in a different manner than personal property and even within the classification of real property draws a sharp distinction between the homestead and other real property. These distinctions are products of our inherited system of descent and distribution, drawn from the English law of prior centuries and abandoned in England by statute in 1925; the separate descent of the homestead is added as a purely American statutory innovation. The result of this hodgepodge of legislation is that inheritance rights are dependent upon the kind of property owned by the decedent. There is no longer any sound policy reason for retaining these distinctions, and the modern trend is toward a single system of inheritance (intestate succession) with abolition of common-law dower

> and curtesy. This statute provides a single rule for inheritance of all kinds of property. Although there is a strong argument for special treatment of the home, the present law of homestead and descent is illustrative of the complexities involved in attempting any such distinction. Moreover, most homes are owned jointly by husband and wife and do not pass under the intestate law at all (but go to the survivor because of the survivorship right in joint tenancy).

It is recognized that many of the most difficult problems in our present probate code arise because of this artificial distinction between real and personal property. The proposed code in all the areas of intestate succession and administration would resolve these technical difficulties by abolishing all distinction between real and personal property.

Section 2. Devolution of estate at death; title to property. The general language is taken from Section 3-101 of the 1967 Uniform Probate Code. This would change the present law of Oregon in that it would vest title at the date of death not only to the real property but to the personal property of the estate in the heirs or devisees. The section spells out that this vesting is subject to family allowance, creditors' rights, the elective share of the surviving spouse, and administration. Reference may be made to ORS 111.020.

Section 3. Duty of personal representative; possession of estate. This language is based upon Section 3-409 of the 1967 Uniform Code. It would replace ORS 116.105. The proposed section spells out what has been a difficult practical problem in the present Oregon code. The proposed code recognizes

the factual situation that much of the real and personal property of an estate should remain, and rightfully so, in the possession of those to whom it is left by will or intestacy who were in actual possession at the time of the decedent's death. The proposed section recognizes this situation and specifies that the personal representative may recognize such possession and is only required to take actual possession where it is required for purposes of administration.

Section 4. Time of accrual and duties and powers. This section is taken from Section 3-401 of the 1967 Uniform Probate Code. We do not find an equivalent of this most useful section in the present Oregon Revised Statutes. The obvious value of spelling out this provision is evident.

Section 5. Duties of personal representative. The language is taken from Section 3-403 of the 1967 Unfirm Probate Code. The section would include the provisions of ORS 116.105.

Section 6. Personal representative to proceed without court order; application for authority, approval or instructions. This section is taken from Sections 1-207 and 3-404 of the 1967 Uniform Probate Code. The thrust of this section was commented on in the introduction. It gives full authority to the personal representative to proceed without court order unless he desires the authority, approval or instructions of the court in particular situations.

Section 7. Publication of notice by personal representative. This is a redraft of ORS 116.505. The first basic change is that the number of publications is cut from five to

two. The committees considered that the first publication is the one most likely to be seen by those who systematically check such notices, and that two publications would be adequate. The second substantial change is that the statute designates the information which must appear in the published notice. The committees felt that the notice should be kept as simple as possible and that the four items required gave adequate notice. Finally, it was felt that, in view of the present state of the technology of communications, the period for filing claims could reasonably be cut from six to four months, to attempt to shorten the time of probate. Beyond this the new section merely clarifies the language of the present section.

Section 8. Inventory and Appraisement, when and how made. The proposed sections covering inventory and appraisement would supersede and replace ORS 116.405 to 116.465 inclusive. The background for these sections is taken principally from Sections 361 to 365 of the 1963 Iowa Probate Code. For other comparable sections see Chapter 11.44, 1965 Washington Code, Chapter 858 of the State of Wisconsin 1967 Probate Code, and Sections 3-406, 3-407, and 3-408 of the 1967 draft of the Uniform Probate Code.

Section 8 includes much of the language of ORS 116.405, with the following differences. The initial period is changed from one month to 60 days, which your committee felt was a more realistic period. The requirement of the oath was

eliminated as is done in all the other provisions of the proposed code. The section makes a basic change in that the inventory shall include the personal representative's estimate of the true cash value of the items he lists in his inventory. This would permit the personal representative to include his own appraisal of such items as bank accounts, cash items, securities whose quotations are listed on the major stock exchanges and shown in the daily paper, and other items where an appraisal is not necessary to arrive at the actual true cash value.

Section 9. Property discovered after inventory filed. This section would replace ORS 116.415. However, it allows thirty days for the preparation and filing of a supplemental inventory, and further gives the personal representative the option of including the after-discovered property in his next accounting.

Section 10. Appraisement; employment and appointment of appraisers. The proposed section embodies a fundamental change in the appraisement procedure. The suggested language would place the power to employ the services of "qualified and disinterested appraisers" in the hands of the personal representative, in much the same manner as the other professional helper, namely, the attorney for the estate, is retained by the interested party. The section, rather than setting out fixed fees as now contained in ORS 116.425,

provides in Section 12 that the appraiser shall be paid "a reasonable fee and necessary expenses." Your committees have not only heard criticisms from their clients and the general public of the appraisers' fees in some instances, but have also had serious criticism from realtor and professional appraiser bodies. They feel, and in the opinion of your committees justly T so, that the relationship of the appraiser to the personal representative should be similar to the present attorney relationship.

So far as appraising real estate is concerned, we quote the following from the report of Mr. Robert Lundy, Legislative Counsel of Oregon.

> Lundy commented that he had received correspondence from real estate appraisers who indicated the scale was in conflict with their code of ethics. He had, he said, received a letter from Oregon Chapter 14, American Institute of Real Estate Appraisers, in which they set forth the following four specific recommendations:
>
> "1. That some form of qualification as evidenced by membership in a properly recognized professional organization or by examination or by demonstration, be a requirement of eligibility to appraise an estate or a portion of an estate and that appointment be made only for such portion of an estate for which proper qualification is so evidenced.
>
> "2. That appraisal fees be agreed upon in advance (prior to assignment) and that they be based on the investigation and analysis necessary for a proper appraisal rather than on the amount of value found. A procedure somewhat similar to that which is in current use by the State Highway Commission is suggested.
>
> "3. That any appraiser for an estate or a portion of an estate should sign and attest to his opinion of value only on types of assets for which his qualifications are in evidence.

> "4. That the over-all value of an estate be submitted to the court by the attorney conducting probate thereof, and that such be a composite of values found on various types of assets; each by persons qualified to appraise the specific types involved."

In general, we believe that the suggested provisions meet the criticisms and suggestions referred to. The proposed section requires a qualified and disinterested appraiser. Different appraisers may be employed to appraise different kinds of assets. The employment would be on a reasonable fee and expenses basis which would take into account the difficulty and expertise required in individual appraisals.

Power is retained in the probate court to direct that all or any part of the property be appraised by one or more appraisers appointed by the court. It may well be that the personal representative in certain cases has failed or neglected to arrange for the appraisal, or that he would prefer to have the court take direction and appointment of the appraisal and the appraisers.

Section 11. Appraisal to be at true cash value at date of death. Section 11 replaces ORS 116.435 and substitutes the requirement that each article shall be appraised "at its true cash value as of the date of the decedent's death." This language has been adopted in preference to the term "full and true value" which now appears in the inheritance tax code (ORS 118.640).

Section 12. Fees of appraisers. This has been covered in the preceding comment.

Section 13. Naming of personal representative does not discharge claim against him. This section replaces and incorporates most of the language in ORS 116.440. The language of the present ORS section has been changed to include not only executors but personal representatives of intestate estates. The necessity of this statute and the reason for the language incorporated from our present ORS section is explained in Section 626, Jaureguy & Love, Oregon Probate Law and Practice, as follows: (Notes to citations omitted).

> At common law, if testator appointed as executor of his estate a person who was his debtor and the latter accepted the appointment, the debt was thereby discharged unless there were not sufficient other assets to satisfy creditors. This rule of law has been expressly changed by statute which provides that such a claim is not discharged and must be included in the inventory. Furthermore, if the person so named accepts the appointment and administers the estate, the amount of the indebtedness is treated as "so much money in his hands" for which he must account. The same rule apparently applies in the case of an administrator.
>
> This particular wording of our statute becomes important in case of the insolvency of the executor or administrator. In some states a similar statute provides that the debt of the personal representative "shall be assets", instead of "so much money", in his hands. Under such a statute "a debt due from an executor is placed on the same footing with debts due the estate from other sources, and he and his sureties are only required to account for the actual value thereof." In those states, accordingly, in case of the personal representative's insolvency, his sureties need only pay a portion of the indebtedness. But under our statute providing that the debt of the personal representative is deemed "so much money" it is held that the estate is entitled to recover the full amount of the representative's debt.

Section 14. Discharge or devise in will of claim of testator. Section 14 is identical with ORS 116.445 except for minor editorial changes.

Section 15. Transactions authorized for personal representative. The language of this comprehensive section has been taken, with substantial changes, from Section 3-416 of the 1967 Uniform Probate Code. It would, among its various provisions, cover powers given by ORS 116.110, 116.125, 116.130, 116.135, 116.170, 116.175, 116.180, 116.785, 116.790, 116.795 and 116.800. A detailed comment upon each of the specific authorities given would seem unnecessary. Subsections (1), (2) and (3) grant broad powers not prescribed by present ORS sections. The provisions for performing contracts made by the deceased are broader than the present ORS provision. It would specifically sanction practices which now do not have legislative authority. Subsection (7) for abandonment of burdensome property and Subsections (8), (9), (10) and (11) for dealing with securities of the estate do not have counterparts in our present code. Subsection (16), authorizing personal representatives to employ attorneys, accountants, and investment authorities supplies an authority not found in our present code. To summarize, an examination of this section will make it clear that many essential acts of administration which have to be now performed without express legislative sanction are covered by this comprehensive section.

Section 16. Right to file notice of and perfect lien. This section is ORS 16.120 with editorial changes.

Section 17. Power of personal representative to sell, mortgage, lease and deal generally with property. As noted in the introductory comment, this section would give the personal representative power to sell, mortgage, lease or otherwise deal with property of the estate without petition, notice, hearing or court order. It gives not only full power to the personal representative in this area, but it gives the widest protection to those dealing with the personal representative, against will provisions, procedural irregularity or jurisdictional defect in the administration. This is a wide protection not extended by our present code.

The philosophy of the proposed section is described in the comment to Section 860.01 of the proposed Wisconsin Code (Assembly Bill 280, March 1, 1967):

> "This section gives to all personal representatives the power that is given to executors in most wills. It is the power which all personal representatives have always had over personal property in Wisconsin. Though a personal representative is given unrestricted power to sell, mortgage or lease property he will be held financially responsible to the persons interested if he acts carelessly or unreasonably. He 'must act not only honestly or with good faith in the narrow sense but must also exercise the duty of loyalty toward the beneficiary for whose benefit the power of sale is to be exercised and with such care and skill as a man of ordinary prudence would exercise in dealing with his own property.'"

We call attention to the fact that this proposed short section would replace some thirty-three sections of the present code, ORS 116.705 to 116.890 inclusive, covering 6 1/2 pages of the

present Oregon Revised Statutes, which have probably caused more practical difficulties and problems to attorneys representing estates than all of the other sections of the code combined. Yet, with this simple authority given, adequate protection is given in succeeding provisions, both to the parties dealing with the personal representative, and to the parties interested as heirs, devisees, and creditors.

Section 18. Court order for sale, mortgage or lease. This section is taken from Section 860.11 of the 1967 Wisconsin Code. It would permit any interested person to apply to the court for an order of sale, mortgage or lease which would protect and justify the personal representative in proceeding.

Section 19. Title conveyed free of claims of creditors. This section is taken from Section 860.05 of the 1967 Wisconsin Probate Code. It is merely a statement of the present Oregon law, although its exact parallel is not now found in ORS.

Section 20. Non-liability of transfer agents. This section is taken from Section 860-01 of the 1967 Wisconsin Code. It may avoid some technical problems now raised by transfer agents in transferring securities sold by personal representatives.

Section 21. Persons dealing with personal representatives; protection. This section is a verbatim copy of Section 3-415 of the 1967 Uniform Probate Code. The effect of this section is to grant absolute protection to purchasers and other parties dealing with personal representatives. It is felt that such

a broad and absolute protection is necessary in view of the fact that the personal representative is operating, in dealing with estate property, without specific court order or adjudication.

Section 22. Sale or encumbrance to personal representative voidable; exceptions. This section is taken verbatim from Sections 3-414 of the 1967 Uniform Probate Code. This section would replace the present ORS 116.820 which reads in part as follows: "All purchases of the property of the estate by an executor or administrator, however made, whether directly or indirectly, are prohibited, and if made are void, except when made in compliance with another statute, or the will of the decedent, or a contract, or other instrument, executed by the decedent." This section is discussed in Sections 754 and 755 of Volume II, Oregon Probate Law and Practice, Jaureguy and Love, in which the authors mention a number of problems either inherent in the present ORS section quoted or not dealt with by the section. It is believed that the proposed new section, particularly in its use of the term "voidable" rather than "void," and in its protection of an innocent purchaser for value without notice of the circumstances of the transaction, is a definite improvement over the ORS section it would replace.

Section 23. Improper exercise of power; breach of fiduciary duty. This section is taken from Section 3-413 of the 1967 Uniform Probate Code. For a discussion of the problems covered by this section see Section 638, Volume II,

Oregon Probate Law and Practice, Jaureguy and Love. The proposed section spells out that the liability of the personal representative for breach of duty is that of the trustee of an express trust. This is a more forthright statement than that contained in some of the Oregon cases. The definition of interested persons is a broad one, including heirs, devisees, creditors, and others having a property right in or claim against the estate which may be affected by the proceedings. The personal representative is made liable for breach of his fiduciary duty for resulting damage or loss to these persons.

Section 24. Right to control disposition of remains. This section would amend ORS 97.130 as indicated. The amendment would take care of a very present and serious problem when directions and authority for disposition of the remains of the deceased parties cannot be obtained from the parties now given such authority by the statute. The proposed amendment would effectively meet this problem.

Section 25. Authority of personal representative when will includes gift of body for scientific and medical purposes; nonliability for actions. This section amends ORS 116.115. Since ORS 97.130 is in the general section giving the power of the personal representative to control the remains, it would seem preferable that ORS 116.115 be placed to follow ORS 97.134. It should be noted that ORS 97.132 was Section 1 of Chapter 674, Session Laws of 1961, ORS 97.134 comprised

Sections 2 and 3 of this chapter, and ORS 116.115 was Section 4 of the same chapter. ORS 116.115 applies not only to wills which have been probated but also to unprobated instruments. There therefore seems no reason why this section should not follow ORS 97.134.

Section 26. Discovery of assets during procedure by personal representative. This section would rewrite and replace ORS 116.305, 116.310, and 116.320. Additional language has been included covering the right to examine books and records of a corporation which the decedent had a right to examine. It was considered preferable to make a general reference to the procedure set out in chapter 45 for taking testimony, rather than limiting it to the present language of ORS 116.310.

Section 27. Proceedings when person refuses to appear and give testimony. Section 27 rewrites ORS 116.315 to provide for a punishment for refusal to appear or answer questions as a contempt.

Section 28. Power to avoid transfers. This section would replace ORS 116.330, 116.335, and 116.340. The language is taken from Sections 3-410 of the 1967 Uniform Probate Code. The proposed section is also almost verbatim Section 368 of the 1963 Iowa Probate Code.

Section 29. Execution of deed where personal representative, guardian or conservator is unable or refuses to act. This useful section is amended to cover the situation where the personal representative sells property without a court order.

Proposed revised Oregon probate code
TITLE AND POSSESSION OF PROPERTY; DUTIES
AND POWERS OF PERSONAL REPRESENTATIVES
Amended 3rd Draft
November 17, 1967

Prepared by

Stanton Allison

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Proposed revised Oregon probate code
TITLE AND POSSESSION OF PROPERTY;
DUTIES AND POWERS OF PERSONAL
REPRESENTATIVES
3rd Draft
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Prepared by

Stanton Allison

Section 1. No distinction between real and personal property. The provisions of this code shall apply without distinction between real and personal property.

Section 2. Devolution of estate at death; title to property. Upon the death of a decedent title to his property vests in the persons to whom it is devised by his will, or, in the absence of testamentary disposition, in his heirs, subject to family allowance, rights of creditors, elective share of the surviving spouse and administration.

Section 3. Duty of personal representative; possession of estate. A personal representative has a right to and shall take possession and control of the decedent's estate, except that he shall not be required to take possession of or be accountable for property in the possession of an heir or devisee unless in his opinion possession by the personal representative is reasonably required for purposes of administration.

Section 4. Time of accrual of duties and powers. The duties and powers of a personal representative commence upon the issuance of his letters. The powers of a personal representative relate back in time to give his acts occurring prior to appointment the same effect as those

occurring thereafter. A personal representative may ratify and accept acts on behalf of the estate done by others where such acts would have been proper for a personal representative.

Section 5. Duties of personal representative. A personal representative is a fiduciary who is under a general duty to and shall collect the income from property of the estate in his possession and preserve, settle and distribute the estate in accordance with the terms of the will and this code, as expeditiously and with as little sacrifice of value as is reasonable under the circumstances.

Section 6. Application to court. A personal representative shall proceed with the settlement and distribution of the estate without adjudication, order or direction of the court, but he may apply to the court for an adjudication of questions concerning the estate or its administration.

Section 7. Publication of notice by personal representative. (1) Promptly after his appointment a personal representative shall cause a notice of his appointment to be published once in each of two successive weeks in:

(a) A newspaper published in the county in which the proceeding is pending; or

(b) If no newspaper is published in the county where the proceeding is pending, a newspaper designated by the court.

(2) The notice shall include:

(a) The name of the decedent; and

(b) Whether a will of the decedent has been admitted to probate; and

(c) A statement requiring all persons having claims against the estate to present them, within four months from the date of first publication of the notice, to the personal representative at the address designated in the notice for the presentation of claims; and

(d) The date of the first publication of the notice.

(3) A personal representative shall file in the probate proceeding proof by an affidavit of the publication of notice required by this section. The affidavit shall include a copy of the published notice.

Section 8. Inventory and appraisement, when and how made. Within 60 days after the date of his appointment, unless a longer time shall be granted by the court, the personal representative shall file an inventory of all of the property of the decedent which has come into his possession or knowledge. The inventory shall show the estimates of the personal representative of the respective true cash values of the properties described in the inventory as of the date of the decedent's death.

Section 9. Property discovered after inventory filed. Whenever any property not included in the inventory comes to the possession or knowledge of the personal representative,

he shall either file a supplemental inventory within 30 days of receiving possession or knowledge, or include the property in his next accounting.

Section 10. Appraisement; employment and appointment of appraisers. The personal representative may employ a qualified and disinterested appraiser to assist him in the appraisal of any asset the value of which may be subject to reasonable doubt. Different persons may be employed to appraise different kinds of assets included in the estate. The court also in its discretion may direct that all or any part of the property be appraised by one or more appraisers appointed by the court.

Section 11. Appraisal to be at true cash value at date of death. Property for which appraisement is required shall be appraised at its true cash value as of the date of the decedent's death. Each appraisement shall be in writing and shall be signed by the appraiser or appraisers making it.

Section 12. Fees of appraisers. Each appraiser shall be entitled to be paid from the estate a reasonable fee and necessary expenses.

Section 13. Naming of personal representative does not disqualify child [illegible] him. The naming or appointment of [illegible] personal representative shall not operate to [illegible] the power [illegible] decedent had [illegible] inventory.

If he agrees to act as personal representative he shall be liable for such claim as for so much money in his hands at the time the claim became due and payable; otherwise he is liable for such claim as any other debtor of the deceased.

Section 14. Discharge or bequest in will of claim of testator. The discharge or devise in a will of a claim of the testator against a personal representative or against any other person shall be of no effect as against creditors of the decedent. The claim shall be included in the inventory and for purposes of administration shall be regarded and treated as a specific legacy in that amount.

Section 15. Transactions authorized for personal representative. Except as restricted or otherwise provided by the will or by court order, a personal representative, acting reasonably for the benefit of interested persons, is authorized to:

(1) Direct and authorize disposition of the remains of the decedent pursuant to ORS 97.130 and incur expenses for the funeral, burial or other disposition of the remains in a manner suitable to his condition in life.

(2) Retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested or which are otherwise unsuitable for trust investment.

(3) Receive assets from fiduciaries, or other sources.

(4) Complete, compromise, or refuse perfomance of the

decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other courses of action, may:

(a) Execute and deliver a deed upon satisfaction of any sum remaining unpaid, or upon receipt of the purchaser's note adequately secured; or

(b) Deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement.

(5) Satisfy written pledges of the decedent for contributions irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented as claims.

(6) Deposit funds not needed to meet currently payable debts and expenses, and not immediately distributable, in bank or saving and loan accounts, or invest the funds in short term United States government obligations.

(7) Abandon burdensome property when it is valueless, or is so encumbered or is in a condition that it is of no benefit to the estate.

(8) Vote stocks or other securities in person or by general or limited proxy.

(9) Pay calls, assessments, and other sums chargeable or

accruing against or on account of securities.

(10) Sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(11) Hold a security in the name of a nominee or in other form without disclosure of the interest of the estate, but the personal representative shall be liable for any act of the nominee in connection with the security so held.

(12) Insure the assets of the estate against damage and loss and himself against liability to third persons.

(13) Advance or borrow money with or without security.

(14) Compromise, extend, renew or otherwise modify an obligation owing to the estate. If the personal representative holds a mortgage, pledge, lien or other security interest, accept a conveyance or transfer of the encumbered asset in lieu of foreclosure in full or partial satisfaction of the indebtedness.

(15) Pay taxes, assessments, and expenses incident to the administration of the estate.

(16) Employ qualified persons, including attorneys, accountants and investment advisors, to advise and assist the personal representative and to perform acts of administration, whether or not discretionary, on behalf of the personal representative.

(17) Prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties.

(18) Continue any business or venture in which decedent was engaged at the time of his death to preserve the value of the business or venture.

(19) Incorporate or otherwise change the business form of any business or venture in which decedent was engaged at the time of his death.

(20) Discontinue and wind up any business or venture in which the decedent was engaged at the time of his death.

(21) Provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate.

(22) Satisfy and settle claims and distribute the estate as provided in this Code.

(23) Perform all other acts required or permitted by law or by the will of decedent.

Section 16. Right to file notice of and perfect lien. The personal representative shall have the same rights to file notice of or otherwise perfect a lien or security interest as the decedent would have had if he were living.

Section 17. Power of personal representative to sell, mortgage, lease and deal generally with property. A personal

representative has the same power over title to property of the estate that he would have if he owned the property personally. He has power to sell, mortgage, lease and otherwise deal with property of the estate without notice, hearing or court order. The rights and title of any purchaser, mortgagee, lessee or other person dealing with the personal representative are in no way affected by any provision in a will of the decedent or by any procedural irregularity or jurisdictional defect in the administration of the estate.

Section 18. Title conveyed free of claims of creditors. Property sold, mortgaged or leased by a personal representative shall be subject to liens and encumbrances of record but shall be free and clear of rights of creditors based on the filing and allowance of a claim in the estate. The filing and allowance of a claim in an estate does not make the claimant a secured creditor.

Section 19. Nonliability of transfer agents. A transfer agent or a corporation transferring its own securities incurs no liability to any person by making a transfer of securities in an estate as requested or directed by a personal representative.

Section 20. Persons dealing with personal representatives; protection. A person dealing with or assisting a personal representative without actual knowledge that the personal representative is improperly exercising his power is protected as if the personal representative properly exercised the

power. The person is not bound to inquire whether the personal representative is properly exercising his power, and is not bound to inquire concerning the provisions of any will or any order of court that may affect the propriety of the acts of the personal representative. No provision in any will or order of court purporting to limit the power of a personal representative shall be effective except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative. The protection here expressed extends to instances where some procedural irregularity or jurisdictional defect, including the case where the alleged decedent is found to be alive, occurred in proceedings leading to the issuance of letters.

Section 21. Sale or encumbrance to personal representative voidable; exceptions. Any sale or encumbrance to the personal representative, his spouse, agent or attorney, or any corporation or trust in which he has more than a one-third beneficial interest, is voidable unless:

(1) The transaction was consented to by all interested persons affected thereby except any who were under legal disability for whom no guardian had been appointed; or

(2) The will expressly authorizes the transaction by the personal representative with himself.

The title of a purchaser for value without notice of the circumstances of the transaction with the personal representative

is not affected unless the purchaser should have known of the defect in the title of his seller.

Section 22. Improper exercise of power; breach of fiduciary duty. If the exercise of power by the personal representative in the administration of the estate is improper he shall be liable for breach of his fiduciary duty to interested persons for resulting damage or loss to the same extent as a trustee of an express trust. Exercise of power in violation of a court order is a breach of duty. Exercise of power contrary to the provisions of the will may be a breach of duty.

Section 23. ORS 97.130 is amended to read:

97.130. Right to control disposition of remains. The right to control the disposition of the remains of a decedent, unless other directions have been given by him, vests in his surviving spouse, his surviving children, his surviving parents and the person in the next degree of kindred to him, in the order named. If disposition of the remains has not been directed and authorized within ten days after the death of decedent the special administrator or the personal representative of the deceased may direct and authorize disposition of the remains.

Section 24. ORS 116.115 is amended to read:

116.115. Authority of personal representative when will includes gift of body for scientific and medical purposes;

nonliability for actions. The authority of a person named [executor] personal representative of a will which includes a gift pursuant to ORS 97.132 extends to performing acts necessary to carrying out the gift although [the] letters testamentary have not been issued. A person named [executor] personal representative who carries out the gift of the testator before issuance of letters testamentary or under a will which is not admitted to probate shall not be liable to the surviving spouse or next of kin for performing acts necessary to carry out the gift of the testator.

Section 25. Discovery of assets during procedure by personal representative. The court may order any person to appear and give testimony as provided in ORS chapter 45 if it appears probable:

(1) That he has concealed, secreted or disposed of any property of the estate of a decedent.

(2) That he has been intrusted with property of the estate of a decedent and refuses or neglects to account therefor to the personal representative.

(3) That he has concealed, secreted or disposed of any writing or other instrument or document relating or pertaining to the estate.

(4) That he has knowledge or information that is necessary to the administration of the estate.

(5) That officers or agents of a corporation refuse to allow examination of the books and records of the corporation which the decedent had the right to examine.

Section 26. Proceedings when person refuses to appear and give testimony. If the person cited as provided in ORS

_____refuses to appear, or to answer questions asked of him as authorized by the order of the court, he is in contempt and may be punished as for other contempts.

Section 27. Power to avoid transfers. The property liable for the payment of charges, administration expenses and claims against a decedent's estate shall include property transferred by him with intent to defraud his creditors or transferred by any means which is in law void or voidable as against his creditors; and the right to recover such property so far as necessary for the payment of charges, administration expenses and claims against the estate shall be in the personal representative, who shall take necessary steps to recover it. Such property shall constitute general assets for the payment of creditors.

Section 28. Repeal of existing sections. ORS 116.105, 116.110, 116.115, 116.120, 116.125, 116.130, 116.135, 116.170, 116.175, 116.180, 116.305, 116.310, 116.320, 116.325, 116.330, 116.340, 116.405, 116.410, 116.415, 116.420, 116.425, 116.430, 116.435, 116.440, 116.445, 116.450, 116.455, 116.460, 116.465, 116.705, 116.710, 116.715, 116.720, 116.725, 116.730, 116.735, 116.740, 116.745, 116.750, 116.755, 116.760, 116.765, 116.770, 116.775, 116.780, 116.785, 116.790, 116.795, 116.800, 116.805, 116.811, 116.815, 116.820, 116.825, 116.830, 116.840, 116.850, 116.860, 116.870, 116.880, 116.890, 116.900, 116.990 and 121.060 are repealed.

Proposed revised Oregon probate code
TITLE AND POSSESSION OF PROPERTY;
DUTIES AND POWERS OF PERSONAL
REPRESENTATIVES
3rd Draft
October 9, 1967

Prepared by

Stanton Allison

COMMENTS

The proposed chapter follows closely the format and language of the 1967 draft of the Uniform Probate Code. A reference to the corresponding Uniform Code Sections will show that while much of the language has been adopted verbatim, a large part of the language is that of the combined committees.

The general approach of the Uniform Code is that the personal representative is given power to act without hearing, order, or adjudication of the probate court unless he may desire to secure such adjudication. This new approach will be most noticeable in the section covering sale, mortgage, lease, and other dealings with property of the estate. These powers of the personal representative are given without the requirement of petition, hearing, notice and court order and confirmation of these transactions. This concept does not seem so radical, however, if it is remembered that the Oregon courts have always recognized the right of a testator to give his executor exactly the same power to operate without court order as the proposed code would do in the absence of testamentary instructions. Logically and factually, there seems no reason why the personal representative in an intestate situation or in the absence of testamentary provisions should not be given the same power over the administration of the estate as now given by a testator by his will. It should be noted further that in the usual will where the executor is authorized to act

without court order or supervision in the sale of estate assets the executor is operating without bond. In the proposed code, in an intestate situation, a surety bond is required in all cases and the court is given a wider discretion to require a surety bond in testate situations where the court deems such protection advisable. Although persons dealing with a personal representative are protected in a much greater degree than provided in the present code, the proposed chapter imposes a liability upon the personal representative for a breach of his fiduciary duty "to the same extent as a trustee of an express trust." It would seem therefore that under the proposed code the actual protection to the estate is much greater than under our present probate code.

Separate comments with reference to the equivalent ORS section as well as the source of the new language will follow as to each section. However, comments should be made of certain fundamental differences between the present code and the proposed code. First, no distinction is made as between real and personal property, but they are included and treated identically in all the powers granted in the chapter.

Second, unlike the present probate code, the provisions concerning the title and the possession of property both real and personal are specifically spelled out in the proposal code. No such specific provisions occur in the present code. There is a fundamental distinction in this area from our present law. In the proposed code, title to both real and personal property is vested in the heirs and/or devisees;

under the present law title only to the real property is so vested.

The proposed chapter sets out in much greater detail not only the powers of the personal representative, but also his duties and authority in a good number of specific areas which are not covered by the present rather peacemeal approach of the ORS sections. We believe this feature will have particular value to attorneys who may not specialize in probate practice, many of whom have expressed the thought of the difficulty of finding code provisions covering specific duties, specific problems, and specific authorities.

Section 1. No distinction between real and personal property. The language is taken generally from Section 3-101 of the 1967 Uniform Probate Code. The rationale of this concept is described in the following comment in the 1967 Wisconsin Probate Code discussing intestate succession.

> This section makes one very substantial change in the legal structure of intestate succession in Wisconsin. Existing law treats real property in a different manner than personal property and even within the classification of real property draws a sharp distinction between the homestead and other real property. These distinctions are products of our inherited system of descent and distribution, drawn from the English law of prior centuries and abandoned in England by statute in 1925; the separate descent of the homestead is added as a purely American statutory innovation. The result of this hodgepodge of legislation is that inheritance rights are dependent upon the kind of property owned by the decedent. There is no longer any sound policy reason for retaining these distinctions, and the modern trend is toward a single system of inheritance (intestate succession) with abolition of common-law dower and curtesy. This statute provides a single rule for inheritance of all kinds of property. Although there

> is a strong argument for special treatment of the home, the present law of homestead and descent is illustrative of the complexities involved in attempting any such distinction. Moreover, most homes are owned jointly by husband and wife and do not pass under the intestate law at all (but go to the survivor because of the survivorship right in joint tenancy).

It is recognized that many of the most difficult problems in our present probate code arise because of this artificial distinction between real and personal property. The proposed code in all the areas of intestate succession and administration would resolve these technical difficulties by abolishing all distinction between real and personal property.

Section 2. Devolution of estate at death; title to property. The general language is taken from Section 3-101 of the 1967 Uniform Probate Code. This would change the present law of Oregon in that it would vest title at the date of death not only to the real property but to the personal property of the estate in the heirs or devisees. The section spells out that this vesting is subject to family allowance, creditors' rights, the elective share of the surviving spouse, and administration. Reference may be made to ORS 111.020.

Section 3. Duty of personal representative; possession of estate. This language is based upon Section 3-409 of the 1967 Uniform Code. It would replace ORS 116.105. The proposed section spells out what has been a difficult practical problem in the present Oregon code. The proposed code recognizes the factual situation that much of the real and personal property of an estate should remain, and rightfully so, in

the possession of those to whom it is left by will or intestacy who were in actual possession at the time of the decedent's death. The proposed section recognizes this situation and specifies that the personal representative may recognize such possession and is only required to take actual possession where it is required for purposes of administration.

Section 4. Time of accrual and duties and powers. This section is taken from Section 3-401 of the 1967 Uniform Probate Code. We do not find an equivalent of this most useful section in the present Oregon Revised Statutes. The obvious value of spelling out this provision is evident.

Section 5. Duties of personal representative. The language is taken generally from Section 3-403 of the 1967 Uniform Probate Code. The section would include the provisions of ORS 116.105.

Section 6. Application to court. This section is taken from Section 3-404 of the 1967 Uniform Probate Code. The thrust of this section was commented on at some length in the introduction. It gives full authority to the personal representative to proceed without court order unless he desires the decision and adjudication of the court in particular situations.

Sections 7-14. The separate comments on Sections 7 to 14 inclusive are included in the chapters where these sections have been placed temporarily.

Section 15. Transactions authorized for personal

representative. The language of this comprehensive section has been taken, with substantial changes, from Section 3-416 of the 1967 Uniform Probate Code. It would, among its various provisions, cover powers given by ORS 116.110, 116.125, 116.130, 116.135, 116.170, 116.175 and 116.180. A detailed comment upon each of the specific authorities given would seem unnecessary. Subsections (1), (2) and (3) grant broad powers not prescribed by present ORS sections. The provisions for performing contracts made by the deceased are much broader than the present ORS provision. It would specifically sanction many practices which now do not have legislative authority. Subsection (7) for abandonment of burdensome property and Subsections (8), (9), (10) and (11) for dealing with securities of the estate do not have counterparts in our present code. Subsection (16), authorizing personal representatives to employ attorneys, accountants and investment authorities supplies an authority not found in our present code. To summarize, an examination of this section will make it clear that many essential acts of administration which have to be now performed without express legislative sanction are covered by this comprehensive section.

Section 16. Right to file notice of and perfect lien. This section is ORS 16.120 with editorial changes.

Section 17. Power of personal representative to sell, mortgage, lease and deal generally with property. As noted in the introductory comment, this section would give the

personal representative power to sell, mortgage, lease or otherwise deal with property of the estate without petition, notice, hearing or court order. It gives not only full power to the personal representative in this area, but it gives the widest protection to those dealing with the personal representative, against will provisions, procedural irregularity or jurisdictional defect in the administration. This is a wide protection not extended by our present code.

The philosophy of the proposed section is described in the comment to Section 860.01 of the proposed Wisconsin Code (Assembly Bill 280, March 1, 1967):

> "This section gives to all personal representatives the power that is given to executors in most wills. It is the power which all personal representatives have always had over personal property in Wisconsin. Though a personal representative is given unrestricted power to sell, mortgage or lease property he will be held financially responsible to the persons interested if he acts carelessly or unreasonably. He 'must act not only honestly or with good faith in the narrow sense but must also exercise the duty of loyalty toward the beneficiary for whose benefit the power of sale is to be exercised and with such care and skill as a man of ordinary prudence would exercise in dealing with his own property.'"

We call attention with some amazement to the fact that this proposed short section would replace some thirty-three sections of the present ORS code, 116.705 to 116.890 inclusive, covering 6 1/2 pages of the present Oregon Revised Statutes, which have probably caused more practical difficulties and problems to attorneys representing estates than all of the other sections of the code combined. Yet, with this simple authority given, adequate protection is given in succeeding

provisions, both to the parties dealing with the personal representative, and to the parties interested as heirs, devisees and creditors.

Section 18. Title conveyed free of claims of creditors. This section is taken from Section 860.05 of the 1967 Wisconsin Probate Code. It is merely a statement of the present Oregon law, although its exact parallel is not now found in ORS.

Section 19. Nonliability of transfer agents. This section is taken from Section 860.01 of the 1967 Wisconsin Code. It may avoid some technical problems now raised by transfer agents in transferring securities sold by personal representatives.

Section 20. Persons dealing with personal representatives; protection. This section is a verbatim copy of Section 3-415 of the 1967 Uniform Probate Code. The effect of this section is to grant absolute protection to purchasers and other parties dealing with personal representatives. It is felt that such a broad and absolute protection is necessary in view of the fact that the personal representative is operating in dealing with estate property without specific court order or adjudication.

Section 21. Sale or encumbrance to personal representative voidable; exceptions. This section is taken verbatim from Section 3-414 of the 1967 Uniform Probate Code. This section

would replace the present ORS 116.820 which reads in part as follows: "All purchases of the property of the estate by an executor or administrator, however made, whether directly or indirectly, are prohibited, and if made are void, except when made in compliance with another statute, or the will of the decedent, or a contract, or other instrument, executed by the decedent." This section is discussed in Sections 754 and 755 of Volume II, Oregon Probate Law and Practice, Jaureguy and Love, in which the authors mention a number of problems either inherent in the present ORS section quoted or not covered by this section. It is believed that the proposed new section, particularly in its use of the term "voidable" rather than "void," and in its protection of an innocent purchaser for value without notice of the circumstances of the transaction, is a definite improvement over the ORS section it would replace.

Section 22. Improper exercise of power; breach of fiduciary duty. This section is taken from Section 3-413 of the 1967 Uniform Probate Code. For a discussion of the problems covered by this section see Section 638, Volume II, Oregon Probate Law and Practice, Jaureguy and Love. The proposed section spells out that the liability of the personal representative for breach of duty is that of the trustee of an express trust. This is a more forthright statement than that contained in some of the Oregon cases. The definition of interested persons is a broad one, including heirs, devisees,

creditors, and others having a property right in or claim against the estate which may be affected by the proceedings. The personal representative is made liable for breach of his fiduciary duty for resulting damage or loss to these persons.

Section 23. Right to control disposition of remains. This section would amend ORS 97.130 as indicated. The amendment would take care of a very present and serious problem when directions and authority for disposition of the remains of deceased parties cannot be obtained from the parties now given such authority by the statute. The proposed amendment would effectively meet this problem.

Section 24. Authority of personal representative when will including the gift of body for scientific and medical purposes; nonliability for actions. This section is identical with the present ORS 116.115. However, since the reference to ORS 97.130 is incorporated in the general section giving the power of the personal representative to control the remains, it would seem preferable that ORS 116.115 be placed to follow ORS 97.134. It should be noted that ORS 97.132 was section 1 of chapter 674, Session Laws of 1961, ORS 97.134 comprised sections 2 and 3 of this chapter, and ORS 116.115 was section 4 of the same chapter. Please note also that ORS 116.115 applies not only to wills which have been probated but also applies to unprobated instruments. There therefore seems no reason why this section would have to be incorporated in the probate code.

Section 25. Discovery of assets during procedure by personal representative. This section would rewrite and replace ORS 116.305, 116.310 and 116.320. Additional language has been included covering the right to examine books and records of a corporation which the decedent had a right to examine. It was considered preferable to make a general reference to procedure set out in Chapter 45 for taking testimony, rather than limit it to the present language of 116.310.

Section 26. Proceedings when person refuses to appear and give testimony. Section 26 rewrites ORS 116.315 and generalizes the language to provide for a punishment for refusal to appear or answer questions as a contempt.

Section 27. Power to avoid transfers. This section would replace ORS 116.330, 116.335 and 116.340. The language is taken from Section 3-410 of the 1967 Uniform Probate Code. The proposed section is actually almost verbatim Section 368 of the 1963 Iowa Probate Code.

CORRESPONDING SECTIONS - CHAPTER ON
TITLE AND POSSESSION OF PROPERTY; DUTIES AND
POWERS OF PERSONAL REPRESENTATIVES

Proposed Third Draft

Draft Sections	ORS Sections
1	
2	
3	116.105
4	
5	116.105
6	
7	116.505
8	116.405, 116.410
9	116.415
10	116.420
11	116.435
12	116.425
13	116.440
14	116.445
15(4)	116.110
15 (13)	116.125
15 (14)	116.130, 116.135
15 (18)	116.170, 116.175
15 (20)	116.180
16	116.120
17	116.705 to 116 930 incl. and 116.840 tc 116.900 incl.
18	
19	
20	
21	116.820

Draft Sections	ORS Sections
22	
23	97.130
24	116.115
25	116.305, 116.310, 116.320
26	116.315
27	116.330, 116.335, 116.340
28	Repealer

Proposed revised Oregon probate code
POWERS AND DUTIES OF PERSONAL REPRESENTATIVE
2nd Draft
September 1, 1967

Prepared by
Stanton W. Allison

Section 1. Devolution of estate at death; restrictions. The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations expressed or implicit in this chapter to facilitate the prompt settlement of estates. Upon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will, or, in the absence of testamentary dispostion, to his heirs, subject to family allowance, rights of creditors, elective share of the surviving spouse, and to administration. The provisions of this chapter shall apply without any preference or priority as between real and personal property.

References: Uniform Probate Code,
Sec. 3-101 (1967)

Section 2. Duty of personal representative; possession of estate. Every personal representative has a right to, and shall take possession or control of the decedent's estate, except that property in the possession of the person presumptively entitled thereto as heir or devisee shall be possessed by the personal representative only when reasonably necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by the heir or devisee shall be conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is reasonably necessary for purpose

of administration. The personal representative shall pay taxes on all property in his possession. He shall keep buildings and fixtures in his possession in tenantable repair. He may maintain an action to recover possession of any property or to determine the title thereto.

References: Uniform Probate Code, Sec. 3-409 (1967)
ORS 116.105

Section 3. Time of accrual of duties and powers. The duties and powers of a personal representative commence upon the issuance of his letters. The powers of a personal representative relate back in time to give his acts occurring prior to appointment the same effect as those occurring thereafter where beneficial to the estate. A personal representative may ratify and accept acts on behalf of the estate done by others where such acts would have been proper for a personal representative.

References: Uniform Probate Code, Sec. 3-401 (1967)

Section 4. General duties; relation and liability to persons interested in estate; standing to sue.

(1) A personal representative is a fiduciary who, in addition to the specific duties expressed in this chapter, is under a general duty to settle and distribute the estate of the decedent in accordance with the terms of the will and this chapter, and as expeditiously and with as little sacrifice of value as is reasonable under all of the circumstances. He shall use the authority

conferred upon him by this chapter, the terms of the will, if any, any order of the court, and the rules generally applicable to fiduciaries, for the best interests of creditors of the decedent and successors to the estate. A personal representative shall not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time.

(2) A personal representative of a decedent who was domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as his decedent had immediately prior to death.

References: Uniform Probate Code,
Sec. 3-703, (1967)

Section 5. Powers of personal representative; in general. Until termination of his appointment a personal representative has the same power over the title to property of the estate as an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing, or order of court.

References: Uniform Probate Code,
Sec. 3-712, (1967)

Section 6. Notice to creditors. (See Section 11.A of chapter on Initiation of Probate draft dated 7/5/67.

Section 7 - 13, inclusive. Inventory and Appraisal. (See

second draft pursuant to minutes of 8/18, 19/1967.)

Section 14. Transactions authorized for personal representative. Except as restricted or otherwise provided by the will or by court order, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

(1) Direct and authorize disposition of the remains of the decedent pursuant to ORS 97.130 and incur expenses for the funeral, burial or other disposition of the remains in a manner suitable to his condition in life.

(2) Retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested or which are otherwise improper for trust investment.

(3) Receive assets from fiduciaries, or other sources.

(4) Complete, compromise, or refuse performance of the decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may:

(a) Execute and deliver a deed of conveyance, for cash payment of all sums remaining due, or the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or

(b) Deliver a deed in escrow with directions that the

proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement.

(5) Satisfy written charitable pledges of the decedent irrespective of whether such pledges constituted binding obligations of the decedent or were properly presented as claims when, in the judgment of the personal representative, the decedent would have wanted the pledges completed under the circumstances.

(6) When funds are not needed to meet debts and expenses currently payable and are not immediately distributable, deposit liquid assets of the estate, including moneys received from the sale of other assets, in federally insured interest-bearing accounts or other short-term loan arrangements that may be reasonable for use by trustees generally.

(7) Abandon property when, in the opinion of the personal representative, it is valueless, or is so encumbered or is in condition that it is of no benefit to the estate;

(8) Vote stocks or other securities in person or by general or limited proxy.

(9) Pay calls, assessments, and other sums chargeable or accuring against or on account of securities, unless barred by the provisions relating to claims.

(10) Hold a security in the name of a nominee or in other form without disclosure of the interest of the estate but the

personal representative shall be liable for any act of the nominee in connection with the security so held.

(11) Insure the assets of the estate against damage, loss and liability and himself against liability in respect to third persons.

(12) Borrow money with or without security to be repaid from the estate assets or otherwise; and advance money for the protection of the estate.

(13) Effect a fair and reasonable compromise with any debtor or obligor, or extend, renew or in any manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge or other lien upon property of another person, he may, in lieu of foreclosure, accept a conveyance or transfer of encumbered assets from the owner thereof in satisfaction of the indebtedness secured by lien.

(14) Pay taxes, assessments, compensation of the personal representative, and other expenses incident to the administration of the estate.

(15) Sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(16) Allocate items of income or expense to either estate income or principal, as permitted or provided by law.

(17) Employ persons, including attorneys, auditors,

investment advisors, or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary.

(18) Prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties.

(19) Continue any unincorporated business or venture in which the decedent was engaged at the time of his death:

(a) In the same business form for a period of not more than four months from the date of appointment of the personal representative where continuation is a reasonable means of preserving the value of the business including good will.

(b) In the same business form for any additional period of time that may be approved by order of the court, or

(c) Throughout the period of administration if the business is incorporated by the personal representative and if none of the probable distributees of the business who are competent adults object to its incorporation and retention in the estate.

(20) Upon order of the court discontinue and wind up any business or venture in which the decedent was engaged at the time of his death.

(21) Provide for exoneration of the personal representative

from personal liability in any contract entered into on behalf of the estate.

(22) Satisfy and settle claims and distribute the estate as provided in this Code.

References: Uniform Probate Code, Sec. 3-416,(1967) and

ORS 116.110, 116.125, 116.130, 116.135, 116.170, 116.175 & 116.180.

Section 15. Power of personal representative to sell, mortgage and lease. A personal representative has power to sell, mortgage or lease property of the estate without notice, hearing or court order. The rights and title of any purchaser, mortgagee or lessee from the personal representative are in no way affected by any provision in a will of the decedent or any procedural irregularity or jurisdictional defect in the administration of the decedent's estate. A transfer agent or a corporation transferring its own securities incurs no liability to any person by making a transfer of securities in an estate as requested or directed by a personal representative.

Section 16. Free of claims and creditors. Property sold, mortgaged or leased by a personal representative shall be subject to liens and encumbrances of record but shall be free and clear of rights of creditors based on the filing and allowances of a claim in the estate. The filing and allowance of a claim in an estate does not make one a secured creditor.

Section 17. Contract of decedent to sell or lease land.

When any person legally bound to make a sale, mortgage or lease dies before making the same and the personal representative fails or refuses to perform in accordance with the decedent's contract, any person claiming to be entitled to the sale, mortgage or lease may petition the court for specific performance of the contract. Upon satisfactory proof the court may order the personal representative to make a sale, mortgage or lease or may by its own order make a conveyance, mortgage or lease to the person entitled thereto upon the performance of the contract.

Section 18. Except as may be required by section 17, any sale, mortgage or lease of property by a personal representative shall be without express or implied warranties.

Section 19. Persons dealing with personal representatives; protection. A person dealing with or assisting a personal representative without actual knowledge that the personal representative is improperly exercising his power is protected as if the personal representative properly exercised the power. The person is not bound to inquire whether the personal representative is properly exercising his power, and is not bound to inquire concerning the provisions of any will or any order of court that may affect the propriety of the acts of the personal representative. No provision in any will or order of court purporting to limit the power of a personal representative shall be effective except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets

paid or delivered to a personal representative. The protection here expressed extends to instances where some procedural irregularity or jurisdictional defect, including the case where the alleged decedent is found to be alive, occurred in proceedings leading to the issuance of letters.

References: Uniform Probate Code, Sec. 3-415, (1967)

Section 20. Sale or encumbrance to personal representative voidable; exceptions. Any sale or encumbrance to the personal representative, his spouse, agent or attorney, or any corporation or trust in which he has more than a one-third benefical interest, is voidable unless,

(a) The transaction was consented to by all interested persons affected thereby, or approved by the court.

(b) The will expressly authorized the transaction by the personal representative with himself.

The title of a purchaser for value without notice of the circumstances of the transaction with the personal representative is not affected unless the purchaser should have known of the defect in the title of his seller.

References: Uniform Probate Code, Sec. 3-414, (1967)

Section 21. Improper exercise of power; breach of fiduciary duty. If the exercise of power concerning the estate is improper, the personal representative shall be liable for beach of his

fiduciary duty to interested persons for resulting damage or loss to the same extent as a trustee of an express trust. The exercise of power in violation of court order, or contrary to the provisions of the will may be breaches of duty. The rights of purchasers and others dealing with a personal representative shall be determined as provided in ORS_____and_____and may be unaffected by the fact that the personal representative breached his fiduciary duty in the transaction.

References: Uniform Probate Code, Sec. 3-413, (1967)

Section 22. Right to file notice of and perfect lien. The personal representative shall have the same rights to file notice of or otherwise perfect a lien or security interest as the decedent would have had if he were living.

References: Advisory Committee Minutes: 6/17, 18/66 p. 19; and Appendix

ORS 116.120

Section 23. ORS 97.130 is amended to read:

97.130. Right to Control Disposition of Remains. The right to control disposition of the remains of a decedent, unless other directions have been given by him, vests in his surviving spouse, his surviving children, his surviving parents and the person in the next degree of kindred to him, in the order named. If disposition of the remains has not been directed

and authorized within ten days after the death of decedent the special administrator or the personal representative of the deceased may direct and authorize disposition of the remains.

Section 24. Authority of executor when will includes gift of body for scientific and medical purposes; nonliability for actions. The authority of a person named executor of a will which includes a gift pursuant to ORS 97.132 extends to performing acts necessary to carrying out the gift although letters testamentary have not been issued. A person named executor who carries out the gift of the testator before issuance of letters testamentary or under a will which is not admitted to probate shall not be liable to the surviving spouse or next of kin for performing acts necessary to carry out the gift of the testator. Reference: ORS 116.115

Section 25. Discovery of assets during procedure by personal representative. The court may order any person to appear and give testimony as provided in ORS chapter 45 if it appears probable:

(1) That he has concealed, secreted or disposed of any property of the estate of a decedent.

(2) That he has been intrusted with property of the estate of a decedent and refuses or neglects to account therefor to the personal representative.

(3) That he has concealed, secreted or disposed of any writing or other instrument or document relating or pertaining to the estate.

(4) That he has knowledge or information that is necessary to the administration of the estate and the knowledge or information is otherwise unavailable to the personal representative.

(5) That corporate officers or agents refuse to allow inspection of books and records of a corporation in which there are stocks, bonds or debentures of the estate.

References: Advisory Committee Minutes:
6/17, 18/66 Appendix
7/15, 16/66 pp. 5 and 6; and Appendix

ORS 116.305
116.320

Section 26. Proceedings when person refuses to appear and give testimony. If the person cited as provided in ORS _____ refuses to appear, or to answer questions asked of him as authorized by the order of the court, he is in contempt and may be punished as for other contempts.

References: Advisory Committee Minutes:
6/17, 18/66 Appendix
7/15, 17/66 pp. 5 to 7; and Appendix

ORS 116.315

Section 27. Power to avoid transfers. The property liable for the payment of debts of a decedent shall include all property transferred by him by any means which is in law void or voidable as against his creditors, and the right to recover such property, so far as necessary for the payment of the debts of the decedent, shall be exclusively in the personal representative.

References: Uniform Probate Code,
Sec. 3-410, (1967)

ORS 116.330, 116.335,
116.340

Section 28. Property embezzled or converted. If any person embezzles or converts to his own use any of the personal property of a decedent before the appointment of a personal representative, the person shall be liable to return the property or its value to the estate. No person shall be charged as executor by his own wrong [de son tort].

References: Uniform Probate Code,
Sec. 3-411, (1967)

ORS 116.325

Section 29. Repeal of existing statutes:

Proposed revised Oregon probate code
POWERS AND DUTIES OF PERSONAL REPRESENTATIVE
2nd Draft
September 1, 1967

Prepared by
Stanton W. Allison

COMMENTS

In view of the general directive to your draftsman at the meeting of August 18 and August 19, 1967, to incorporate to a substantial extent the applicable language of the 1967 Draft Uniform Code, I suggested that I prepare a tentative draft of Tabs 15, 19, and 21 to be combined in a single chapter. However, since Tab 19 covering discharge of incumbrance has not been on the agenda for consideration by the committees, I have not included this material in the present draft. Since Section 7 of the first draft of April 27 also appears in Tab 19, I have not included that section.

The sections on notice to creditors and inventory and appraisal have been separately redrafted, and since these were thoroughly considered at the previous meeting and at earlier meetings, I have not included these items.

Tab 21 covering sale, mortgage, and lease of property was considered and discussed at previous meetings as noted on the front. Although powers in this category are included within the general section of the Uniform Code, because Tab 21 had been carefully discussed and also because in your draftsman's opinion it will be preferable to have a separate section on real property sales, I have included the separate section from Tab 21.

In preparing this tentative draft I followed as closely as possible the general order and outline of the first draft. As

will be noted, a number of the sections use the language of the first draft. However, where I felt the language of the Uniform Code covered the same material and in some cases with broader language, I have incorporated the language of the Uniform Code.

The following separate comments are not intended for use when the final draft is approved and written but are primarily for the understanding of the two committees to explain the changes or substitutions from the former draft. It should also be stated that minor changes and some eliminations have been made in the Uniform Code sections, but, somewhat to your draftsman's surprise, the sections seemed appropriate without any extensive editing.

Section 1. Devolution of estate at death.

Although the discussion of this subject is on the agenda for the September meeting, I felt the language taken from Section 3-101 of the Uniform Code was so in line with our previous discussion that it would be helpful to have it included here.

Section 2. Duty of Personal Representative; Possession of Estate.

The comment on Section 1 is equally applicable to Section 2. The language has been taken from Section 3-409 of the Uniform Code without change.

Section 3. Time of accrual of duties and powers.

This section is taken verbatim from Section 3-401 of the

Uniform Code. There is no precise counterpart in ORS but this supplies language applicable in a number of situations, particularly in regard to ORS 116.115.

Section 4. General Duties; relation and liability to persons interested in estates; standing to sue.

The language of this section, with minor modifications, is the same as Section 3-403 of the Uniform Code. Although there is now a counterpart for this section in ORS, it was felt advisable to include this language to implement the general theory of the new code that the personal representative, except in special instances where order of court was required, would be given powers to operate without court order. It is, however, the general understanding that the administrator should have the supervision of the court and complete permission to secure court order when needed. Please note, however, that the draftsman has not included the language of Section 3-404 of the Uniform Code which reads as follows: "Except where supervised administration has been ordered, a personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate without adjudication, order, or direction of the (judge), but he may invoke the jurisdiction of the (probate) court, in roceedings authorized by this Code, to resolve questions concerning the estate or its administration." The proposed code does not adopt the distinction in the Uniform Code between informal probate and supervised administration. In view of the proposal that the county clerk act in ex parte matters, it would seem advisable to make it permissive

in all cases for a personal representative to seek the advice and the authority of the probate court. Any hard and fast legislation in the form of the above-quoted section might tend to change this concept.

Section 5. Powers of personal representative; in general.

This language is taken verbatim from Section 3-412 of the Uniform Code. No comparable section is now in ORS. This is the basic section for the protection of persons dealing with a personal representative under the broad powers given by the proposed code. It was thought advisable to place this basic section prior to the later specific sections on powers and particularly that of the power of sale. It is the intention to incorporate all or at least a major part of the comment in the Uniform Code when the definitive comments are prepared on these individual sections.

Section 6. Notice to creditors.

This has been drafted and placed temporarily in the second draft of the Initiation of Probate chapter which has been already circulated to key members of the committees.

Sections 7 to 13, covering Inventory and appraisal, as stated above, have been drafted separately and will be circulated separately.

Section 14. Transactions authorized for personal representatives.

As instructed by the last joint meeting, this language was incorporated from Section 3-416 of the Uniform Code. The changes

from 3-416 have been minimal. To comply with directions of the August meeting, I have included a section which would authorize disposition of the remains of the decedent when authority was given under ORS 97.130, which provides that authority can be given when no directions have been received for ten days following the death. I have eliminated the provisions for sale, mortgage, and lease since, as stated, those are included in a separate section and I have included a specific section authorizing a discontinuing and winding up of a business upon court order, which complies with present ORS.

Sections 15-21 cover Tab 21. Minor editing changes have been made. However, the sections covering breach of duty have been taken from comparable provisions of the Uniform Code and appear as Sections 16, 17, and 18.

Section 22 is Section 4 of Tab 15.

Section 23 implements the instructions from the August meeting to give the power to the personal representative to provide for funeral and burial of the remains where the family failed to act for ten days. The amendment is to ORS 97.130.

Section 24 is identical with the present ORS 116.115. However, since the reference to ORS 97.130 is incorporated in the general section giving the power of the personal representative to control the remains, it would seem preferable that 116.115 be placed to follow ORS 97.134. It should be noted that 97.132 was Section 1 of Chapter 674, Session Laws of 1961, 97.134 comprised Sections 2 and 3 of this chapter, and ORS 116.115 was Section 4 of the same chapter, Please note also that 116.115 applies

not only to wills which have been probated but also applies to unprobated instruments. There therefore seems no reason why this section would have to be incorporated in the probate code.

Sections 25 and 26 cover Sections 11 and 12 of Tab 15. Please note that Section 7 of Tab 15 will be considered as a part of Tab 19; that Section 9 of Tab 15 is now included as Section 19 of Tab 23. I suggest that Section 10, Recording with copies, be considered where it is later shown as Section 16 of Tab 23.

Section 27 would substitute Section 3-410 of the Uniform Code for ORS 116.330, 116.335, and 116.340 shown as Sections 14, 15, and 16 of Tab 15.

Section 28 covers present ORS 116.325. I have incorporated the language of Section 3-411 of the Uniform Code which would seem more comprehensive than Section 13 of the present Tab 15.

To summarize, your draftsman has checked the comparable ORS sections and believes that all of the pertinent sections have been covered by the proposed draft or the drafts for future consideration.

Prepared by
Legislative Counsel

POWERS AND DUTIES OF PERSONAL REPRESENTATIVE

Section __ Powers and duties, generally. The personal representative shall, with regard to the property of the estate of the decedent:

(1) Collect and possess all of the property.

(2) Manage the estate and when reasonable maintain in force or purchase casualty and liability insurance.

(3) Collect all income and rent.

(4) Inventory all property subject to inheritance tax and have it appraised as required by law.

(5) Pay and discharge out of the estate all expenses of administration, taxes, charges, claims allowed by the court or such payment as ordered by the court.

(6) Sell property when necessary to pay claims, expenses, or as provided by law or order of the court.

(7) Contest all claims except those claims he believes are valid.

(8) Sue, be sued and defend in his capacity as personal representative. No order of court shall be required prior to the commencement of or defense of the suit or action except as otherwise provided by law.

(9) Render accurate accounts.

(10) Distribute the estate and do such other things as required by law or order of the court.

References: Advisory Committee Minutes:
12/16, 17/ 66 pp. 4 and 5
8/19, 20/ 66 p. 16

ORS 116.105 to 116.890

Comment: Subsection (5) of this section is not exactly as adopted by the committees because of previous action on 8/19, 20/66 p. 16. Subsection (6) was added by the draftsman.

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
POWERS AND DUTIES OF PERSONAL REPRESENTATIVE
1st Draft
April 27, 1967

This draft is based primarily on a draft by Herbert E. Butler, (appendix to 6/17, 18/66 minutes) and action taken by the committee at the June and July, 1966, meeting.

Section 1. Possession and control of property. (1) The personal representative is entitled to possession and control of all property of the decedent and to the rents and profits therefrom. Upon completion of the administration of the estate or upon order of the court, the personal representative shall deliver the property to the persons entitled thereto.

(2) The personal representative shall keep property in his possession and control in repair and preserve it from decay.

(3) The rights of the personal representative as provided in this section, are subordinate to the right to possession and control by a third party who has a valid lease or bailment of the property.

References: Advisory Committee Minutes:
6/17, 18/66 pp. 16 and 17; and Appendix
7/15, 16/66 p. 2

ORS 116.105

Section 2. Performance of contract. If a decedent for whom a personal representative is appointed was, at the time of appointment, a party to a contract requiring the decedent to convey property, and if the price has been paid either before or after the appointment of the personal

representative, the personal representative of the estate, with prior approval of the court by order, may convey the interest of the estate of the decedent in the property. The effect of the conveyance shall be the same as though made by the decedent while he was alive.

References: Advisory Committee Minutes:
6/17, 18/66 pp. 18 and 19

ORS 116.110 and 126.285

Comment: Compare to section 3 of the draft on Sale, Mortgage and Loan of Property.

Section 3. Gift of body of decedent; nonliability for delivery. Prior to the issuance of letters testamentary or of administration, a person authorized by will or other written instrument may take such action as is necessary to implement a gift of the decedent of the whole or any part of his body as provided in ORS 97.132. Any person implementing a gift of decedent as provided in this section shall not be liable to the surviving spouse or next of kin.

References: Advisory Committee Minutes:
6/17, 18/66 p. 19; and Appendix

ORS 116.115

Section 4. Right to file notice of and perfect lien. The personal representative shall have the same rights to file notice of or otherwise perfect a lien as the decedent would have had if he were living.

References: Advisory Committee Minutes:
6/17, 18/66 p. 19; and Appendix

ORS 116.120

Section 5. Right of personal representative to borrow money. (1) A personal representative may borrow money when authorized by the will, or order of court, to pay debts; taxes; expenses of administration; payment of legacies; homestead; exempt property, dower or curtesy; or for distribution.

(2) Any debt incurred under the provisions of this section shall be evidenced by a note of the personal representative executed in his capacity as personal representative.

(3) No distribution of assets shall be made by the personal representative while any note is outstanding, without the consent of the holder of the note.

References: Advisory Committee Minutes:
6/17, 18/66 pp. 19 and 20

ORS 116.125

Section 6. Personal Representative may compound for debts due estate. (1) If a debtor of a decedent is not able to pay his debts, the personal representative may petition the court for an order authorizing him to compound with and discharge the debtor.

(2) In making the order the court shall take into consideration whether or not the personal representative will receive a fair and just proportion of the money or property of the debtor.

(3) If a compound is induced by false or fraudulent representations by the debtor, the discharge of the debtor shall only apply to the extent of actual payment or the

value of the property received by the personal representative.

Section 7. Right to redeem mortgaged property. (1) The court may order redemption of mortgaged property of a decedent upon petition by the personal representative, heir, creditor or other interested party provided:

(a) The will, if any, did not provide for redemption and did not devise the property; and

(b) Redemption would not be detrimental to creditors; and

(c) Redemption of the property appears in the best interests of the estate.

(2) If the debt secured by the mortgage as provided in this section is not due at the time of the making of the order for redemption or application of the proceeds of sale, the party to whom the money is due is entitled to receive in satisfaction thereof such sum as may be ascertained to be equal to the present value thereof.

(3) The personal representative shall have the same rights to redeem property sold upon foreclosure of a mortgage or execution as the decedent would have had if he were alive.

References: Advisory Committee Minutes:
11/19, 20/65 pp. 7 and 8
12/17, 18/65 Appendix A
4/15, 16/66 pp. 31 to 33
5/20, 21/66 pp. 3 to 9

Section 8. Personal representative continue business. When the will provides the authority or direction to continue the business of the decedent, the personal representative may, without court order, continue the business. However, the court may, on its own motion or that of any other interested party, and upon good cause being shown, order the discontinuance of the business. The order of the court may also provide:

(1) For the conduct of the business solely by the personal representative, or jointly with one or more persons; or

(2) For the formation of a partnership for the conduct of the business; or

(3) For the formation of, or for the personal representative to join in the formation of, a corporation for the conduct of the business; and

(4) The extent of the liability of the estate or any part thereof, or of the personal representative, for obligations incurred in the continuation of the business; and

(5) Whether or not liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate set aside for use in the business or to the estate as a whole; and

(6) The period of time for which the business may be conducted; and

(7) Any other conditions, restrictions, regulations and requirements the court requires.

References: Advisory Committee Minutes:
6/17, 18/66 pp. 22 and 23
7/15, 16/66 pp. 2 to 4

ORS 116.170, 116.175, 116.180

Section 9. ORS 116.186. Delivery of personal property and payment of debts to foreign administrators and executors; publication of notice; effect of payment or delivery. (1) Foreign administrators and executors may receive payment of, and discharge, debts owning by residents of this state and accept delivery of, and give acquittances for, personal property in the possession of residents of this state, upon complying with the provisions of this section.

(2) If the indebtedness is in an amount, or the personal property is of a value, in excess of $500, such payment or delivery shall not be made until 90 days after first publication of notice, as provided in subsection (3) of this section. If such notice is not required, such payment or delivery shall not be made until 90 days after the date of death of the deceased owner.

(3) (a) If the indebtedness is in an amount, or the personal property is of a value, in excess of $500, the foreign administrator or executor shall publish a notice once each week for four successive weeks in a newspaper of general circulation in the county in which the debtor or person in possession of personal property resides or is engaged in business, describing the debt or personal

property, identifying the debtor or person in possession thereof, showing his residence or business address, stating that, after 90 days from the date of first publication, payment or delivery of such indebtedness or personal property to such foreign administrator or executor will be requested, and directing any person objecting to such payment or delivery to give notice in writing to the debtor or person in possession of personal property that he objects thereto. Such notice shall be directed to all persons interested as creditors or beneficiaries in the estate of the decedent.

(b) If the person, indebted to, or holding personal property of, the decedent maintains branch offices, the publication shall be in the county where it is located, and the notices and consent by claimants shall be given to, the office or branch at which the account evidencing the indebtedness or credit is carried, or at which the personal property is located or controlled.

(4) Upon expiration of 90 days after the first publication of such notice, if required, or upon the expiration of 90 days after the date of death of the deceased owner, if such notice is not required, the debtor or person in possession of personal property may pay such debt or deliver such personal property to the foreign administrator or executor if, prior to such payment or delivery, he shall not have received written notice of objections thereto and he shall have received:

(a) Proof of publication of notice, as provided in ORS 193.070, if such notice be required by subsection (3) of this section;

(b) An affidavit of the executor or administrator averring to the best of his knowledge and belief that no other letters on said estate are then outstanding, that no petition for such letters is then pending in this state, that no ancillary proceedings will be brought and that there are no unpaid creditors of the decedent or the estate in this state who have not consented to such payment or delivery;

(c) Copy of letters testamentary or of administration, certified by the clerk of the court out of which such letters issued. The certificate of the clerk shall be dated no more than 30 days prior to the date of delivery thereof to the debtor or person in possession of personal property and shall declare that, at the date thereof, the person therein named is the duly appointed, qualified and acting executor or administrator of the estate of the decedent; and

(d) Release in writing of such indebtedness or personal property, given by the State Treasurer in respect to inheritance taxes.

(5) Payment or delivery of personal property to a foreign administrator or executor, as provided in this section, shall constitute an acquittance and discharge of the debtor or person in possession of personal property, to the extent thereof. [1961 c.417 §1]

References: Advisory Committee Minutes:
7/15, 16/66

Section 10. Recording of copies of records in other counties wherein real property is situated. (1) If any real property belonging to an estate of a deceased person is situated in any county other than that in which the estate is being administered, the personal representative of the estate shall cause to be recorded in the deed records of each of those counties a certified copy of:

(1) The will, if any;

(2) Petition for appointment of personal representative;

(3) Order appointing personal representative;

(4) Order determining heirship, if any;

(5) Order authorizing sale of real property, if any;

(6) If real property is sold, order approving claims, expenses and costs of administration.

(7) If real property is sold, approval of final account.

References: Advisory Committee Minutes:
6/17, 18/66 Appendix
7/15, 16/66 pp. 4 and 5

ORS 116.190

Section 11. Discovery of assets during procedure by personal representative. The court may order any person or persons and give testimony as provided in ORS chapter 45 if it appears from the affidavit of the personal representative or other interested person:

(1) That any person has concealed, secreted or disposed of any property of the estate of a decedent.

(2) That any person has concealed, secreted or disposed of any writing or other instrument or document relating to the estate of a decedent.

(3) That any person has knowledge or information that is necessary to the administration of the estate of a decedent and the knowledge or information is otherwise unavailable to the personal representative.

(4) That corporate officers or agents refuse to allow inspection of books and records of a corporation in which there are stocks, bonds or debentures of the estate.

References: Advisory Committee Minutes:
6/17, 18/66 Appendix
7/15, 16/66 pp. 5 and 6; and Appendix

ORS 116.305
116.320

Section 12. Proceedings when person refuses to appear and give testimony. If the person cited as provided in ORS _____ refuses to appear, or to answer questions asked of him as authorized by the order of the court, he is in contempt and may be punished as for other contempts.

References: Advisory Committee Minutes:
6/17, 18/66 Appendix
7/15, 17/66 pp. 5 to 7; and Appendix

ORS 116.315

Section 13. Liability for interference with property of deceased. A person who has innocently taken, received or interfered with property of the estate of a decedent is liable for the actual damages resulting to the estate. A person who, before administration is granted, wilfully

embezzles, aliens or in any way converts to his own use any property of a decedent is liable to the estate for double the amount of damages assessed therefor.

References: Advisory Committee Minutes:
7/15, 16/66 p.7; and Appendix

ORS 116.325, 121.060

Comment: Should this section apply only if the wrongdoer acts prior to administration? If so, should there be another provision for a wrong done after letters of administration have been issued?

Section 14. ORS 116.330. Avoidance of acts of decedent in fraud of creditors. Whenever the assets of the estate are insufficient to satisfy the funeral charges, expenses of administration and the claims against the estate, and the deceased in his lifetime made or suffered any conveyance, transfer or sale of any property, or any right or interest therein, with intent to delay, hinder or defraud creditors, or when such conveyance, transfer or sale was so made or suffered that the same is void in law as against creditors, or when the deceased in his lifetime suffered, consented or procured any judgment or decree to be given against him with such intent or in such manner as to be likewise void, such executor or administrator shall make application by petition to the probate court or judge thereof for leave to commence and prosecute to final judgment or decree the necessary and proper actions, suits or

proceedings to have such conveyance, transfer, sale, judgment or decree declared void, and the property affected thereby discharged from the effect thereof.

Section 15. ORS 116.335. Order allowing proceedings therefor. If upon the application it appears to such court or judge that the assets are insufficient for the purposes specified in ORS 116.330, and that it is probable that the conveyance, transfer, judgment or decree was made, suffered, consented to or procured with the intent or in the manner specified in such section, it shall make the order directing the proceedings to be commenced and prosecuted as to any or all of the matters alleged in the petition and necessary to supply the deficiency in the assets.

Section 16. ORS 116.340. Disposition of property recovered. The property recovered by means of any proceeding pursuant to ORS 116.330 and 116.335 is to be sold and appropriated to supply the deficiency mentioned in ORS 116.330 in the same manner as other like property; but the right to or interest in the surplus, if any, remains as if such proceeding had not been allowed or commenced.

References: Advisory Committee Minutes:
6/17, 18/66 Appendix
7/15, 16/66 pp. 9 to 11

Section 17. Repeal of existing sections. ORS 116.105, 116.110, 116.115, 116.120, 116.125, 116.130, 116.135, 116.140, 116.145, 116.150, 116.155, 116.160, 116.165, 116.170, 116.175, 116.180, 116.190, 116.195, 116.305, 116.310, 116.320, 116.325 and ORS 121.060 are repealed.

Proposed revised Oregon probate code
UNIFORM SIMULTANEOUS DEATH ACT
(with Comments) 2nd Draft
October 17, 1967

Prepared by

Stanton W. Allison

UNIFORM SIMULTANEOUS DEATH ACT

The Uniform Simultaneous Death Act was proposed by the National Conference of Commissioners on Uniform State Laws in 1940. It was enacted in Oregon in 1947 (c. 555, secs. 1-9; ORS 112.010 to 112.080). In 1953 the Commissioners proposed amendments to the Act. As of December 31, 1965, 46 states, the District of Columbia and the Panama Canal Zone had enacted the original Uniform Simultaneous Death Act with 9 of the states and the District of Columbia having enacted the Act as amended in 1953.

The following proposed amendments would adopt the amendments to the Uniform Act proposed by the Commissioners on Uniform State Laws in 1953.

Section 1. ORS 112.010. Disposition of property upon simultaneous death, generally. Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this chapter.

Comment: The 1953 amendments made no changes in this section.

Section 2. ORS 112.020 is amended to read:

112.020. Beneficiaries designated to take successively. [Where two or more beneficiaries are designated to take successively by reason of survivorship under another person's

disposition of property and there is no sufficient evidence that these beneficiaries have died otherwise than simultaneously, the property thus disposed of shall be divided into as many equal portions as there are successive beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each designated beneficiary had survived.]

If property is so disposed of that the right of a beneficiary to succeed to any interest therein is conditional upon his surviving another person, and both persons die, and there is no sufficient evidence that the two have died otherwise than simultaneously, the beneficiary shall be deemed not to have survived. If there is no sufficient evidence that all of two or more beneficiaries have died otherwise than simultaneously and property has been disposed of in such a way that at the time of their death each of such beneficiaries would have been entitled to the property if he had survived the others, the property shall be divided into as many equal portions as there were such beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each of such beneficiaries had survived.

Comment: Section 2 was amended in 1953 by the Commissioners to provide that if the holder of a life estate and a remainderman of the same estate die where there is no sufficient evidence that the two died otherwise than simultaneously, the remainderman will be deemed not to have survived and his estate will take nothing. This amendment was made as a result of the court's decision in Miami Beach First Nat'l Bank v.

Miami Beach First Nat'l Bank, 52 So. 2d 893 (Fla. 1951). In that case T granted a life estate to A with the remainder in a class of persons of which B was a member. A and B were killed in a common accident. B's estate claimed B's share of T's estate under section 2 and the other remaindermen contended that the section did not apply. The court held that section 2 applied and that B's estate received B's share of T's estate. The Uniform Commissioners believed this to be a misinterpretation of section 2 and designed the first sentence of the amendment to nullify the result. The second sentence of the proposed amendment would continue the rule of the current section with slightly modified wording. It is meant to apply when all the beneficiaries die in a common accident by providing that the estates of each would receive the share that each beneficiary would have received had he survived.

Section 3. ORS 112.030. is amended to read:

112.030. Joint tenants or tenants by entirety. (1) Where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived. If there are more than two joint tenants and all of them so died the property thus distributed shall be in the proportion that one bears to the whole number of joint tenants.

(2) The term "joint tenants" includes owners of property held under circumstances which entitled one or more to the whole of the property on the death of the other or others.

Comment: Subsection (1) of section 3 remains unchanged. The 1953 amendments by the Commissioners added subsection (2) to solve the problem created in states not having joint tenancy. Oregon abolished joint tenancies in ORS 93.180.

Section 4. Community property. Where a husband and wife have died, leaving community property, and there is no sufficient evidence that they have died otherwise than simultaneously, one-half of all the community property shall pass as if the husband survived and the other one-half thereof shall pass as if the wife had survived.

Comment: This section was proposed in 1953 to cover the situation where community property is involved. This provision is needed in Oregon because of the many people living in Oregon who own community property in another state or who have sold community property and purchased property in Oregon with the proceeds.

Section 5. ORS 112.040 is amended to read:

112.040. Insured and beneficiary. Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy shall be distributed as if the insured had survived the beneficiary, except if the policy or any interest therein is community property of the insured and his spouse, and there is no alternative beneficiary except the estate or personal representatives of the insured, the proceeds of such interest shall be distributed as community property under section 4.

Comment: The addition of the new provision proposed in 1953 is included for the reasons stated in the comment on the preceding section.

Section 6. ORS 112.060 is amended to read:

112.060. Chapter does not apply if decedent provides otherwise. This chapter shall not apply in the case of wills,

living trusts, deeds, or contracts of insurance, or any other situation [wherein] where provision [has been] is made for distribution of property different from the provisions of this chapter, or where provision is made for a presumption as to survivorship which results in a distribution of property different from that here provided.

Comment: The phrase "or other situation" was adopted from the Texas version of the Act. The clause "or where provision is made for a presumption as to survivorship which results in a distribution of property different from that here provided" was contained in Alabama's 1951 enactment. The Commissioners were of the opinion that the courts would construe the original Act the same as the amended one, if a liberal construction was adopted, but that the amendment would clarify and be helpful. "Draftsmen of instruments listed in the Act quite often make provision for a presumption of survivorship. They may provide that a person shall not be deemed to have survived unless he shall survive by at least 30 days. They may, in connection with the so-called Marital Deduction in the Federal Estate Tax Law, provide that the beneficiary shall be deemed to have survived if there is no sufficient evidence that the testator and the beneficiary spouse died other than simultaneously."

Section 7. ORS 112.070. Construction and interpretation. This chapter shall be so construed and interpreted as to effectuate its general purpose to make uniform the law in those states which enact the Uniform Simultaneous Death Act.

Comment: No changes were made in this section by the 1953 amendments.

Section 8. ORS 112.080. Citation of chapter. This chapter may be cited as the "Uniform Simultaneous Death Act."

Comment: No changes were made in this section by the 1953 amendments

Section 9. Repeal of existing statute. ORS 112.050 is repealed.

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
UNIFORM SIMULTANEOUS DEATH ACT
1st Draft
April 25, 1967

UNIFORM SIMULTANEOUS DEATH ACT

Relating to the disposition of property where there is no sufficient evidence that persons have died otherwise than simultaneously.

Section 1. ORS 112.010. Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in this chapter.

Comment: The 1953 amendments made no changes in this section.

Section 2. ORS 112.020. [Where two or more beneficiaries are designated to take successively by reason of survivorship under another person's disposition of property and there is no sufficient evidence that these beneficiaries have died otherwise than simultaneously, the property thus disposed of shall be divided into as many equal portions as there are successive beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each designated beneficiary had survived.]

If property is so disposed of that the right of a

beneficiary to succeed to any interest therein is conditional upon his surviving another person, and both persons die, and there is no sufficient evidence that the two have died otherwise than simultaneously, the beneficiary shall be deemed not to have survived. If there is no sufficient evidence that all of two or more beneficiaries have died otherwise than simultaneously and property has been disposed of in such a way that at the time of their death each of such beneficiaries would have been entitled to the property if he had survived the others, the property shall be divided into as many equal portions as there were such beneficiaries and these portions shall be distributed respectively to those who would have taken in the event that each of such beneficiaries had survived.

Comment: Section 2 was amended in 1953 to provide that if the holder of a life estate and a remainderman of the same estate die where there is no sufficient evidence that the two died otherwise than simultaneously, the remainderman will be deemed not to have survived and his estate will take nothing. This amendment was made as a result of the court's decision in Miami Beach First Nat'l Bank v. Miami Beach First Nat'l Bank, 52 So. 2d 893 (Fla. 1951). In that case T granted a life estate to A with the remainder in a class of persons of which B was a member. A and B were killed in a common accident. B's estate claimed B's share of T's estate under sec. 2 and the other remaindermen contented that the section did not apply. The court held that sec. 2 applied and that B's estate received B's share of T's estate. The Uniform Commissioners believed this to be a misinterpretation of sec. 2 and designed the first sentence of the amendment to nullify the result. The second sentence of the proposed amendment would continue the rule of the current section with slightly modified wording.

It is meant to apply when all the beneficiaries die in a common accident by providing that the estates of each would receive the share that each beneficiary would have received had he survived.

Section 3. ORS 112.030. (1) Where there is no sufficient evidence that two joint tenants or tenants by the entirety have died otherwise than simultaneously the property so held shall be distributed one-half as if one had survived and one-half as if the other had survived. If there are more than two joint tenants and all of them so died the property thus distributed shall be in the proportion that one bears to the whole number of joint tenants.

(2) The term "joint tenants" includes owners of property held under circumstances which entitled one or more to the whole of the property on the death of the other or others.

Comment: Subsection (1) of section 3 remains unchanged. The 1953 amendments added subsection (2) to solve the problem created in states not having joint tenancy. Oregon abolished joint tenancies in ORS 93.180.

Section 4. Where a husband and wife have died, leaving community property, and there is no sufficient evidence that they have died otherwise than simultaneously, one-half of all the community property shall pass as if the husband survived and the other one-half thereof shall pass as if the wife had survived.

Comment: This section was proposed in 1953 to cover the situation where community property is involved. Unless Oregon adopts community property, there is no need for this new section.

Section 5. ORS 112.040. Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy shall be distributed as if the insured had survived the beneficiary, except if the policy or any interest therein is community property of the insured and his spouse, and there is no alternative beneficiary except the estate or personal representatives of the insured, the proceeds of such interest shall be distributed as community property under section 4.

Comment: This section remains the same as it was when adopted with the exception of the addition of the new provision to cover community property. As with section 4 the new provision is not necessary in Oregon in the absence of the adoption of community property.

Section 6. ORS 112.050. This chapter shall not apply to the distribution of the property of a person who has died before July 5, 1947.

Comment: No provision for this section was made in the 1953 amendments. Two questions concerning it might be raised:
1) should this section be retained or can it be repealed,
2) should a new provision be added to prevent the 1953 amendments from being retroactively applied?

Section 7. ORS 112.060. This chapter shall not apply

in the case of wills, living trusts, deeds, or contracts of insurance, or any other situation where [in] provision [has been] is made for distribution of the property different from the provisions of this chapter, or where provision is made for a presumption as to survivorship which results in a distribution of property different from that here provided.

Comment: The phrase "or other situation" was adopted from the Texas version of the Act. The clause "or where provision is made for a presumption as to survivorship which results in a distribution of property different from that here provided" was contained in Alabama's 1951 enactment. The committee was of the opinion that the courts would construe the original Act the same as the amended one, if a liberal construction was adopted, but that the amendment would clarify and be helpful. "Draftsmen of instruments listed in the Act quite often make provision for a presumption of survivorship. They may provide that a person shall not be deemed to have survived unless he shall survive by at least 30 days. They may, in connection with the so-called Marital Deduction in the Federal Estate Tax Law, provide that the beneficiary shall be deemed to have survived if there is no sufficient evidence that the testator and the beneficiary spouse died other than simultaneously."

Section 8. ORS 112.070. This chapter shall be so construed and interpreted as to effectuate its general purpose to make uniform the law in those states which enact the Uniform Simultaneous Death Act.

Comment: No changes were made in this section by the 1953 amendments.

Section 9. ORS 112.080. This chapter may be cited as the "Uniform Simultaneous Death Act."

Comment: No changes were made in this section by the 1953 amendments.

References: Advisory Committee Minutes 4/21,22/67; and Appendix