PROBATE ADVISORY COMMITTEE
Probate Law Revision

Forty-fourth Meeting
(Joint meeting with Bar Committee on Probate Law and Procedure)

Dates and Times	)	1:30 p.m., Friday, January 19, 1968 and 9:00 a.m., Saturday, January 20, 1968
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 December meeting.

2. Miscellaneous matters.

3. Inheritance Tax. Tab 27.
   Miss Lisbakken and special committee.

4. Report by subcommittee on Discharge of Encumbrance. Tab 19.
   Mr. Butler.

5. Discussion of Section on effect of "pay my just debts."
   Mr. Riddlesbarger.

6. Power--Authority--Duty of Personal Representative. Tab 15.
   Draft by Professor Mapp.

7. Escheat. Tab 26.
   Mr. Carson.

8. Ancillary Administration. Tab 24.
   Professor Mapp, Mr. Riddlesbarger.

PLEASE NOTE: Meeting Place, Lloyd Center.

ADVISORY COMMITTEE
Probate Law Revision

Forty-fourth Meeting, January 19 and 20, 1968
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The forty-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, January 19, 1968, in Suite 2201, Lloyd Center, Portland, by Chairman Dickson.

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

The following members of the Bar Committee were present: Bettis, Buhlinger, Gilley, Heisler, Krause, Lovett, Meyers, Mayer, McKay, Rhoten, Thalhofer, Shetterly, Smith and Thomas. Anderson, Field, Kraemer, Piazza, Pendergrass, Richardson and Warden were absent.

Also present was Donald Georgeson, an appointee of the advisory committee, who had worked on the preparation of the proposed revised Oregon probate code, Estate Tax.

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

Approval of the Minutes

A motion was made, seconded and carried to approve the minutes of the December 1967 meeting.

Miscellaneous Matters

The committees discussed the possibility of moving the meetings to Salem and Senator Husband said that he would investigate the problem of space and advise the members at the next meeting.

Sorte advised the committee of the Supreme Court decision regarding the unconstitutionality of Oregon's alien law. A

section will be prepared to repeal this section of Oregon law.

Miss Lisbakken informed the members of a meeting she had with the Public Service and Information Service Committee of the Oregon State Bar regarding Mr. Dacey's book on "How to Avoid Probate." They prepared the following recommendations, which have not been approved by the full committee:

"To obtain enactment of the code by the legislature.

"To create public demand for its passage.

"To improve the image of the Oregon State Bar and its members.

"To appoint one person in charge of implementing this program.

"To have the announcement timed for early September and to carry on a public campaign thereafter.

"Prepare press releases stating the need for the new code, state-wide to all news media.

"The history of its preparation.

"The good it will accomplish for the public and what is necessary to obtain its enactment.

"A contribution of the Oregon State Bar for better judicial procedures.

"Prepared by experienced persons.

"Answer questions concerning the new code.

"Emphasize that revisions were started before the Dacey book was published.

"Announce to members of the Bar and mail and urge support of code.

"Advertise financial implications.

"A stuffer to go with bank statements to enlist public support of the program.

"A flyer by savings and loan associations.

"A questionnaire to legislative candidates asking them

to endorse this legislation. Publish their answers in the Bar Bulletin and press releases.

"Followup of Bar members, encouraging support.

"Appearances on TV interview shows.

"Public service announcements, on radio.

"Have Bar announce results of a poll and appraise the proper committee and mail to each legislative representative before the convening date.

"Lobbying, as much personal contact as possible.

"It is not intended to limit to the means mentioned, but get to all fields that can be reached, always keeping in mind objective two, the public image."

Allison pointed out that this is not just a Bar effort, but the Bar Committee sitting with the Law Improvement Committee.

Butler pointed out that the lawyers are about equally divided in Wisconsin, for and against their new code. Dickson also mentioned that the small newspaper publishers might be opposed because of the loss of revenue due to the fewer number of notices to be published, the content and number of times of publication. He also felt that any policy decisions should be made by the Law Improvement Committee since they appointed the advisory committee, which subsequently called upon the Bar committee to help with the program. The Chairman asked Miss Lisbakken to act as the representative of the committee to meet with the Law Improvement Committee and the Bar Committee and obtain the approval of the Law Improvement Committee and direction from them on the steps to be taken by this committee.

Inheritance Tax (The draft discussed is Appendix A to these minutes without the changes made at the meeting)

Miss Lisbakken outlined the background of the work of the subcommittee which consisted of members Carson, Butler and Braun and Don Georgeson. The committee has been attempting to get information on the rates from the State Treasurer's office, but as yet nothing definite has been determined. She said that they have arranged to have information from the State Treasurer's office on inheritance tax returns computed to give information on the rate necessary under the proposed estate tax, rather than an inheritance tax, to

yield the same amount of revenue to the state as is presently being paid.

Butler commented on the subcommittee's appearance before the Legislative Tax Study Committee at which time they requested that committee's assistance in getting information that is needed from the State Treasurer. He indicated the Legislative Tax Study Committee had expressed no concern about their approach to the inheritance or estate tax and that they expressed their appreciation for their appearance.

Miss Lisbakken read parts of an interpretation of federal estate and gift tax from a book written by Mr. Bittker. On a suggestion by Senator Husband the chairman asked that this article read by Miss Lisbakken be reproduced and furnished to the members of the committee.

In discussing Husband's comment that inheritance tax is the third largest revenue producing tax in Oregon, Georgeson estimated the tax amounts to 3 1/2 to 4 percent of the total revenue. Husband suggested that a table be prepared showing the relationship of the inheritance tax to the total of all tax collected.

Riddlesbarger asked whether or not the committee was to go through the entire proposal before they decided on whether to accept the idea or not. Miss Lisbakken and Butler indicated that prior approval of the theory had been obtained from the committee for the estate tax. Husband did not feel the committee, or at least he, could accept the estate tax until he was sure of the rates that would be imposed.

Miss Lisbakken outlined the proposed change from inheritance tax to estate tax would follow the federal estate tax, as much as possible, for simplicity of administration and preparation of tax returns.

Miss Lisbakken read through the entire proposed revision and requested the following changes be made:

Section 240, page 7, delete "255" and insert "225" and in the same line, delete "renouncing," and insert "renunciation."

Section 300, on page 9, delete "300" and insert "310."

Section 330, section (1), page 12, after "before" delete "the date prescribed for filing of the Oregon estate tax return" and insert "the expiration of 15 months from the date of decedent's death." Page 13, delete "date prescribed

for the filing of the Oregon estate tax return" and insert "expiration of 15 months from the date of decedent's death."

Section 520, page 18, subsection (1), after "payment" insert the words "at that time."

Section 530, page 19, delete "a bond is given" and insert "an extension is granted." On page 20, after the period, insert "or expiration of the extension period, whichever first occurs."

Section 550, page 21, after the period insert, "The recorder of deeds shall charge and collect, for the use of the county, the sum of 25 cents for recording each receipt or certificate." In section (3) "Recorder of Deeds" should be "recorder of deeds" and "transfer tax" should be "Transfer Tax."

Section 605, page 22, after "unless" insert "in the discretion of the Treasurer."

Section 610, page 23, delete "615" and insert "620."

Section 630, page 26, delete "State" in "Oregon State Tax Court", and in the next to the last line of subsection (1) insert "Oregon" before "Tax Court." On page 27, delete "by the Treasurer, or the claim for additional refund is asserted by the plaintiff,".

Miss Lisbakken mentioned that chapter 118, the last two sections, should be incorporated after Sections 8 and 9. ORS 118.810 through 118.880.

Gilley noted that the discount provision had been eliminated. Georgeson pointed out that several provisions had been deleted from existing law, including exemptions for insurance, homestead and elimination of discounts in order to offset to some extent the loss from the collateral tax elimination.

The committee did not consider the gift tax because this was not in the directive to the committee, but it was agreed that the gift tax law would have to be completely revised to conform to the proposed code.

Allison asked if it was the intention of the subcommittee that a return be filed for every estate. Miss Lisbakken noted that this is presently required by regulation of the Treasurer, who feels there are presently too many deaths they are not aware

of and too much property being transferred without the knowledge of the State Treasurer.

The committee discussed the $25,000 exemption, the marital deduction, specific exemptions and deductions for debts, claims, last illness, administration, etc., and the proposed rates. Miss Lisbakken again pointed out that the committee had approved the revision and adoption of an estate, as opposed to the existing inheritance tax, with a marital deduction similar to the federal deduction.

Allison brought up the question of whether or not this revision should be presented as a separate measure, apart from the actual probate code, to the legislature. The feeling was that they would perhaps be sent to two different committees of the legislature if introduced separately, but it would be up to the Law Improvement Committee.

On a question regarding the three-year provision in Section 610, on page 2, Georgeson pointed out that this is present law, both state and federal.

Dickson expressed the opinion that the committees should approve this proposal and then submit it to the State Treasurer for his consideration regarding the substantive provisions, before the rates are determined, which will be costly and time-consuming.

Allison expressed concern about the determination of the effect of the marital deduction on the tax rates. Dickson said that he did not feel this would be too difficult after the information from the State Treasurer had been prepared for the computer.

Dickson then asked the committee to go through the proposal, section by section, for explanation and discussion. Georgeson outlined the general provisions of each section.

Tax Imposed

Section 100. Rate of Tax.

Gross Estate

Section 200. Definition of Gross Estate.

Section 205. Property in which the Decedent had an Interest.

Riddlesbarger noted that this was the main section under

Gross Estates.

Shettlerly raised the question, under Section 200, about the meaning of the words "within the jurisdiction of the state." Riddlesbarger agreed that it was more a reference to territory and perhaps should be "subject to the jurisdiction of the state." Dickson pointed out that if there is a reciprocal tax policy with Oregon, to permit Oregon to take personal property at the domicile, Oregon will recognize the same rights of other states to tax in Oregon. Georgeson read Section 118.060 of present Oregon law and commented that the proposal is to eliminate the necessity for looking to the other state to see what type of law they had to determine whether Oregon would tax the estate. Because "within the jurisdiction of the state." is included in present Oregon law; it was the general feeling of the committee that it should be retained.

Section 210. Transactions in Contemplation of Death.

This is incorporated directly from the federal law.

Section 215. Transfers with Retained Life Estate.

This is incorporated from the federal law and is also present Oregon law.

Riddlesbarger inquired about the penalty in this connection, but Georgeson indicated it was covered in the gift tax law, Section 119.100.

Rhoten expressed concern about the phrase "money or money's worth" but others did not feel this was a problem.

Georgeson explained that the distinction of whether these gifts were made prior to or subsequent to 1931, as provided in the federal law, was eliminated and made excludible, regardless of when the transfer was made.

Section 220. Transfers taking Effect at Death.

This provision was taken from the federal law with the elimination of the differences resulting from dates or time of transfer. This is a change from Oregon law, as the State Treasurer presently interprets it.

Section 225. Revocable Transfers.

Georgeson indicated a change on page 4, after "in" and before "money's" insert "money or."

Subparagraph (b) is in the federal law but not in the state. The rest remains the same as present law.

Section 230. Annuities.

This provision was taken from the federal statute. The difference from the state statute is the $20,000 exemption limit is eliminated.

Section 235. Joint Interests.

This is taken from the federal statute and is a change from existing law in that the entirety exemption of one-half of real property held by husband and wife under present law is eliminated. The husband's contribution would be all includible.

The committee discussed the Oregon Supreme Court Erickson decision in relation to this section.

Section 240. Powers of Appointment.

With modification this was taken from the federal law, and contains reference to the Internal Revenue code. Basically it doesn't change existing Oregon law very much.

Section 245. Proceeds of Life Insurance.

This section adopts the federal approach and all proceeds are taxable. This section also eliminates the exemptions under current Oregon law.

Section 250. Transfers for Insufficient Consideration.

This is from the federal statute.

Shetterly questioned the use of the words "dower and curtesy" since this would be abolished in the new probate code. Georgeson indicated it was left in because it would apply to transfers that have already taken place in other states.

Section 255. Prior Interests.

Basically, this is from the federal.

Taxable Estate

Section 300. Definition of Taxable Estate.

Section 310. Exemption.

The exemption is $25,000 rather than the current $15,000.

Section 320. Expenses, Indebtedness, and Taxes.

This section was taken from the federal law but modified to take into account the possibility that portions of the estate might not be subject to tax because of non-residence or located in another state.

Rhoten asked if heirs could advance the cash to pay the taxes or if the claims had to be paid from property included in the gross estate. In discussing this the members decided that an heir could pay a claim and still have it deducted from the gross estate. Gilley suggested that it might simplify paragraphs (a), (b), (c) and (d) by deleting "from property included in the gross estate" from each paragraph.

The committee also discussed the allowance of expenses of the estate including funeral expenses. Bettis pointed out that this was covered in Tab 18 under Claims.

The committees recessed until 9 o'clock Saturday morning, January 20, 1968.

The meeting was reconvened at 9 a.m., Saturday, January 20, 1968, by Chairman Dickson in Suite 2201, Lloyd Center, Portland.

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

The following members of the Bar committee were present: Buhlinger, Gilley, Heisler, Krause, Meyers, Mayer, McKay, Rhoten, Thalhofer, Shetterly, Smith and Thomas.

Also present was James Sorte.

Discussion continued on Section 320. Georgeson suggested that this section be rewritten because of the problems involved. Dickson requested that the subcommittee correct the problems in Section 320, as well as in Section 235, relating to property held as joint tenancts, if they felt it necessary.

Section 330. Transfers for Public, Charitable and Religious Uses.

Subsection (1) was taken from the federal code and paragraph (a) is somewhat broader than present Oregon income tax law because it designates the United States as a donee.

Paragraph (b) is also taken from the Oregon income tax law, with minor modification. Paragraph (c) is from the Oregon income or gift tax law and (d) is from the Oregon income tax law. The designation of charitable donees are the same form that were included in the Bar bills that were passed by the last legislature, but were vetoed by the Governor.

Riddlesbarger brought up the question of use of the words "private stockholder" where they are unincorporated instututions, in paragraphs (b) and (c). After discussion the members concurred in the following amendment: In the last line of subparagraphs (b) and (c), after "stockholder" insert ", member".

In considering subparagraph (d) Allison pointed out that the terms "contributions and gifts" had been used in place of the usual "legacies and devises" and Dickson asked that this be corrected editorially.

Subsection 3 was taken from the federal law.

Section 340. Bequests, etc., to Surviving Spouse.

This section is the federal deduction provision.

In discussing subsection (2), Georgeson pointed out that the subcommittee did not attempt to follow state or federal regulations in preparing the revision.

Riddlesbarger expressed the opinion that this would be the cause of more dissension among members of the Oregon State Bar than anything the committee has done, because most lawyers don't attempt to learn about marital deductions, but turn it over to accountants.

Butler pointed out that the subcommittee had been given a mandate from the joint committees to draft an estate tax which would incorporate a marital deduction provision, provide administrative determination rather than judicial determination of the tax and would result in no loss of revenue to the State of Oregon.

Mapp discussed the possibility of following the federal law completely, including raising the exemption to $60,000, to make it easier for the attorneys to follow. The feeling was that the State Treasurer would not go along with this suggestion. Frohnmayer asked if the marital deduction could be dropped and Georgeson indicated it could, except the present law has the homestead exemption and if this section

were dropped it would take away the exemption the widow now has.

Butler asked the committee to reconsider its original action in approving the estate tax approach to inheritance taxation. Husband did not want to vote on this matter until it was known what the rates would be. Riddlesbarger opposed any vote until the entire proposal had been reviewed.

Allison complimented the committee on their work, asked that the committee complete the discussion of the draft and then asked that this draft be introduced as a separate bill, apart from the proposed probate code bill. He further recommended that this draft be submitted to the Taxation Committee of the Oregon State Bar for their approval. Dickson indicated an attempt would be made to get their approval.

The members discussed the possibilities of the two measures, i.e., the tax and the probate bills, being introduced separately. Dickson shared Husband's view that they should be introduced in one package and that they would go to the judiciary committee, but not to the tax committee, because it is not a revenue raising measure. The only thing that might be required would be an amendment at a later date to bring it in line with the quantity of revenue produced. He also expressed the view that these changes were long overdue and he thought it was a good idea to reconsider the position originally taken, if the members felt some change should be made.

Husband pointed out to the committees that the present collateral tax has many inequities.

Butler then moved that the committee reaffirm their original position favoring an estate tax, with a marital deduction and administrative determination. The motion was seconded by Frohnmayer. Dickson asked for a vote and the motion carried, with Husband voting no.

Discussion continued on Section 340. Shetterly questioned the time for filing a disclaimer in (b) (i) and Georgeson indicated that the following correction should be made: On page 15, after "interest" insert "before the expiration of 15 months from the date of death."

Credits Against Tax

Section 400. Credit for Gift Tax.

The credit provision was taken from the federal law. Under

present Oregon law it is treated as a prepayment of the death tax.

Section 410. Credit for Tax on Prior Transfers.

This section incorporates the federal approach, providing for a credit provided the second death occurs within ten years. The reference to inheritance tax in subsection (2) was because of the possibilities of an inheritance tax being paid under the old law.

Payment of Tax

Section 500. To Whom Tax Payable.

This is taken from present Oregon law.

Section 510. When Tax Accrues; When Due.

This is also from present Oregon law, with the addition of the provision for an extension granted under Section 520.

Section 520. Extension of Time for Payment of Tax; Bond.

This is a new provision, a change from existing law and taken from the federal code to some extent. Subsection (1) is from the federal law.

Georgeson outlined that the payment period was not extended to the federal 15 months, primarily because of the revenue impact this would have. Butler added that the subcommittee was also concerned about extending the time required for probate in the smaller estates.

Subsection (2) is similar to present Oregon law, but was taken from the federal statute.

Riddlesbarger brought up the question of the type of bond required. Frohnmayer and Gilley agreed it was covered because the Treasurer is given the power to make rules and regulations in such matters.

Mayer asked why there was no provision for discount for prompt payment and Georgeson indicated that this would require an increase in the rates to offset the discount. The members, in discussing this, determined that the effectiveness of a discount was largely dependent upon the money market. There was comment on the possibility of charging the interest from date of death if not paid on the date due, but this was

determined to be unfair.

A motion was made to include a five percent discount for payment within eight months. Dickson asked for a division and there were ten for and eleven against the motion and the motion failed.

Section 530. Interest.

This section is in present Oregon law.

Mayer asked if interest should not be paid by the state on any overpayment. Georgeson agreed, and this could be done, if the overpayment was made with the return when the tax was determined, but that it should not be paid when an overpayment is made before a return has been filed and the tax determined. A motion was made that an appropriate section be included so that if an overpayment results, interest will be paid from the date of payment. Butler asked that it be amended to provide for interest to accrue from the date the claim for refund was made. The amendment was accepted. The motion to include a section so that if an overpayment results, interest is paid from the date the claim for refund is made, carried.

Shetterly asked if the State Treasurer might delay making the refund. Butler replied that he would be required to make the refund immediately. In discussing the time limit of 90 days within which the Treasurer must approve or reject a return, Georgeson thought there should be some point where temporary payment ceases to be a temporary payment if the personal representative thinks he is entitled to a refund and the State Treasurer thinks more tax is due, and he suggested allowing the Treasurer 30 days.

Shetterly moved, second by Rhoten, that the Treasurer make the refund without interest within 30 days after filing of the return, and if not made, interest shall accrue at the rate of six percent per annum. The motion carried. Dickson asked the subcommittee to make that correction in the draft.

Mapp asked what circumstances would constitute necessary litigation or unavoidable delay to give the Treasurer discretion to lower the interest rate to six percent. Georgeson said, for example, a will contest or litigation to determine whether a decedent did or did not own certain property. Dickson added any litigation that would affect the amount of the estate or the people entitled to distribution. Mapp did not believe this was fair to the person who was unable to pay within the eight months but did not have litigation, but the general feeling was that the cost of attorneys fees incurred in

litigation would more than offset the difference in interest rates.

Section 540. Liability for Payment; Lien of Tax.

Rhoten mentioned the fact that heirs are not mentioned in the definition of a personal representative. He felt that if the personal representative does not pay the tax, the heirs should have the right to go in and pay it. Butler pointed out that the definition in Section 700 would cover it, but Rhoten did not think it would.

Carson suggested the following change: After "(1)" insert "If not otherwise paid," and this was accepted by the committee.

Frohnmayer asked who would have the right to the over-payment if there was a disagreement between the personal representative and the heirs and the heirs made the payment on the tax. Thomas wondered if, under this language, the personal representative could pay the tax or would he have to wait to see if anyone else was going to pay it. Butler advised the members that the subcommittee had discussed this situation and the term refund would mean you refund the amount to the person who made the payment and that "refund" was self-explanatory.

Dickson inquired if there shouldn't be some method to enable the personal representative to relieve himself of such liability by forcing an unwilling beneficiary to pay the tax. Miss Lisbakken concurred that some provision should be made. Frohnmayer mentioned the fact that the basic concept is supposed to be that the personal representative is liable only to pay the tax on property that comes into his possession, not on property over which he never gets control.

After discussing the right of the personal representative to collect funds for payment of taxes, Dickson authorized Mapp and Allison to prepare language for insertion in the section on powers and duties of the personal representative to cover this situation. Allison indicated a belief that the personal representative can recover attorney's fees from the estate in situations such as this, but the committee felt that the estate should not pay the attorney's fees, but they should come from the heir who took his benefit and didn't pay the tax. Georgeson and Allison both agreed that such a provision would properly belong in the inheritance tax section.

Allison advised the committee that they had not considered Section 3-614 of the Uniform Probate Code entitled "Uniform Estate Tax Apportionment Act" and he read the following from the latest draft of the Uniform Probate Code:

"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 preceding 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; or 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 estate who 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 general purpose to make uniform the law of those states which enact it."

Georgeson felt this approach was broader and goes beyond the probate estate. He also indicated the Bar had looked at the Uniform Probate Code approach and felt it was too complicated. Allison agreed.

Dickson advised the members that this was answered by Allison and Mapp who indicated this had been covered during the last meeting. Georgeson said this would not be adequate because there are gifts that pass notwithstanding the estate and the apportionment statute in the tax chapter.

Allison expressed the view that the expenses of administration, including taxes, should come out of the residual estate, which is after the specific devises have been taken care of, but there is no recourse for collecting expenses from the assets or the benefits of nonprobate assets. Mapp didn't completely agree because most of the new statutes in the uniform code do specifically provide for specific apportionment to specific devisees, before distribution of the residue.

Mapp read to the committee from the Uniform Probate Code, Apportionment of Estate Taxes: "Apportionment of all estate taxes, defintions, 1. Estate means gross estate of decedent . . . payable to this state."

Riddlesbarger felt this was in line with his work on the direction meaning in a will the phrase "to pay all debts." Dickson then asked that Riddlesbarger, Mapp and Allison work with Pat Lisbakken and her subcommittee on this matter, and it will be discussed as the first item on the agenda at the next meeting.

Section 540. Liability for Payment; Lien of Tax.

Georgeson indicated this material should be taken under advisement and revised and discussed at another time.

Dickson expressed the opinion that subsection (3) could be eliminated entirely.

Section 550. Receipt.

This is in the present law, but not in the same language. It is also in the probate provisions of the code the committee has been working on. Allison read the revised language and the committee agreed that it would be worthwhile to leave the provision in both places. The reference in the proposed probate code is in Tab 23.

Georgeson suggested an amendment in subsection (4) by deleting "additional" in the last line of page 21. This section was taken from present law.

The meeting recessed at 11:45 a.m.

When the meeting reconvened at 1 p.m., the following members were present: Advisory committee, Dickson, Allison, Butler, Carson, Frohnmayer, Gooding, Husband, Lisbakken and Mapp; Bar committee, Buhlinger, Gilley, Heisler, Krause, Rhoten, Shetterly, Smith and Thomas.

Also present was Sorte.

When the committees reconvened Dickson expressed the regret of the entire committee in losing the services of Mr. Sorte. Allison also thanked him for his help with the work of the committees.

Filing of Return

Section 600. Returns by Personal Representative.

Section 605. Addition to Tax for Failure to File a Return.

This would be a new provision in the Oregon law and it was taken from the federal law.

Husband thought the 25 percent penalty was a little high, and Rhoten agreed.

Frohnmayer agreed that the penalty was too high and would favor eliminating it altogether and failing that, he would like to see it lowered to five percent of the tax. Husband agreed.

Georgeson pointed out that the filing of the return and payment of the tax are two different obligations. Even if the tax is paid within the eight months, the return must be filed within the eight months, an extension obtained or the penalty assessed.

Dickson expressed the opinion that the federal provision for 15 months should be adopted. Butler opposed this because it would open the door to the extension of time for probate of estates. He felt if the penalty was too severe, the answer was not an extension of the time, but to modify the percent of penalty.

Gilley moved to delete from Section 605, starting in the 4th line, "for each month or part of month after the return is due, but no such addition shall exceed 25 percent of the tax." The motion was seconded by Krause and carried.

Section 610. Determination of Tax, Assessment, Limitation, Collection.

In subsection (2) Georgeson pointed out that while this was

in existing law, because of the change from the court granting extensions, it was felt the time should be extended from 60 to 90 days. Gilley felt this language was a little bit difficult to understand and Georgeson agreed that the committee should take this under advisement and perhaps express it more clearly. Dickson requested that this be done.

In subsection (3) Dickson recommended omitting the words "at any time" and Georgeson concurred.

Dickson then suggested changing subsection (3) to read as follows:

"If no return as required under the chapter is filed with the Treasurer, or if a false or fraudulent return is filed with intent to evade the tax, the Treasurer may determine and assess the correct amount of the tax, within six years after the facts are discovered."

Frohnmayer thought the Treasurer should be limited to a shorter period of time than six years in subsection (4) in which to collect the taxes due. Gooding agreed that a two year limit would be sufficient. Dickson suggested this could hold true for both subsection (3) and subsection (4). Frohnmayer then moved that "two years" be substituted for "six years" in subsection (3) and (4). The motion was seconded by Gooding and carried.

Georgeson pointed out that the procedure in subsection (5) for the statute of limitations is similar to the income tax procedure. The committee discussed the periods of time that would be involved in the running of the statute of limitations as it relates to this section. Allison expressed the belief that the 90-day period or 15-day period tells you to get something done, but the statute of limitations tells you when you can assert in court a legal right or remedy, and he did not feel that the 90-day period was intended as a statute of limitations.

Gilley suggested amending the parenthetical clause by deleting "if" and insert "until".

Dickson reread the changes in the first part of the section as follows:

"The running of the limitations provided in this section shall be suspended after the mailing of a notice under Section 620 for the period during which the Treasurer is prohibited from making the assessment or the beginning of a proceeding in court. . ."

At Gilley and Georgeson's suggestion, Dickson asked for

editorial revision of the section because of the inability of so many committee members to understand it.

Section 615. Definition of Deficiency.

This section was taken from the Oregon income tax schedules and similar definitions are included in the federal income and estate tax laws.

Rhoten asked that "personal representative" be deleted from this section and that there be a reference just to "from the time the return is filed" or "upon the filing of the return" because it might be filed by an heir or interested party.

Allison questioned the words "previously assessed" with respect to the filing of a return. He did not feel they could be previously assessed when a return had not been filed.

Frohnmayer asked why there was a need for a definition,but Miss Lisbakken indicated it was quite important to have deficiency defined.

Because of the confusion expressed by the members over the section, Georgeson agreed to take this section under advisement.

Section 620. Determination and Notice of Deficiency.

Krause again brought up the definition of personal representative, which he felt should include anybody that filed the return. Georgeson felt it should be limited because of the personal liability involved in other sections. The committee outlined various instances where a person not in constructive or actual possession of property of the estate might file a return.

Dickson asked that the subcommittee make editorial revision of this subsection (1), or perhaps by definition of personal representative.

Allison suggested that subsection (1) be amended in the second sentence, after "and" insert "make."

Allison expressed the opinion that these provisions would be sufficient, because they wouldn't begin to run until the assessment was made.

Section 625. Refund of Tax Erroneously Paid; Limitation.

Rhoten did not feel that this section was clear in subsection (2)

that the claim would be filed with the Treasurer, so Georgeson recommended inserting at the end of the sentence, after the word "filed" the words "with the State Treasurer."

Frohnmayer suggested the time limit in this section should also be made two years. After discussion of this section with relation to Section 610, Frohnmayer moved that the limitation in that section be changed to three years. The motion was seconded by Gooding and carried.

The committee discussed the provision which provides for automatic rejection if the Treasurer fails to act within 90 days. Some felt it should be the other way around, if the claim is not denied within 90 days, it is deemed accepted. Thomas pointed out that there is the right to appeal within 60 days, so the lawyer would have time to take care of it.

Section 630. Appeal.

Georgeson advised the committees that the reference to State Treasurer should be changed to "Treasurer" all the way through.

Gilley expressed doubt that the procedures to be followed in the Tax Court would need to be in the inheritance tax code. Georgeson indicated that these procedures had been included in the income tax law by the last legislature and was written by Judge Howell.

Allison and Thomas both questioned whether having the clerk of the Oregon Tax Court mailing a certified copy constituted service, and if the clerk did not do so, would the appeal be lost. Georgeson felt this was taken care of in the section, because once the two copies were filed with the court, the appeal was perfected.

Members of the committee questioned the provision for a responsive pleading and the fact that no time was stated in which a response was to be made. Dickson suggested editorial revision of the section.

Allison advised the committee that it was his feeling subsections (4) and (5) did not belong in the same section as (1), (2) and (3) because these sections tell how to appeal to the Oregon Tax Court and (4) and (5) provide if a complaint is filed with the court or if no claim is filed with the court. Georgeson agreed that this should be done and they will become subsections (1) and (2) of Section 635.

Shetterly asked if there was further appeal from this Oregon Tax Court and Georgeson advised that Section 305.445 provides for the appeal of any Tax Court decision to the Supreme Court.

Section 700. Definition of Personal Representative.

Rhoten reminded the committees of the discussion on enlarging the definition of the personal representative to include anyone who would file a return. The members further discussed the necessity for a broader definition and Georgeson agreed the sub-committee should reconsider this definition from the standpoint of liability of the personal representative and the notice of deficiency and determine who should be included in the definition of a personal representative.

The committees also discussed the liability of the personal representative, both as to payment of tax on property which he never had under his control and property discovered after the return had been filed and the tax paid and the remainder of the estate distributed. Dickson asked the committees to provide some reciprocal provision to enable the State Treasurer to reach transferees in another state.

Section 710. Disposition of Revenues.

This section taken from present laws.

Section 720. Consent Required for Transfer of Stock or Bonds.

This section was taken from present law.

Georgeson indicated that a new section relating to safety deposit boxes and bank accounts was to be inserted after Section 720, but it has not been done as yet. It would contain the requirements for notifying the State Treasurer of the inventory for boxes and releases of bank accounts. Dickson thought this was under banks and banking laws, but Georgeson said that it was not.

Section 730. Rules and Regulations.

Section 740. Reference to Internal Revenue Code; Intent.

Allison questioned why the reference date to the Internal Revenue Code could not be changed to December 31, 1968, since the proposed tax measure would be presented to the 1969 legislature.

Dickson referred back to Section 100, which applies to the date of the enactment of this chapter. He felt the dates of the probate code and the inheritance tax should coincide, and the probate code is to be effective on January 1, 1970. The committees concurred with this suggestion.

Georgeson pointed out that reference to the Internal Revenue Code and the date, December 31, 1967, is to be deleted whereever it appears in this code, except in Section 740 will refer to the Internal Revenue Code as of December 31, 1968.

Dickson asked if it was the intention of the subcommittee to incorporate the provisions of Sections 118.010 to 118.800 at the end of the draft and Georgeson indicated it was.

Dickson then asked if the subcommittee could complete all of the revisions that have been indicated throughout the draft, submit the draft to the Bar Committee on Taxation and be able to report back with a final draft for the March meeting. The subcommittee agreed that this could be done.

Frohnmayer asked if the comments would be ready at that time and Dickson did not feel it would be necessary to have them in March. Allison felt the comments were going to be very important to the understanding of what has been done in this draft.

Miss Lisbakken then moved the committee approve the Estate Tax Law as indicated by the corrections, additions, deletions and instructions that were given yesterday and today. The motion was seconded by Butler and carried.

Dickson reminded the committees that the draft on apportionment should be ready for the February meeting.

Miss Lisbakken advised the committee that Mr. Georgeson had worked many hours on this draft and was not a member of either committee. Dickson expressed the appreciation of the committees for his work on the estate tax law.

Husband asked if the next meeting would be the 16th and 17th of February and Dickson indicated it would.

Allison advised the committee that the question on discharge of encumbrances has been cleared up so it will not have to be on the agenda and neither will the matter of "pay my just debts". Mapp is to have something ready by next time on Ancillary Administration, which Riddlesbarger feels should be tabled.

Butler moved the meeting adjourned.

The meeting of the committees adjourned at 3:30 p.m.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting,
January 19 and 20, 1968)

Proposed revised Oregon probate code
INHERITANCE TAX
January 19, 1968

TAX IMPOSED

Sec.	
100	Rate of Tax

GROSS ESTATE

200	Definition of Gross Estate
205	Property in which the Decedent had an Interest
210	Transactions in Contemplation of Death
215	Transfers with Retained Life Estate
220	Transfers taking Effect at Death
225	Revocable Transfers
230	Annuities
235	Joint Interests
240	Powers of Appointment
245	Proceeds of Life Insurance
250	Transfers for Insufficient Consideration
255	Prior Interests

TAXABLE ESTATE

300	Definition of Taxable Estate
310	Exemption
320	Expenses, Indebtedness, and Taxes
330	Transfers for Public, Charitable, and Religious uses
340	Bequests, etc., to Surviving Spouse

CREDITS AGAINST TAX

400	Credit for Gift Tax
410	Credit for Tax on Prior Transfers

PAYMENT OF TAX

500	To Whom Tax Payable
510	When Tax Accrues; When Due
520	Extension of Time for Payment of Tax; Bond
530	Interest
540	Liability for Payment; Lien of Tax
550	Receipt

ADMINISTRATION

600	Filing of Return
605	Addition to Tax for Failure to File a Return
610	Determination of Tax, Assessment, Limitation, Collection
615	Definition of Deficiency
620	Determination and Notice of Deficiency
625	Refund of Tax Erroneously Paid; Limitation
630	Appeal

MISCELLANEOUS

700	Definition of Personal Representative
710	Disposition of Revenues
720	Consent Required for Transfer of Stock or Bonds
730	Rules and Regulations
740	Reference to Internal Revenue Code; Intent
750	Effective Date

TAX IMPOSED

§100. Rate of Tax.

A tax computed in accordance with the following table is hereby imposed on the transfer of the taxable estate, determined as provided in section 300, of every decedent dying after the date of enactment of this chapter.

GROSS ESTATE

§200. Definition of Gross Estate.

The gross estate of the decedent shall be determined by including, to the extent provided for in this chapter, the value at the time of his death of all property within the jurisdiction of this state exclusive of intangible personal property of a nonresident decedent.

§205. Property in Which the Decedent had an Interest.

The gross estate shall include the value of all property to the extent of the interest therein of the decedent at the time of his death.

§210. Transactions in Contemplation of Death.

(1) The gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, in contemplation of his death.

(2) If the decedent within a period of three years ending with the date of his death (except in case of a bona fide sale for an adequate and full consideration in money or money's worth) transferred an interest in property, relinquished a power, or exercised or released a general power of appointment, such transfer, relinquishment, exercise, or release shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this section and sections 225 and 240 (relating to revocable transfers and powers of appointment); but no such transfer, relinquishment, exercise, or release made before such three-year period shall be treated as having been made in contemplation of death.

§215. Transfers with Retained Life Estate.

The gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death---

(a) The possession or enjoyment of, or the right to the income from, the property, or

(b) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom.

§220. Transfers Taking Effect at Death.

(1) The gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money or money's worth), by trust or otherwise, if---

(a) possession or enjoyment of the property can, through ownership of such interest, be obtained only by surviving the decedent, and

(b) the decedent has retained a reversionary interest in the property and the value of such reversionary interest immediately before the death of the decedent exceeds five percent of the value of such property.

(2) For purposes of this section, the term "reversionary interest" includes a possibility that property transferred by the decedent---

(a) may return to him or his estate, or

(b) may be subject to a power of disposition by him, but such term does not include a possibility that the income alone from such property may return to him or become subject to a power of disposition by him. The value of a reversionary interest immediately before the death of the decedent shall be determined (without regard to the fact of the decedent's death) by usual methods of valuation. In determining the

value of a possibility that property may be subject to a power of disposition by the decedent, such possibility shall be valued as if it were a possibility that such property may return to the decedent or his estate. Notwithstanding the foregoing, an interest so transferred shall not be included in the decedent's gross estate under this section if possession or enjoyment of the property could have been obtained by any beneficiary during the decedent's life through the exercise of a general power of appointment (as defined in §240) which in fact was exercisable immediately before the decedent's death.

§225. Revocable Transfers.

The gross estate shall include the value of all property to the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona fide sale for an adequate and full consideration in money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death.

§230. Annuities.

(1) The gross estate shall include the value of an annuity or other payment receivable by any beneficiary by reason of surviving the decedent under any form of contract or agreement (other than as insurance under policies on the life of the decedent), if, under such contract or agreement, an annuity or other payment was payable to the dececent, or the decedent possessed the right to receive such annuity or payment, either alone or in conjunction with another for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death.

(2) Subsection (1) shall apply to only such part of th value of the annuity or other payment receivable under such contract or agreement as is proportionate to that part of t.e purchase price therefor contributed by the decedent. For purposes of this section, any contribution by the decedent s employer or former employer to the purchase price of such contract or agreement (whether or not to an employee's trust or fund forming part of a pension, annuity, retirement, bonus or profit sharing plan) shall be considered to be contributed by the decedent if made by reason of his employment.

(3) Notwithstanding the provisions of this sect.on or of any provision of law, there shall be excluded fro: the gross estate the value of an annuity or other payment receivable by any beneficiary (other than the personal representative) if the value of such annuity or other payment would be excludible

from the gross estate for Federal estate tax purposes under the provisions of sec. 2039 of the Internal Revenue Code of 1954 as of December 31, 1967.

§235. Joint Interests.

The gross estate shall include the value of all property to the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth; provided, where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person; provided further, where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to

be determined by dividing the value of the property by the number of joint tenants.

§240. Powers of Appointment.

(1) The gross estate shall include the value of all property to the extent of any property with respect to which the decedent has at any time exercised or released a general power of appointment by a disposition which is of such nature that if it were a transfer of property owned by the decedent such property would be includible in the decedent's gross estate under sections 210 to 255. A disclaimer or renouncing under such power of appointment shall not be deemed a release of such power. The lapse of a power of appointment during the life of an individual possessing the power shall be considered a release of the power.

(2) The provisions of subsection (1) of this section shall not apply to the release of a general power of appointment created prior to August 3, 1955, but shall apply to the exercise of such power.

(3) For purposes of this section, the terms "general power of appointment", "lapse of power" and the "date of creation of power" shall have the same meaning as such terms are defined in section 2041(b) of the Internal Revenue Code of 1954, except the dates therein shall read "August 3, 1955".

§245. Proceeds of Life Insurance.

The gross estate shall include the value of all property--

(1) To the extent of the amount receivable by the personal

representative as insurance under policies on the life of the decedent.

(2) To the extent of the amount receivable by all other beneficiaries as insurance under policies on the life of the decedent with respect to which the decedent possessed at his death any of the incidents of ownership, exercisable either alone or in conjunction with any other person. For purposes of the preceding sentence, the term "incident of ownership" includes a reversionary interest (whether arising by the express terms of the policy or other instrument or by operation of law) only if the value of such reversionary interest exceeded five percent of the value of the policy immediately before the death of the decedent. As used in this paragraph, the term "reversionary interest" includes a possibility that the policy, or the proceeds of the policy, may return to the decedent or his estate, or may be subject to a power of disposition by him. The value of a reversionary interest at any time shall be determined (without regard to the fact of the decedent's death) by usual methods of valuation. In determining the value of a possibility that the policy or proceeds thereof may be subject to a power of disposition by the decedent, such possibility shall be valued as if it were a possibility that such policy or proceeds may return to the decedent or his estate.

§250. Transfers for Insufficient Consideration.

(1) If any one of the transfers, trusts, interests, rights, or powers enumerated and described in sections 210 to 225,

inclusive, and section 240, is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.

(2) For purposes of this chapter, a relinquishment or promised relinquishment of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration "in money or money's worth".

§255. Prior Interests.

Except as otherwise specifically provided therein, sections 210 to 245, inclusive, shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whenever made, created, arising, existing, exercised or relinquished.

TAXABLE ESTATE

§300. Definition of Taxable Estate.

For purposes of the tax imposed by section 100, the value of the taxable estate shall be determined by deducting from the value of the gross estate the exemption and deductions provided for in sections 300 through 340.

§310. Exemption.

For purposes of the tax imposed by section 100, the value of the taxable estate shall be determined by deducting from the value of the gross estate an exemption of $25,000.

§320. Expenses, Indebtedness, and Taxes.

For purposes of the tax imposed by section 100:

(1) The value of the taxable estate shall be determined by deducting from the value of the gross estate amounts allowable by the laws of this state:

(a) For funeral expenses which are paid from property included in the gross estate;

(b) For administration expenses incurred with respect to property included in the gross estate;

(c) For claims against the estate which are paid from property included in the gross estate; and

(d) For unpaid mortgages on, or any indebtedness in respect of, property where the value of decedent's interest therein undiminished by such mortgage or indebtedness is included in the value of the gross estate.

(2) There shall be deducted in determining the taxable estate amounts representing expenses incurred in administering property not subject to claims which is included in the gross estate to the same extent such amounts would be allowable as a deduction under subsection (1) if such property were subject to claims, and such amounts are paid before the

expiration of the period of limitation for assessment provided in section 610.

(3) (a) The deduction allowed by this section in the case of claims against the estate, unpaid mortgages, or any indebtedness shall, when founded on a promise or agreement, be limited to the extent that they were contracted bona fide and for an adquate and full consideration in money or money's worth; except that in any case in which any such claim is founded on a promise or agreement of the decedent to make a contribution or gift to or for the use of any donee described in section 330 for the purposes specified therein, the deduction for such claims shall not be so limited, but shall be limited to the extent that it would be allowable as a deduction under section 330 if such promise or agreement constituted a bequest.

(b) Any income taxes on income received after the death of the decedent, or property taxes not accrued before his death, or any estate, succession, legacy, or inheritance taxes, shall not be deductible under this section.

(c) In the case of the amounts described in subsection (1), there shall be disallowed the amount by which the deductions specified therein exceed the value, at the time of the decedent's death, of property subject to claims, except to the extent that such deductions represent amounts paid before the date prescribed for the filing of the Oregon estate tax return. For purposes of this section, the term "property subject to claims" means property includible in the gross estate of the decedent which, or the avails of which,

would, under the applicable law, bear the burden of the payment of such deductions in the final adjustment and settlement of the estate.

§330. Transfers for Public, Charitable, and Religious Uses.

(1) For purposes of the tax imposed by section 100, the value of the taxable estate shall be determined by deducting from the value of the gross estate the amount of all bequests, legacies, devises, or transfers (including the interest which falls into any such bequest, legacy, devise or transfer as a result of an irrevocable disclaimer of a bequest, legacy, devise, transfer, or power, if the disclaimer is made before the date prescribed for filing of the Oregon estate tax return)-to or for the use of:

(a) The United States, the State of Oregon or any political subdivision thereof for use exclusively for public purposes within the State of Oregon;

(b) A corporation, trust, community chest, fund, foundation or association organized and operated or which, pursuant to the terms of the instrument containing such devise, bequest, legacy or gift, is to be organized and operated, exclusively for religious, charitable, scientific, literary or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private stockholder or individual;

(c) Posts or organizations of war veterans (including their auxiliary units and societies) located

in the State of Oregon no part of the net earnings of which inures to the benefit of any private stockholder or individual; and

(d) A domestic fraternal society, order or association, operating under the lodge system, but only if such contributions or gifts are to be used exclusively for religious, charitable, scientific, literary or educational purposes, or for the prevention of cruelty to children or animals.

(2) For purposes of this section, the complete termination before the date prescribed for the filing of the Oregon estate tax return of a power to consume, invade, or appropriate property for the benefit of an individual before such power has been exercised by reason of the death of such individual or for any other reason shall be considered and deemed to be an irrevocable disclaimer with the same full force and effect as though he had filed such irrevocable disclaimer.

(3) Property includible in the decedent's gross estate under section 240 (relating to powers of appointment) received by a donee described in this section shall, for purposes of this section, be considered a bequest of such decedent.

(4) If the tax imposed by section 100, or any estate, succession, legacy, or inheritance taxes, are, either by the terms of the will, by the law of the jurisdiction under which the estate is administered, or by the law of the jurisdiction imposing the particular tax, payable in whole or in part out of the bequests, legacies, or devises otherwise deductible

under this section, then the amount deductible under this section shall be the amount of such bequests, legacies, or devises reduced by the amount of such taxes.

(5) The amount of the deduction under this section for any transfer shall not exceed the value of the transferred property required to be included in the gross estate.

§340. Bequests, etc., to Surviving Spouse.

(1) For purposes of the tax imposed by section 100, the value of the taxable estate shall, except as limited by subsections (2) and (3), be determined by deducting from the value of the gross estate an amount equal to the value of any interest in property which passes or has passed from the decedent to the surviving spouse if such interest is of such character as would qualify for the marital deduction under the provisions of section 2056 of the Internal Revenue Code of 1954, as of December 31, 1967, defined and valued as provided therein, but only to the extent such interest is included in determining the value of the gross estate.

(2) The aggregate amount of the deductions allowed under this section (computed without regard to this subsection) shall not exceed 50 percent of the value of the adjusted gross estate. For this purpose the adjusted gross estate shall be computed by subtracting from the entire value of the gross estate the aggregate amount of the deductions allowed by section 320.

(3) (a) If under this section an interest would, in the absence of a disclaimer by the surviving spouse, be

considered as passing from the decedent to such spouse, and if a disclaimer of such interest is made by such spouse, then such interest shall, for the purposes of this section, be considered as passing to the person or persons entitled to receive such interest as a result of the disclaimer.

(b) If under this section an interest would, in the absence of a disclaimer by any person other than the surviving spouse, be considered as passing from the decedent to such person, and if a disclaimer of such interest is made by such person and as a result of such disclaimer the surviving spouse is entitled to receive such interest, then---

(i) If the disclaimer of such interest is made by such person before the date prescribed for the filing of the Oregon estate tax return and if such person does not accept such interest before making the disclaimer, such interest shall, for purposes of this section, be considered as passing from the decedent to the surviving spouse, and

(ii) If subparagraph (i) does not apply, such interest shall, for purposes of this section, be considered as passing not to the surviving spouse, but to the person who made the disclaimer, in the same manner as if the disclaimer had not been made.

CREDITS AGAINST TAX

§400. Credit for Gift Tax.

(1) If a tax on a gift has been paid under ORS chapter 119, and thereafter on the death of the donor any amount in respect of the gift is required to be included in the value of the gross estate of the decedent for purposes of this chapter, then there shall be credited against the tax imposed by section 100 the amount of the tax paid on the gift under ORS chapter 119 with respect to so much of the property which constituted the gift as is included in the gross estate, except that the amount of such credit shall not exceed an amount which bears the same ratio to the tax imposed by section 100 as the value (at the time of the gift or at the time of the death, whichever is lower) of so much of the property which constituted the gift as is included in the gross estate bears to the value of the entire gross estate reduced by the aggregate amount of the charitable and marital deductions allowed under sections 330 and 340.

§410. Credit for Tax on Prior Transfers.

(1) The tax imposed by section 100 shall be credited with all or part of the amount of the Oregon estate tax, or Oregon inheritance tax under corresponding provisions of prior laws, paid with respect to the transfer of property (including property passing as a result of the exercise or non-exercise of a power of appointment) to the decedent by or from a person (herein designated as a "transferor") who died

within 10 years before, or within two years after, the decedent's death. If the transferor died within two years of the death of the decedent, the credit shall be the amount determined under subsection (2). If the transferor predeceased the decedent by more than two years, the credit shall be the following percentage of the amount so determined--

(a) 80 percent, if within the third or fourth years preceding the decedent's death;

(b) 60 percent, if within the fifth or sixth years preceding the decedent's death;

(c) 40 percent, if within the seventh or eighth years preceding the decedent's death; and

(d) 20 percent, if within the ninth or tenth years preceding the decedent's death.

(2) The credit provided by this section shall be an amount which bears the same ratio to the estate or inheritance tax paid with respect to the estate of the transferor as the value of the property transferred bears to the taxable estate of the transferor (determined for purposes of the estate or inheritance tax) decreased by any estate or inheritance tax paid with respect to such estate and increased by the exemption provided for by section 310, or the corresponding provisions of prior laws, in determining the taxable estate of the transferor for purposes of the estate or inheritance tax. For purposes of the preceding sentence, the estate or inheritance tax paid shall be the Oregon estate or inheritance tax paid increased by any credits allowed against such estate

tax under section 400, or corresponding provisions of prior laws, on account of gift tax, and for any credits allowed against such estate or inheritance tax under this section on account of prior transfers where the transferor acquired property from a person who died within 10 years before the death of the decedent.

PAYMENT OF TAX

§500. To Whom Tax Payable.

The tax imposed by section 100 shall be paid to the State Treasurer.

§510. When Tax Accrues; When Due.

The tax imposed by section 100 takes effect at and accrues upon the death of the decedent, and is due and payable at the expiration of eight months from the death of the decedent unless an extension therefor is granted under section 520.

§520. Extension of Time for Payment of Tax.

(1) If the Treasurer finds the payment of any part of the tax imposed by section 100 would result in undue hardship to the estate or person liable therefor, the Treasurer may extend the time for payment for a reasonable period not in excess of ten years from the date prescribed in section 510 for payment of the tax.

(2) If the value of a reversionary or remainder interest in property is included in the value of the gross estate, the

payment of the part of the tax attributable to such interest may be postponed, at the election of the personal representative, until six months after the termination of the precedent interest or interests in property, under such regulations as the Treasurer may prescribe.

(3) In the event the Treasurer grants an extension of time within which to pay any tax or any deficiency therein, the Treasurer may require the personal representative or other person seeking the extension to furnish a bond in an amount not exceeding three times the amount with respect to which the extension is granted, conditioned upon the payment of the amount extended in accordance with the terms of such extension. The Treasurer may require the renewal of such bond every five years.

§530. Interest.

(1) If the tax imposed by section 100 is not paid within eight months from the accruing thereof, interest shall be charged and collected thereon at the rate of eight percent per year from the time when the tax became due and payable, unless by reason of claims upon the estate, necessary litigation or other unavoidable delay such tax could not be determined and paid as provided in this chapter, in which case interest at the rate of six percent per year shall be charged upon such tax from the time when the tax became due and payable until the cause of such delay is removed, after which eight percent per year shall be charged.

(2) In all cases in which a bond is given under the

provisions of section 520, interest shall be charged at the rate of six percent per year from the time when the tax became due until the date of payment.

(3) If the tax has not been determined, a temporary payment may be made to avoid interest. Should the amount of the temporary payment exceed the amount due, the State Treasurer shall refund the excess without interest.

(4) Payments made after accrual of interest on the tax shall be applied first to interest and then to principal.

§540. Liability for Payment; Lien of Tax.

(1) The tax imposed by section 100 shall be paid by the personal representative.

(2) The tax is a lien upon the property included in the gross estate until paid, and the person to whom such property is transferred, and the personal representative and trustee of every estate embracing such property, are personally liable for the tax until its payment, to the extent of the value of such property in the actual or constructive possession of such person, personal representative or trustee at the date of death.

(3) A personal representative has power to sell as much of the property included in the gross estate which is in his possession as will enable him to pay the tax, in the same manner as he is authorized to do for the payment of the debts of the decedent.

(4) Any part of the gross estate sold for purposes of administration or distribution shall be divested of the lien

of the tax and such lien shall be transferred to the proceeds of the sale. A mortgage on property executed for purposes of administration or distribution shall constitute a lien upon the property prior and superior to the estate tax lien, which estate tax lien shall attach to the proceeds of the mortgage.

§550. Receipt.

(1) The State Treasurer shall give the personal representative or other person paying the tax imposed by section 100 a receipt as provided by ORS 293.290, which shall be a proper voucher in the settlement of his account, or, if no tax is found by the Treasurer to be due, a certificate to that effect. The receipt or certificate shall identify the real property included in the gross estate if the decedent's estate is not being probated in the county wherein such property is situated.

(2) No personal representative is entitled to approval of his final account by the court until he files a receipt or certificate, or a copy thereof certified by the Treasurer, with the court, or unless bond approved by the Treasurer has been filed as prescribed by section 520.

(3) The receipt or certificate may be recorded in the office of the Recorder of Deeds in the county in which real property is situated, in a book to be kept by him for that purpose, which shall be labeled "transfer tax."

(4) The Treasurer shall, upon the payment of $2, issue to any person demanding the same, a copy of the receipt or certificate issued under subsection (1). No additional charge

for copies of a receipt or certificate shall be made by the Treasurer if issued at the time of the issuance of the original thereof.

FILING OF RETURN

§600. Returns by Personal Representative.

The personal representative of every decedent leaving a gross estate as defined in this chapter shall make a return with respect to the tax imposed by this chapter.

(2) The return shall be filed with the Treasurer prior to the expiration of eight months from the date of decedent's death unless within such period written application is made for an extension, whereupon the due date of the return shall be automatically extended to the expiration of fifteen months from the date of decedent's death. The Treasurer may grant such further extensions of time for filing the return as he may deem reasonable. No extension of time for filing the return shall extend the time within which the tax imposed by this chapter is due and payable.

§605. Addition to Tax for Failure to File a Return.

If a timely return is not made and filed as required by this chapter, then, unless the failure to file was due to reasonable cause, five percent of the tax imposed by section 100 shall be added thereto for each month or part of month after the return is due, but no such addition shall exceed 25 percent of the tax. Any such addition to the tax shall be collected at the same time, in the same manner, and as a part of the tax.

§610. Determination of Tax; Assessment; Limitation; Collection.

(1) As soon as practicable after the return is filed, the State Treasurer shall examine the same and shall determine the correct amount of the tax.

(2) Except as provided in subsection (3) of this section, the amount of tax imposed by this chapter shall be assessed within 90 days after the return is filed, or within such additional time thereafter as may be fixed by written stipulation between the Treasurer and the personal representative, and no proceeding in court without assessment for the collection of such tax shall be begun after the expiration of such period.

(3) If no return as required under this chapter is filed with the Treasurer, or if a false or fraudulent return is filed with intent to evade tax, the Treasurer may determine and assess the correct amount of tax at any time after the facts are discovered, but in no event after the lapse of six years from the time the facts are discovered.

(4) Whenever the assessment of the tax imposed by this chapter has been made within the statutory period of limitation properly applicable thereto, such tax may be collected by a proceeding in court, but only if begun within six years after the assessment of the tax.

(5) The running of the statute of limitations provided in this section shall be suspended, after the mailing of a notice under section 615, and the period during which the Treasurer is prohibited from making the assessment or beginning a proceeding in court (and in any event, if a proceeding in respect of the deficiency becomes final), and for 60 days

thereafter.

§615. Definition of Deficiency.

As used in this chapter, the term "deficiency" means:

(1) The amount by which the tax imposed by this chapter exceeds the amount shown as the tax by the personal representative upon his return; but the amount so shown on the return shall first be increased by the amounts previously assessed, or collected without assessment, as a deficiency, and decreased by the amounts previously refunded or otherwise repaid in respect of the tax; or

(2) If no amount is shown as the tax by the personal representative upon his return, or if no return is made by the personal representative, then the amount by which the tax exceeds the amounts previously assessed, or collected without assessment, as a deficiency; but such amounts previously assessed, or collected without assessment, shall first be decreased by the amounts previously refunded or otherwise repaid in respect of such tax.

§620. Determination and Notice of Deficiency.

(1) If the State Treasurer determines that there is a deficiency in respect of the tax imposed by this chapter, he shall send notice of such deficiency to the personal representative by mail. The notice shall state the reason for each proposed adjustment to the return and reference to the statute, regulation or other authority upon which the proposed adjustment is based.

(2) The personal representative shall have the right at any time, by a signed notice filed with the Treasurer, to

waive the restrictions provided in subsection (1) of this section and in section 625 upon the assessment and collection of the whole or any part of the deficiency.

(3) Giving of notice to the personal representative at his last-known address shall constitute the giving of notice of deficiency as prescribed in subsection (1) of this section.

(4) No assessment of any deficiency in respect of the tax imposed by this chapter and no suit for its collection shall be made, begun or prosecuted until the notice required by this section has been given, nor, if a complaint has been filed by the personal representative or other interested person for a review of the deficiency, until the decision of such review has become final.

§625. Refund of Tax Erroneously Paid; Limitation.

(1) When there has been an overpayment of the tax imposed by this chapter, the amount of such overpayment shall be refunded immediately by the State Treasurer.

(2) No such refund shall be allowed or made after three years from the time the tax is paid, unless before the expiration of such period a claim therefor is filed.

(3) When a claim for refund has been filed the Treasurer shall examine it and, within 90 days after such claim is filed or within such additional time thereafter as may be fixed by written stipulation between the Treasurer and the person claiming the refund, the Treasurer shall approve or reject the claim in whole or in part. If the Treasurer fails to act upon any claim within such period, the claim shall be deemed rejected on the last day of such period.

§630. Appeal.

(1) An appeal from the determination by the State Treasurer of a deficiency pursuant to section 620, or from the rejection in whole or in part of a claim for refund filed pursuant to section 625, may be taken by the personal representative by filing a complaint against the Treasurer in the Oregon State Tax Court. An original and one certified copy of the complaint shall be filed with the clerk of the Oregon Tax Court at its principal office at the State Capitol, Salem, Oregon, within 60 days after notice of the deficiency has been given as provided in section 620 or within 60 days after rejection of the claim for refund as provided in section 625. Such filing in the Oregon Tax Court shall constitute the perfection of the appeal. Service upon the Treasurer shall be accomplished by the clerk of the Tax Court filing a certified copy of the complaint with the Treasurer.

(2) The complaint shall state the nature of the plaintiff's interest, the facts showing how the plaintiff is aggrieved and directly affected by the Treasurer's determination, and the grounds upon which the plaintiff contends the Treasurer's determination is erroneous. The complaint shall be entitled in the name of the person filing the same as plaintiff and the Treasurer as defendant. A responsive pleading shall be required of the defendant.

(3) The Oregon Tax Court has jurisdiction to determine the correct amount of the deficiency or refund, even if the amount so determined is greater or less than the amount of the

MISCELLANEOUS

§700. Definition of Personal Representative.

The term "personal representative" wherever it is used in this chapter means the personal representative of the decedent appointed, qualified and acting within this state, or, if there be no personal representative appointed, qualified and acting within the state, then any person in actual or constructive possession of any property of the decedent.

§710. Disposition of Revenues.

The net revenue from the taxes imposed by this chapter and ORS chapter 119, including temporary payments, fees, taxes, interest and penalties, after deduction of refunds, shall be credited to the General Fund as miscellaneous receipts available generally to meet any expense or obligation of this state properly incurred. A working balance of unreceipted revenue from these taxes may be retained for the payment of refunds under this chapter and ORS chapter 119, however, the working balance shall not at the end of any fiscal year exceed $250,000.

§720. Consent Required for Transfer of Stock and Bonds.

(1) No personal representative or trustee of any resident decedent shall assign or transfer any stock or bonds of any corporation of this state or of any national banking association located in this state standing in the name of the decedent, or in the joint names of the decedent and one

or more other persons, or in trust for the decedent, without first obtaining the consent of the State Treasurer to such a transfer.

(2) No corporation of this state or national banking association located in this state shall transfer any stock or bonds of such corporation or association standing in the name of a resident decedent, or in the joint names of a resident decedent and one or more other persons, or in trust for a resident decedent, without obtaining a written consent from the Treasurer to such transfer. The Treasurer or his representative may examine the shares of stock of such resident decedent at the time of such transfer and also the transfer books of the corporation or association showing such transfer.

(3) Any such corporation or association making any transfer of stock or bonds in violation of the provisions of this section is liable for the payment of the amount of the tax to which the property so transferred is subject, which liability for tax and interest shall be enforced in an action of debt in the name of the state, brought by the Treasurer. In determining whether a decedent is a resident or non-resident of this state, the corporation or association may rely upon the truth of facts stated in an affidavit furnished to such corporation or association.

(4) Nothing in this section shall affect stock properly assigned and held as collateral security.

(5) The Treasurer is empowered to consent to the transfer of any asset standing in the name of a decedent, or in

the joint names of a decedent and one or more other persons, or in trust for a decedent, after payment of the tax imposed by this chapter, or prior to such payment, whenever he deems the transfer may be made without prejudice to the interest of the State of Oregon.

(6) The Treasurer shall, upon the payment of $2, issue to any person demanding the same, a copy of any consent issued pursuant to the provisions of this section; provided no payment shall be required for any original consent or copies thereof issued at the same time as the original.

§730. Rules and Regulations.

The State Treasurer may, from time to time, make and publish such rules and regulations, not inconsistent with legislative enactments, as he considers necessary under this chapter.

§740. Reference to Internal Revenue Code; Intent.

(1) Any reference in this Act to the Internal Revenue Code means the Internal Revenue Code of 1954, and amendments thereto, in effect on December 31, 1967.

(2) It is the intent of the legislative assembly, by the adoption of this Act, insofar as possible, to provide an estate tax in this state similar to the provisions of the Federal Internal Revenue Code of 1954 relating to the Federal estate tax, modified as necessary by the state's jurisdiction to tax. Insofar as is practicable in the administration of this Act, the State Treasurer shall apply and follow the

administrative and judicial interpretation of the Federal estate tax law.

(3) Notwithstanding the provisions of subsection (2), the Treasurer may determine the tax imposed by this chapter independently of any determination of Federal estate tax by the Internal Revenue Service.

the personal representative to pay or deliver the property to the Division of State Lands to be placed in the escheat funds of the state. The personal representative shall take the receipt of the Division of State Lands stating from whom the property was received, a description of the property and the name of the person entitled to the property. The person entitled thereto may apply for and recover the property in the manner provided for recovery of escheat funds.

Section 14. Discharge of personal representative. Upon the filing of receipts or other evidence satisfactory to the court that distribution has been made as ordered in the final decree, the court shall enter an order of discharge. The discharge so obtained shall operate as a release of the personal representative from further duties and shall operate as a bar to any suit against the personal representative and his surety. The court may, however, in its discretion and upon such terms as may be just, within one year after notice thereof, permit a suit to be brought against the personal representative and his surety if the order of discharge was taken through the claimant's mistake, inadvertence, surprise or excusable neglect.

Section 15. Recording of copies of records in other counties wherein real property is situated. (1) If real property belonging to the estate of decedent is situated in a county other than that in which the estate is being administered,

the personal representative shall cause to be recorded in the deed records of the county certified copies of:

(a) The petition for appointment of the personal representative.

shall be prior and superior to the rights of judgment creditors, heirs or assigns of the distributee.

Section 10. Distribution to foreign personal representative. When administration in this state has been completed and the estate is in a condition to be distributed, the court, upon application by the personal representative, may authorize the delivery to the personal representative of an estate of decedent pending in a foreign jurisdiction of such property as the court finds appropriate for the payment of debts, taxes or other charges or for distribution to the beneficiaries of the estate in the foreign jurisdiction.

Section 11. Expenses of personal representative. A personal representative shall be allowed in the settlement of his final account all necessary expenses incurred in the care, management and settlement of the estate, including reasonable fees of appraisers, attorneys and other qualified persons employed by him. When any 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.

Section 12. Compensation of personal representative. (1) Upon application to the court the personal representative shall be entitled to receive compensation for his services as provided in this section. If there is more than one personal

representative acting concurrently, the compensation shall not be increased, but may be divided among them as they agree or as the court may order. The compensation shall be a commission upon the whole estate accounted for which shall include:

(a) Property inventoried and subject to the jurisdiction of the court.

(b) Additions thereto such as income or realized gains.

(c) Property not included in the appraised value of the estate but reportable for Oregon inheritance or federal estate tax purposes.

(2) The commissions of the personal representative shall be:

(a) Four percent of the first $60,000, but not less than $250.

(b) Two percent of all above $60,000.

Subsection (3), which is adapted from the New York Statute on Pretermitted Heirs, would except from abatement specific bequests of tangible personal property, such as articles of jewelry, art objects and other gifts which are not properly susceptible of being subjected to abatement.

Subsection (4) would replace ORS 117.330 and 117.340 and conforms to the general purpose and effect of those sections.

Section 9. Right of retainer. The first sentence is Section 3-603 of the 1967 draft Uniform Probate Code. The second sentence is adapted from Section 471 of the Iowa Probate Code. The Iowa statute does not permit the right of retainer to be barred by the statute of limitations or by discharge in bankruptcy. It was the judgment of your committees that the personal representative should be subject to the same defenses that the decedent would have if he were alive.

It seemed desirable to your committees that the common law "right of retainer" should be codified although it is well established in our decisions. See Stanley vs. U.S. National Bank of Portland, 110 Or 648, 224 Pac 835, Boise Payette Lumber Co. vs. National Surety Corporation, 167 Or 553, 118 P2d 1006, and In Re Miller's Estate, 189 Or 246, 218 P2d 966.

Section 10. Distribution to foreign personal representative. For a comparison with the present language, see Section

12, Uniform Ancillary Administration of Estates Act. This section may be compared to ORS 116.186. However, no comparable statute now appears in Oregon Revised Statutes.

The proposed section codifies the statement in Thomas Kay Woolen Mills vs. Sprague, D.C. Or., 259 Fed 338, that in case of an ancillary administration here the probate court at the conclusion of such administration may direct either that the personal property be delivered to the legatees or next of kin or that it be transferred to the domiciliary executor or administrator.

The proposed section would give the court the right to authorize the local personal representative to make distribution of the net estate to a domiciliary personal representative where the property was needed in the other jurisdiction for payment of estate expenses or for distribution.

Section 11. Expenses of personal representative. The content of this section is substantially the same as ORS 117.660. The second sentence is Section 3-421 of the 1967 draft Uniform

(b) A statement that all creditors have been paid in full.

(c) The matters required to be included by subsection (3).

Section 4. Notice of time for filing objections to final account and petition for distribution. (1) Upon filing the final account and petition for order of distribution the personal representative shall fix a time for filing objections thereto. Not less than twenty days before the expiration of the time fixed for filing objections he shall cause notice thereof to be mailed to:

(a) Each heir at his last known address, if the decedent died intestate.

(b) Each devisee at his last-known address, if the decedent died testate.

(c) Creditors not receiving payment in full whose claims have not otherwise been barred.

(d) The Director of the Division of State Lands if it appears that there is no known person to take by descent the net intestate estate.

(e) Any other person known to the personal representative to have or to claim an interest in the estate being distributed.

(2) The notice does not have to be mailed to the personal representative.

(3) Proof of the mailing to those persons entitled to notice shall be made by affidavit and filed at or before approval of the final account.

Section 5. Objections to final account and petition. Any person entitled to notice under section 4 may, within the time

(d) All disbursements made during the period covered by the account. Vouchers for disbursements shall accompany the account, unless otherwise provided by order or rule of court.

(e) The money and property of the estate on hand.

(f) Such other information as the personal representative considers necessary to show the condition of the affairs of the estate or as the court may require.

(3) When the estate is ready for settlement and distribution, the account shall also include:

(a) A statement that all Oregon income and estate taxes, and personal property taxes, if any, have been paid and that appropriate receipts, releases and clearances therefor have been filed, or if not so paid, that payment of such taxes has been secured by bond, deposit or otherwise.

(b) A petition for an order authorizing the personal representative to distribute the estate to the persons and in the portions specified therein.

(4) If the beneficiaries consent thereto in writing, and all creditors of the estate have been paid in full, the personal representative, in lieu of the annual accounts required by paragraph (1) (a), and in lieu of the information required by subsection (2), may file as his final account a verified statement which shall include the following:

(a) The period of time covered by the account.

of their interest therein, subject only to the right of appeal and the right to vacate the decree.

Section 7. Effect of order settling account. To the extent that the final account is approved, the personal representative and his surety shall, subject to the right of appeal, to the power of the court to vacate its final orders, and to the provisions of ORS_____(Section 14), be relieved from liability for the administration of his trust. The court may disapprove the account in whole or in part, surcharge the personal representative for any loss caused by any breach of duty, and deny in whole or in part his right to receive compensation.

Section 8. Distribution; order in which assets appropriated; abatement. (1) If the will expresses an order of abatement, or the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (2), the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

(2) Except as provided in ORS _____ dealing with the shares of pretermitted heirs and in ORS_____, dealing with the share of the surviving spouse who elects to take against the will, shares of distributees abate without any preference or priority as between real and personal property in the following order:

(a) Property not disposed of by the will.

(b) Residuary devises.

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

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

(4) When a decedent by his will has made special provision for the compensation of his personal representative the 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 renunciation of the compensation provided by the will.

Section 12. Interest on pecuniary devises. General pecuniary devises bear interest at the rate of three percent per annum 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 13. Disposition of unclaimed assets. If a report filed by the personal representative not less than 30 days after entry of the decree of distribution shows that payment or delivery of property in his possession or under his control cannot be made to a distributee entitled to such payment or delivery, either because the distributee refuses to accept the property, or because he cannot be found, the court may direct

the personal representative to pay or deliver the property to the Division of State Lands to be placed in the escheat funds of the state. The personal representative shall take the receipt of the Division of State Lands stating from whom the property was received, a description of the property and the name of the person entitled to the property. The person entitled thereto may apply for and recover the property in the manner provided for recovery of escheat funds.

Section 14. Discharge of personal representative. Upon the filing of receipts or other evidence satisfactory to the court that distribution has been made as ordered in the final decree, the court shall enter an order of discharge. The discharge so obtained shall operate as a release of the personal representative from further duties and shall operate as a bar to any suit against the personal representative and his surety unless such suit be commenced within one year from the date of the discharge.

Section 15. Recording of copies of records in other counties wherein real property is situated. (1) If real property belonging to the estate of decedent is situated in a county other than that in which the estate is being administered, the personal representative shall cause to be recorded in the deed records of the county certified copies of:

(a) The petition for appointment of the personal representative.

(b) The will, if any.

(c) The order appointing the personal representative.

(d) The decree of distribution.

(e) The order discharging the personal representative.

(2) If real property in such other county has been sold by the personal representative he shall also cause to be recorded a certified copy of any order authorizing sale of the real property.

Section 16. Reopening estate of decedent. Upon the petition of any interested person, the court, with such notice as it may prescribe, may order the estate of a decedent reopened if other property is discovered, if any necessary act remains unperformed or for any other proper cause appearing to the court. The court may reappoint the former personal representative, or appoint another personal representative, to administer any additional property or to perform such other acts as are considered necessary. The provisions of law as to original administration apply, insofar as applicable, to accomplish the purpose for which the estate is reopened, but a claim that already is adjudicated or barred may not be asserted in the reopened administration. (No change in present ORS 117.710, section 16.)

Section 17. Payment of debt and delivery of property to foreign personal representative without local administration. (1) 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 noresident decedent upon an affidavit made by or on behalf of the representative stating:

(a) The date of the death of the nonresident decedent,

(b) That no local administration or application therefor is pending in this state,

(c) That the foreign personal representative is entitled to payment or delivery.

(2) 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.

(3) Payment or delivery under subsection (1) 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.

Section 18. ORS 697.695 is amended to read:

697.695. Assignability of licenses; procedure on death of licensee. (1) Except as provided in subsection (2) of this section, any license granted under ORS 697.610 to 697.655 and 697.660 to 697.785 is a personal privilege and shall not be assignable.

(2) Upon the death of any licensee the commissioner shall have the right to transfer the license of the decedent to the

(2) If the mother described in subsection (1) of this section is dead or unknown, consent shall be obtained in the same manner as if such child had no living parent.

Section 22. ORS 109.330 is amended to read:

109.330. Notice to nonconsenting parent; notice where child has no parent, guardian or next of kin. (1) In the cases provided for in ORS 109.314, 109.322 and 109.324, where a parent does not consent to the adoption of his child, the court shall order a copy of the petition therefor and citation thereon to be served on him personally, if found in the state, and if not found in the state, then a copy of the citation to be published or served in the manner provided by ORS [116.750] 15.110 to 15.140 for the service of citation by publication or for personal service outside the state, and a copy of the citation to be deposited forthwith in the postoffice, directed to such parent at his place of residence, unless it appears that such residence is neither known to the petitioner nor can with reasonable diligence be ascertained by him; except that the citation so served by publication need not contain the names of the adoptive parents.

(2) If the child has no living parent and no guardian or next of kin in this state qualified to appear in its behalf, the court may order such notice, if any, to be given as it deems necessary or proper.

Section 23. Repeal of existing statutes. ORS 116.186, 116.190, 116.195, 117.010, 117.020, 117.310, 117.315, 117.320, 117.340, 117.610, 117.612, 117.615, 117.620, 117.630, 117.640, 117.650, 117.660, 117.670, 117.680, 117.690 and 722.385 are repealed.

Proposed revised Oregon probate code
ACCOUNTING AND DISTRIBUTION
Amended 2nd Draft
February 26, 1968

Prepared by
Stanton W. Allison

COMMENTS

Section 1. Liability of personal representative.
Section 2. Personal representative not liable.

These two sections are adapted from Section 172 of the Model Probate Code (1946), and would replace ORS 117.640 and 117.650. Similar language is found in Sections 157, 158 and 160 of the 1963 Iowa Probate Code. An addition to our statutory and case law in this area is subsection (2) of Section 1, which imposes liability upon the personal representative for property not a part of the estate if he has commingled it with estate property or it was received by him in his capacity as personal representative.

Section 3. Accounting and distribution. This section would replace ORS 117.010 and 117.610. Except as hereafter noted, it contains the content of these present sections. The wording is adapted from ORS 126.336, of the 1961 Guardianship Code. The provision for filing a semiannual account has been eliminated. This requirement has been criticized by attorneys for many years. In your committees' opinion there is no good reason for retaining it. The court is given authority to waive the annual account or to require an accounting at such other times as it may order. Paragraph (3)(a) accords with ORS 117.610, 118.250, 118.840 and 316.530.

Subsection (4) is a new provision which would eliminate the necessity of making detailed accounting in solvent estates where

all debts have been paid and all the beneficiaries consent to the elimination of the detailed account. This would avoid filling the probate files with detailed accountings in those estates where there is no real need for them.

Section 4. Notice of time for filing objections to final account and petition for distribution. This section is generally comparable to ORS 117.612, with the following changes. No publication of notice of final account is required. The proposed code provides for mailing notice to the heirs in the intestate estate and to the devisees in the testate estate at the time of the appointment of the personal representative. Thus the parties to whom the notice of the final account and petition for distribution is mailed have been informed of the probate at the initiation of proceedings. The section also requires notice to creditors whose claims have been filed but who have not received payment in full of their claim. Their interest in being notified of the accounting is obvious. The provision would cover the present requirement of ORS 117.615 for giving notice to the State Public Welfare Commission.

Section 5. Objections to final account and petition. This incorporates the substance of ORS 117.620. However, fundamental difference of procedure should be noted. Section 4 fixes a time for filing objections to the final account and petition for distribution. Section 5 provides that a time for hearing is

designated by the court when objections have been filed. Your committees felt that this change was sensibly in line with usual procedure, since ordinarily no objections are filed to the final account and in the vast majority of estates no hearing is necessary or is held. Objections may be filed only by those parties who are entitled to notice under the preceding section. Thus creditors whose claims have been barred by the nonclaim statute or whose claims have been paid would be not entitled to object.

Section 6. Decree of final distribution. The language is based on Section 183 of the Model Probate Code. The present Oregon code does not have a specific provision for a decree of final distribution. It was the intention of your committees to provide finality and conclusiveness to such a decree. It will be noted that the decree designates the parties in whom the property of the estate is vested and the property to which each is entitled, either by the will, by mutual agreement, or by intestate succession. The section requires a recital of findings of the court with respect to matters mentioned in paragraphs (a) through (j) of subsection (1).

Subsection (2) accords to the present ORS 118.250, 118.840 and 316.530.

Subsection (3) is drafted from paragraph (d) of Section 183 of the Model Probate Code. Your committees believe this section gives necessary finality and conclusiveness to the decree of distribution and to the determination of the successors in

interest of the property of the decedent, subject only to the right of appeal and the right to vacate the decree. By contrast ORS 117.630 provides that the decree is merely primary evidence of the correctness of the account and that the determination of the "names and ages of the heirs and legatees" is merely prima facie evidence of the facts set out in the order.

Section 7. Effect of order settling account. The language of this section is that of Section 179 of the Model Probate Code. In contrast to ORS 117.630, the decree approving the final account relieves the personal representative of liability subject only to the right of appeal, the right of the court to vacate its final orders and to proper distribution and discharge set out in Section 14.

Section 8. Distribution; order in which assets appropriated; abatement. This section is taken from Section 3-602 of the 1967 draft Uniform Probate Code. It follows the plan of abatement set out in ORS 117.330, 116.720, 116.730 and 116.735. However, the present statutory plan of abatement is modified because the proposed code makes no distinction between real and personal property, and title to both real and personal property vests in the heirs or devisees at the moment of death.

Subsection (2) preserves abatement as separately provided in the chapters on pretermitted heirs and election of the surviving spouse to take against a will.

Subsection (3), which is adapted from the New York Statute on Pretermitted Heirs, would except from abatement specific bequests of tangible personal property, such as articles of jewelry, art objects and other gifts which are not properly susceptible of being subjected to abatement.

Subsection (4) would replace ORS 117.330 and 117.340 and conforms to the general purpose and effect of those sections.

Section 9. Right of retainer. The first sentence is Section 3-603 of the 1967 draft Uniform Probate Code. The second sentence is adapted from Section 471 of the Iowa Probate Code. The Iowa statute does not permit the right of retainer to be barred by the statute of limitations or by discharge in bankruptcy. It was the judgment of your committees that the personal representative should be subject to the same defenses that the decedent would have if he were alive.

It seemed desirable to your committees that the common law "right of retainer" should be codified although it is well established in our decisions. See Stanley vs. U.S. National Bank of Portland, 110 Or. 648, 224 Pac. 835, Boise Payette Lumber Co. vs. National Surety Corporation, 167 Or. 553, 118 P2d 1006, and In Re Miller's Estate, 189 Or. 246, 218 P2d 966.

Section 10. Expenses of personal representative. The content of this section is substantially the same as ORS 117.660. The second sentence is Section 3-421 of the 1967 draft Uniform

Probate Code. In several areas, such as abatement, exoneration, partial distribution and apportionment of estate taxes, the proposed code provides for contribution by heirs and devisees. This would require the personal representative in some cases to bring an action against the heir or devisee. Litigation may well ensue in the case of contested claims. It was deemed advisable to include adequate protection to the personal representative for his necessary expenses and reasonable attorneys' fees.

Section 11. Compensation of personal representative. This section would replace ORS 117.660, 117.670 and 117.680.

Subsection (1) is comparable to ORS 117.680, "The compensation provided by law for an executor or administrator is a commission upon the whole estate accounted for by him." Your committees felt they should clarify the language quoted as it had been construed by subsequent Oregon decisions. The provision for dividing the statutory compensation among more than one personal representative seems a protection to the estate and would remove uncertainty.

The section provides some increase over the present compensation. The two percent figure will apply to value above $60,000, rather than above $50,000, as in the present statute. The four percent bracket will apply to the first $60,000 with $250 minimum charge. Provision is also made for a fee of one percent on the nonprobate assets reportable for estate tax purposes.

The present section was last amended in 1951. Since that date there has been no increase in the compensation of the personal

representative, although during this period the duties of the personal representative have increased tremendously in the area of state and federal income taxes and state and federal estate taxes. Reference is made to a study by the American College of Probate Counsel, revised as of July 1, 1966, of fees of executors, administrators and testamentary trustees.

Subsection (3) is subsection (2) of ORS 117.680 with editorial changes. Subsection (4) accords with ORS 117.660, except that the personal representative must file his renunciation of the compensation provided by the will prior to his appointment.

Section 12. Interest on pecuniary legacies. The language is adapted from Section 3-604 of the 1967 draft Uniform Probate Code. The committees felt that nominal interest of three percent should be paid to the distributees of general pecuniary legacies where the funds are not paid by the personal representative for more than a year from his appointment. If the will provides otherwise it would control.

Section 13. Disposition of unclaimed assets. This section would replace subsection (2) of ORS 117.310 with the following changes. The period during which the personal representative must retain the asset awaiting delivery or payment has been reduced from three months to 30 days. The language has been rewritten to include the common case where a legatee refuses to accept a bequest. The present requirement of paying these funds to the

County Treasurer for him to hold for one year has been eliminated. In the proposed section the personal representative pays the money upon court order direct to the Division of State Lands. With these two changes, the procedure conforms to the present code. For comparable legislation, see Section 109 of the 1963 Iowa Probate Code and Section 3-612 of the 1967 draft Uniform Probate Code.

Section 14. Discharge of personal representative. The language of this section is that of Section 193 of the Model Probate Code. The committees, however, changed the period for commencement of a suit against the personal representative and the surety from two years to one year from the date of discharge. Except as provided in ORS 116.195 there is no specific provision in the present code for an order closing the estate, although that is the regular procedure. It was considered desirable that there be provision for an order of discharge which would relieve the personal representative of liability, subject only to the one year limitation for legal action against him.

Section 15. Recording of copies of records in other counties wherein real property is situated. This section is a rewrite of ORS 116.190. The only fundamental change in this section is in regard to the sale of real property. The proposed code does not contemplate that in the usual sale a court order will be required. The committees agreed that recording the deed

of the personal representative in the county where the property was situated would furnish adequate record of the sale. Where a court order is required by the proposed code a certified copy of the order must be recorded.

Section 16. Reopening estate of decedent. ORS 117.710 has been included here without change. Your committees submitted this amended section to the Law Improvement Committee which introduced it in the 1965 Legislature. It was passed as chapter 345, section 1 of the 1965 Session Laws.

Section 17. Payment of debt and delivery of property to foreign personal representative without local administration. This is Sections 4-201, 4-202 and 4-203 of the 1967 draft Uniform Probate Code. It would replace ORS 116.186. The proposed section would eliminate the publication required by the present statute when the property is over $500 in value. It would shorten the period to 30 days after the death, where now 90 days is required after the first publication, or after the death if no publication is required. The requirement that certified copy of letters be furnished is eliminated. A creditor may still require that he be furnished copy of letters in addition to the affidavit if he desires it for his protection. The requirement of a release by the State Treasurer is eliminated.

Your committees decided the simpler procedure provided by the Uniform Probate Code was an improvement over ORS 116.186. They believed the present release requirement from the State

Treasurer is of no particular practical utility, since these releases are apparently furnished quite routinely at the present time.

Sections 18 to 22 are technical amendments which have been included in this chapter as a matter of convenience.

Proposed revised Oregon probate code
ACCOUNTING AND DISTRIBUTION
Amended 2nd Draft
February 26, 1968

Prepared by
Stanton W. Allison

COMPARATIVE SECTION TABLE

Draft Sections	ORS Sections
1	117.640, 117.650
2	117.640, 117.650
3	117.010, 117.610
4	117.612, 117.615
5	117.620
6	117.010, 117.630
7	117.630
8	116.720, 116.730, 116.735, 117.330, 117.340
9	
10	117.660
11	117.660, 117.670, 116.680
12	
13	117.310
14	116.195
15	116.190, 116.195
16	117.710
17	116.186
18	697.695
19	697.165
20	419.488
21	109.326
22	109.330
23	Repealer

Proposed revised Oregon probate code
ACCOUNTING AND DISTRIBUTION
Amended 2nd Draft
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Prepared by
Stanton W. Allison

Section 1. Liability of personal representative. Every personal representative shall be liable for and chargeable in his accounts with:

(1) All of the estate of the decedent which comes into his possession at any time, including the income therefrom.

(2) All property not a part of the estate if:

(a) He has commingled the property with the assets of the estate.

(b) The property was received under a duty imposed on him by law in the capacity of personal representative.

(3) Any loss to the estate arising from:

(a) Neglect or unreasonable delay in collecting the credits or other assets of the estate or in selling, mortgaging or leasing the property of the estate.

(b) Neglect in paying over money or delivering property of the estate.

(c) Failure to pay taxes as required by law or to close the estate within a reasonable time.

(d) Embezzlement or commingling of the assets of the estate with other property.

(e) Unauthorized self-dealing.

(f) Wrongful acts or omissions of his corepresentatives which he could have prevented by the exercise of ordinary care.

(g) Any other negligent or wilful act or nonfeasance in

fixed for such filing, file his objections to the account in the court in which such proceedings are pending, specifying the particulars of the objections. Upon the filing of objections the court shall designate the time for hearing thereon.

Section 6. Decree of final distribution. (1) In its decree of final distribution the court shall designate the persons in whom title to the estate available for distribution is vested and the property to which each is entitled under the will, by agreement approved by the court, or pursuant to intestate succession. The decree of distribution shall also contain any findings of the court with respect to:

(a) Advancements.

(b) Election by surviving spouse.

(c) Renunciation.

(d) Lapse.

(e) Adjudicated controversies.

(f) Partial distribution, which shall be confirmed or modified.

(g) Retainer.

(h) Claims for which a special fund is set aside, and the amount set aside.

(i) Contingent claims which have been allowed and are still unpaid.

(j) Approval of the final account in whole or in part.

(2) The personal representative is not entitled to approval of his final account until personal property taxes and Oregon income and estate taxes, if any, have been paid and appropriate receipts, releases and clearances therefor have been filed, or until payment of such taxes has been secured by bond, deposit or otherwise.

(3) The decree of distribution shall be a conclusive determination of the persons who are the successors in interest to the estate of the decedent and of the extent and character

shall be prior and superior to the rights of judgment creditors, heirs or assigns of the distributee.

Section 10. Expenses of personal representative. A personal representative shall be allowed in the settlement of his final account all necessary expenses incurred in the care, management and settlement of the estate, including reasonable fees of appraisers, attorneys and other qualified persons employed by him. When any 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.

Section 11. Compensation of personal representative. (1) Upon application to the court the personal representative shall be entitled to receive compensation for his services as provided in this section. If there is more than one personal representative acting concurrently, the compensation shall not be increased, but may be divided among them as they agree or as the court may order. The compensation shall be a commission upon the whole estate accounted for which shall include:

(a) Property inventoried and subject to the jurisdiction of the court.

(b) Additions thereto such as income or realized gains.

(c) Property not included in the appraised value of the estate but reportable for Oregon inheritance or federal estate

tax purposes.

(2) The commissions of the personal representative shall be:

(a) Four percent of the first $60,000, but not less than $250.

(b) Two percent of all above $60,000.

the personal representative to pay or deliver the property to the State Land Board to be placed in the escheat fund of the state. The personal representative shall take the receipt of the State Land Board stating from whom the property was received, a description of the property and the name of the person entitled to the property. The person entitled thereto may apply for and recover the property in the manner provided for recovery of escheat funds.

Section 14. Discharge of personal representative. Upon the filing of receipts or other evidence satisfactory to the court that distribution has been made as ordered in the final decree, the court shall enter an order of discharge. The discharge so obtained shall operate as a release of the personal representative from further duties and shall operate as a bar to any suit against the personal representative and his sureties unless such suit be commenced within one year from the date of the discharge.

Section 15. Recording of copies of records in other counties wherein real property is situated. (1) If any real property belonging to the estate of decedent is situated in any county other than that in which the estate is being administered, the personal representative shall cause to be recorded in the deed records of the county, certified copies of:

(a) The petition for appointment of the personal

Proposed revised Oregon probate code
ACCOUNTING AND DISTRIBUTION
2nd Draft
January 10, 1968

Prepared by

Stanton W. Allison

Section 1. Liability of personal representative. Every personal representative shall be liable for and chargeable in his accounts with:

(1) All of the estate of the decedent which comes into his possession at any time, including the income therefrom.

(2) All property not a part of the estate if:

(a) He has commingled the property with the assets of the estate.

(b) The property was received under a duty imposed on him by law in the capacity of personal representative.

(3) Any loss to the estate arising from:

(a) Neglect or unreasonable delay in collecting the credits or other assets of the estate or in selling, mortgaging or leasing the property of the estate.

(b) Neglect in paying over money or delivering property of the estate.

(c) Failure to close the estate within a reasonable time.

(d) Embezzlement or commingling of the assets of the estate with other property.

(e) Unauthorized self-dealing.

(f) Wrongful acts or omissions of his corepresentatives which he could have prevented by the exercise of ordinary care.

(g) Any other negligent or wilful act or nonfeasance in

his administration of the estate by which loss to the estate arises.

Section 2. Personal representative not liable. The personal representative shall not be liable or chargeable for:

(1) Debts due the decedent or other assets of the estate which remain uncollected without his fault.

(2) Loss by the decrease in value or destruction of property of the estate if the loss is caused without his fault.

Section 3. Accounting and distribution. (1) The personal representative shall make and file in the estate proceeding a verified account of his administration:

(a) Annually within thirty days after the anniversary day of his appointment unless the court orders otherwise.

(b) Within thirty days after the date of his removal or resignation or the revocation of his letters.

(c) When the estate is ready for settlement and distribution.

(d) At such other times as the court may order.

(2) Each account shall include the following information:

(a) The period of time covered by the account.

(b) The total value of the property with which he is chargeable according to the inventory, or, if there had been a prior accounting, the amount of the balance of the prior account.

(c) All money and property received during the period covered by the account.

(d) All disbursements made during the period covered by the account. Vouchers for disbursements shall accompany the account, unless otherwise provided by order or rule of court.

(e) The money and property of the estate on hand.

(f) Such other information as the personal representative considers necessary to show the condition of the affairs of the estate or as the court may require.

(3) When the estate is ready for settlement and distribution, the account shall also include:

(a) A statement that all Oregon income and inheritance taxes, and personal property taxes, if any, either have been paid or will be paid prior to final closing of the estate and that appropriate receipts, releases or clearances therefor will be procured and filed prior to such closing or that such taxes will be secured by bond, deposit or otherwise.

(b) A petition for an order authorizing the personal representative to distribute the estate to the persons and in the portions specified therein.

(4) If the beneficiaries consent thereto in writing, and all creditors of the estate have been paid in full, the personal representative, in lieu of the annual accounts required by subsection (1)(a), and in lieu of the information required by subsection (2), may file as his final account a verified statement which shall include the following:

(a) The period of time covered by the account.

(b) A statement that all creditors have been paid in full.

(c) The matters required to be included by subsection (3).

Section 4. Notice of time for filing objections to final account and petition for distribution. (1) Upon filing the final account and petition for order of distribution the personal representative shall fix a time for filing objections thereto. Not less that twenty days before the expiration of the time fixed for filing objections he shall cause notice thereof to be mailed to:

(a) Each heir at his last-known address, if the decedent died intestate.

(b) Each devisee at his last-known address, if the decedent died testate.

(c) Creditors not receiving payment in full whose claims have not otherwise been barred.

(d) Any other person known to the personal representative to have or to claim an interest in the estate being distributed.

(2) The notice does not have to be mailed to the personal representative.

(3) Proof of the mailing to those persons entitled to notice shall be made by affidavit and filed at or before approval of the final account.

Section 5. Objections to final account and petition. Any person entitled to notice under section 4 may, within the time

fixed for such filing, file his objections to the account in the court in which such proceedings are pending, specifying the particulars of the objections. Upon the filing of objections the court shall designate the time for hearing thereon.

Section 6. Decree of final distribution. (1) In its decree of final distribution the court shall designate the persons in whom title to the estate available for distribution is vested and the property to which each is entitled under the will, by agreement approved by the court, or pursuant to intestate succession. The decree of distribution shall also contain any findings of the court with respect to:

(a) Advancements.

(b) Election by surviving spouse.

(c) Renunciation.

(d) Lapse.

(e) Adjudicated controversies.

(f) Partial distribution, which shall be confirmed or modified.

(g) Retainer.

(h) Claims for which a special fund is set aside, and the amount set aside.

(i) Contingent claims which have been allowed and are still unpaid.

(2) The decree of distribution shall be a conclusive determination of the persons who are the successors in interest to the estate of the decedent and of the extent and character

of their interest therein, subject only to the right of appeal and the right to vacate the decree.

Section 7. Effect of order settling account. To the extent that the final account is approved, the personal representative and his surety shall, subject to the right of appeal and to the power of the court to vacate its final orders, be relieved from liability for the administration of his trust, including the investment of the assets of the estate. The court may disapprove the account in whole or in part and surcharge the personal representative for any loss caused by any breach of duty.

Section 8. Distribution; order in which assets appropriated; abatement. (1) If the will expresses an order of abatement, or the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (2), the shares of the distributees abate as may be found necessary to give effect to the intention of the testator.

(2) Except as provided in ORS_____dealing with the shares of pretermitted heirs and in ORS_____, dealing with the share of the surviving spouse who elects to take against the will, shares of distributees abate without any preference or priority as between real and personal property in the following order:

(a) Property not disposed of by the will.

(b) Residuary devises.

(c) General devises.

(d) 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.

(3) 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 amount of the total estate and the court specifically orders contribution because of such gift.

(4) 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.

Section 9. 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. The right of offset and retainer

shall be prior and superior to the rights of judgment creditors, heirs or assigns of the distributee.

Section 10. Expenses of personal representative. A personal representative shall be allowed in the settlement of his final account all necessary expenses incurred in the care, management and settlement of the estate, including reasonable fees of appraisers, attorneys and other qualified persons employed by him.

Section 11. Compensation of personal representative. (1) Upon application to the court the personal representative shall be entitled to receive compensation for his services as provided in this section. If there is more than one personal representative acting concurrently, the compensation shall not be increased, but may be divided among them as they agree or as the court may order. The compensation shall be a commission upon the whole estate accounted for which shall include:

(a) Property inventoried and subject to the jurisdiction of the court.

(b) Additions thereto such as income or realized gains.

(c) Property not included in the appraised value of the estate but reportable for Oregon inheritance or federal estate tax purposes.

(2) The commissions of the personal representative shall be:

(a) Four percent of the first $60,000, but not less than $250.

(b) Two percent of all above $60,000.

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

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

(4) When a decedent by his will has made special provision for the compensation of his personal representative the 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 renunciation of the compensation provided by the will.

Section 12. Interest on pecuniary legacies. Pecuniary legacies shall bear interest at the rate of three percent per annum beginning 12 months from the filing of the petition for the appointment of a personal representative until the payment of the legacies, unless a contrary intent is indicated in the will.

Section 13. Disposition of unclaimed assets. If a report filed by the personal representative not less than 30 days after entry of the decree of distribution shows that payment or delivery of property in his possession or under his control cannot be made to a distributee entitled to such payment or delivery, either because the distributee refuses to accept the property, or because he cannot be found, the court may direct

the personal representative to pay or deliver the property to the State Land Board to be placed in the escheat fund of the state. The personal representative shall take the receipt of the State Land Board stating from whom the property was received, a description of the property and the name of the person entitled to the property. The person entitled thereto may apply for and recover the property in the manner provided for recovery of escheat funds.

Section 14. Discharge of personal representative. Upon the filing of receipts, releases and clearances for Oregon income, estate and inheritance taxes, and personal property taxes, and upon the filing of receipts or other evidence satisfactory to the court that distribution has been made as ordered in the final decree, the court shall enter an order of discharge. The discharge so obtained shall operate as a release of the personal representative from further duties and shall operate as a bar to any suit against the personal representative and his sureties unless such suit be commenced within one year from the date of the discharge.

Section 15. Recording of copies of records in other counties wherein real property is situated. (1) If any real property belonging to the estate of decedent is situated in any county other than that in which the estate is being administered, the personal representative shall cause to be recorded in the deed records of the county, certified copies of:

(a) The petition for appointment of the personal

representative.

(b) The will, if any.

(c) The order appointing the personal representative.

(d) The order determining heirship, if any.

(e) The order discharging the personal representative.

(2) If real property in such other county has been sold by the personal representative he shall also cause to be recorded a certified copy of any order authorizing sale of the real property.

Section 16. Reopening estate of decedent. Upon the petition of any interested person, the court, with such notice as it may prescribe, may order the estate of a decedent reopened if other property is discovered, if any necessary act remains unperformed or for any other proper cause appearing to the court. The court may reappoint the former personal representative, or appoint another personal representative, to administer any additional property or to perform such other acts as are considered necessary. The provisions of law as to original administration apply, in so far as applicable, to accomplish the purpose for which the estate is reopened, but a claim that already is adjudicated or barred may not be asserted in the reopened administration. (No change in present ORS 117.710 - section 16)

Section 17. ORS 116.186 is amended to read:

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 owing 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], $1,000 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] $1,000, 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.

Section 18. ORS 697.695 is amended to read:

697.695. Assignability of licenses; procedure on death of licensee. (1) Except as provided in subsection (2) of this section, any license granted under ORS 697.610 to 697.655 and 697.660 to 697.785 is a personal privilege and shall not be assignable.

(2) Upon the death of any licensee the commissioner shall have the right to transfer the license of the decedent to the

[executor or administrator] personal representative of his estate for the period of the unexpired term of the license and thereupon the court having jurisdiction of the probate of the estate of said decedent may authorize such [executor or administrator] personal representative to continue the business of debt consolidating formerly carried on by the decedent pursuant to the provisions of ORS [116.170 to 116.180] _____, and upon such other terms and conditions as the court may prescribe.

Section 19. ORS 697.165 is amended to read:

697.165. License or certificate as personal privilege; procedure on death of licensee. (1) Except as provided in subsection (2) of this section, any certificate or license granted under ORS 697.010 to 697.041, 697.061 to 697.270, 697.290 and 697.440 to 697.470 shall be a personal privilege and shall not be assignable.

(2) Upon the death of any collection agency licensee, the Real Estate Division shall have the right to transfer the license of the decedent to the [executor or administrator] personal representative of his estate for the period of the unexpired term of the license and thereupon the court having jurisdiction of the probate of the estate of said decedent may authorize such [executor or administrator] personal representative to continue the collection agency business of the decedent pursuant to the provisions of ORS [116.170 to 116.180] _____ _____, and upon such other terms and conditions as

the court may prescribe.

(3) The death of the operator of a corporate licensee shall in no way interfere with the continuation of the licensed business providing another licensed operator is placed in management control of the corporate licensee.

Section 20. ORS 419.488 is amended to read:

419.488. Service of summons and process; travel expenses of person summoned. (1) Summons or other process issuing from the juvenile court may be served without further indorsement in any county of the state by an officer of the county in which the proceeding is pending, by an officer of the county in which the person to be served is found or by any person authorized by the court to serve the process. Except as otherwise provided in ORS 419.472 to 419.587, the provisions of law applicable to summons in civil cases apply to summons issued from juvenile court.

(2) If the parent, parents or guardian required to be summoned as provided in subsection (4) of ORS 419.486 cannot be found within the state, summons may be served on him or them in any of the following ways:

(a) If the address of the parent or guardian is known, by sending him a copy of the summons by registered mail with a return receipt to be signed by the addressee only.

(b) By personal service outside the state in the manner provided in [subsection (3) of ORS 116.750] ORS 15.110.

(c) If, after reasonable inquiry, the whereabouts of the

parent or guardian cannot be ascertained, by publishing a summons in a newspaper having general circulation in the county in which the proceeding is pending. In lieu of the brief statement of facts required by subsection (2) of ORS 419.486, the published summons shall simply state that a proceeding concerning the child is pending in the court and an order making an adjudication will be entered therein. The summons shall be published once a week for a period of three weeks, making three publications in all. If the names of one or both parents or the guardian are unknown, he or they may be summoned as "The parent(s) or guardian of (naming or describing the child), found (stating the address or place where the child was found)."

(3) Service as provided in this section shall vest the court with jurisdiction over the parents or guardian in the same manner and to the same extent as if the person served were served personally within this state.

(4) The court may authorize payment of travel expenses of any person summoned, as provided in ORS 139.140.

Section 21. ORS 109.326 is amended to read:

109.326. Consent where parents not married to each other.

(1) The consent of the mother of the child is sufficient, and for the purpose of giving such consent the mother of the child shall be deemed to have arrived at the age of majority and for all purposes relating to the adoption of the child the father of the child shall be disregarded just as

if he were dead, when it is shown in the court in which the adoption proceedings are pending that:

(a) The mother of the child was unmarried at the time of the conception of the child to be adopted and remained unmarried at the time of the birth of the child and was not married to the father of the child at the time of her consent to the adoption or surrender of the child for the purpose of adoption under ORS 418.270; or

(b) When the mother of the child was married at the time of the conception or birth of the child, and it has been judicially determined that her husband at such time or times was not the father of the child. Such determination of nonpaternity may be made by any court having adoption or juvenile court jurisdiction. The testimony or affidavit of the mother or such husband shall constitute competent evidence before the court making such determination. Before making such determination of nonpaternity, citation to show cause why such husband's parental rights should not be terminated shall be served on him personally, if found in the state, and if not found in the state, then a copy of the citation shall be published or served in the manner provided by ORS [116.750] 15.110 to 15.140 for the service of citation by publication or for personal service outside the state; except that the citation so served by publication need not contain the names of the adoptive parents.

(2) If the mother described in subsection (1) of this section is dead or unknown, consent shall be obtained in the same manner as if such child had no living parent.

Section 22. ORS 109.330 is amended to read:

109.330. Notice to nonconsenting parent; notice where child has no parent, guardian or next of kin. (1) In the cases provided for in ORS 109.314, 109.322 and 109.324, where a parent does not consent to the adoption of his child, the court shall order a copy of the petition therefor and citation thereon to be served on him personally, if found in the state, and if not found in the state, then a copy of the citation to be published or served in the manner provided by ORS [116.750] 15.110 to 15.140 for the service of citation by publication or for personal service outside the state, and a copy of the citation to be deposited forthwith in the postoffice, directed to such parent at his place of residence, unless it appears that such residence is neither known to the petitioner nor can with reasonable diligence be ascertained by him; except that the citation so served by publication need not contain the names of the adoptive parents.

(2) If the child has no living parent and no guardian or next of kin in this state qualified to appear in its behalf, the court may order such notice, if any, to be given as it deems necessary or proper.

Section 23. Repeal of existing statutes. ORS 116.190, 116.195, 117.010, 117.020, 117.310, 117.315, 117.320, 117.340, 117.610, 117.612, 117.615, 117.620, 117.630, 117.640, 117.650, 117.660, 117.670, 117.680, 117.690 and 722.385 are repealed.

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
ACCOUNTING AND DISTRIBUTION
1st Draft
April 10, 1967

This draft is based primarily on a draft by Campbell Richardson, William Tassock and William Keller dated November 14, 1966, and the action of the committees at the November 18, 19, 1966 meeting.

Section 1. Liability of personal representative. Every personal representative shall be liable for and chargeable in his accounts with:

(1) All of the estate of the decedent which comes into his possession at any time, including the income therefrom.

(2) All property not a part of the estate if:

(a) He has commingled the property with the assets of the estate.

(b) The property was received under a duty imposed on him by law in the capacity of personal representative.

(3) Any loss to the estate arising from:

(a) Neglect or unreasonable delay in collecting the credits or other assets of the estate or in selling, mortgaging or leasing the property of the estate.

(b) Neglect in paying over money or delivering property of the estate.

(c) Failure to account for or to close the estate within the time provided by law.

(d) Embezzlement or commingling of the assets of the estate with other property.

(e) Unauthorized self-dealing.

(f) Wrongful acts or omissions of his corepresentatives which he could have prevented by the exercise of ordinary care.

(g) Any other negligent or wilful act or nonfeasance in his administration of the estate by which loss to the estate arises.

Section 2. Personal representative not liable. The personal representative shall not be liable or chargeable for:

(1) Debts due the decedent or other assets of the estate which remain uncollected without his fault.

(2) Loss by the decrease in value or destruction of property of the estate if caused without his fault.

The personal representative shall not be entitled to any profit by the increase in value of any property in the estate.

References: Advisory Committee Minutes:
11/18,19/66 pp. 3 to 7; and Appendix

ORS 117.010
117.020
117.030

Section 3. Accounting and distribution. (1) The personal representative shall make and file in the estate proceeding a written verified account of his administration:

(a) Unless the court orders otherwise, annually within thirty days after the anniversary day of his appointment.

(b) Upon the appointment of a successor personal representative, after the resignation, death or removal of the incumbent representative.

(c) When the estate is ready for settlement and distribution.

(d) At such other times as the court may order.

(2) Each account made and filed by a personal representative shall include the following information:

(a) The period of time covered by the account.

(b) The amount of the property of the estate according to the inventory, or if there was a previous account, the amount of the balance of the next previous account, and all property, rents, income, issues, profits and proceeds from property received during the periods covered by the account.

(c) All disbursements made during the period covered by the account. Vouchers for disbursements shall accompany the account.

(d) The property of the estate on hand.

(e) Such other information as the personal representative considers necessary to show the condition of the affairs of the estate or as the court may order.

(3) When the estate is ready for settlement and distribution, the account shall also include:

(a) An affirmative 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 appropriate receipts, releases or clearances therefor will be procured and filed prior to such closing or that such taxes will be secured by bond, deposit or otherwise.

(b) A petition for an order authorizing the personal

representative to distribute the estate to the persons and in the portions specified therein.

References: Advisory Committee Minutes:
11/18/66, pp. 8,13,14 pp. 8 and 9; and Appendix

ORS 117.010
117.610
126.336

Section 4. Notice, hearing on settlement of account and petition for distribution. (1) Upon the filing of the final account and petition for order of distribution, the personal representative shall fix a day for hearing of objections thereto and the personal representative shall, not less than 20 days before expiration of the time fixed for the hearing, cause notice of the time and place thereof to be mailed to:

(a) Each heir at his last known address, if the decedent died intestate.

(b) Each legatee and devisee at his last known address, if the decedent died testate.

(c) Creditors not receiving payment in full whose claims have not otherwise been barred.

(d) Any other person known to the personal representative to have or to claim an interest in the estate being distributed.

(2) The notice does not have to be mailed to the personal representative.

(3) Proof of the mailing to those persons entitled to

notice shall be made by affidavit and filed at or before approval of the final account.

References: Advisory Committee Minutes:
11/15, 16/66 pp. 15 and 16; and Appendix

ORS 117.615
117.612

Section 5. Objections to final account and petition. Any person entitled to notice under section 3 may, within the time appointed for such filing, file his objections to the account and petition or to any part thereof specifying the particulars of the objections. Upon the filing of objections the court shall designate the time for hearing thereon.

References: Advisory Committee Minutes:
11/18,19/66 p. 20; and Appendix

ORS 117.620

Section 6. Conclusiveness of order settling account. To the extent of approval of the final account, the personal representative and his sureties shall, subject to the right of appeal and to the power of the court to vacate its final orders, be relieved from liability for the administration of his trust during the accounting period, including the investment of the assets of the estate. The court may disapprove the account in whole or in part and surcharge the personal representative for any loss caused by any breach of duty.

References: Advisory Committee Minutes:
11/18,19/66 p. 20; and Appendix

Section 7. Decree of final distribution. (1) In its

decree of final distribution the court shall designate the persons to whom distribution is to be made and the proportions or parts of the estate or the amounts to which each is entitled under the will or by agreement approved by the court or pursuant to law. The decree of distribution shall also contain the findings of the court with respect to:

(a) Advancements.

(b) Election by surviving spouse.

(c) Renunciation.

(d) Lapse.

(e) Adjudicated controversies.

(f) Partial distribution which shall be confirmed or modified.

(g) Retainer.

(h) Claims for which a special fund is set aside, and the amount set aside.

(i) Contingent claims which have been duly allowed and are still unpaid, and whether the distributees take the property subject to a claim of this kind.

(j) A specific description of real property to be distributed.

(2) The decree of final distribution shall be a conclusive determination of the persons who are the successors in interest to the estate of the decedent and of the extent and character of their interest therein, subject only to the right of appeal and the right to reopen the decree. It

shall operate as the final adjudication of the transfer of the right, title and interest of the decedent to the distributees therein designated.

References: Advisory Committee Minutes:
11/18,19/66 pp. 16 to 18; and Appendix

ORS 117.310
117.315
117.320
117.330
117.350
117.361
117.370
117.380
117.390

Section 8. Disposition of unclaimed assets. Any personal representative having in his possession or under his control any property due or to become due to any other person to whom payment or delivery cannot be made, as shown by the report of the personal representative on file, may, upon order of the court, pay or deliver the property to the State Land Board and take the receipt of the State Land Board for the property. The receipt shall specifically state from whom the property was received, a description of the property, and the name of the person entitled to the property. Thereafter the property shall be held and disposed of by the State Land Board in accordance with ORS chapter 98.

References: Advisory Committee Minutes:
11/18,19/66 p. 20; and Appendix

ORS 117.310

Section 9. Order in which assets appropriated; abatement. (1) Except as provided in subsection (3) of this section, shares of the distributees shall abate for the payment of claims, legacies, the family allowance, the shares

of the pretermitted heirs or the share of the surviving spouse who elects to take against the will, without any preference or priority as between real and personal property in the following order:

(a) Property not disposed of by the will;

(b) Residuary gifts;

(c) General gifts not charged on any specific property or fund; and

(d) Specific gifts.

(2) A general gift charged on any specific property or fund is, for purposes of abatement, deemed property specifically given 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 specific gift to the extent of such failure or insufficiency. Abatement within each classification is in proportion to the amounts of the property each of the distributees would have received had full distribution of such property been made in accordance with the terms of the will (p. 82 the last sentence is taken from Wisc. code, sec. 863.11).

(3) If the provisions of the will or the testamentary plan or the express or implied purpose of the gift would be defeated by the order of abatement stated in subsection (1) of this section, the shares of distributees shall abate in such other manner as may be found necessary to give effect to the intention of the testator.

References: Advisory Committee Minutes:
11/18,19/66 pp. 21-22; and Appendix

Section 10. Contribution. When real or personal property which has been specifically given, or charged with a legacy, shall be sold or taken by the personal representative for the payment of claims, family allowance, or an election to take against the will, other legatees and devisees shall contribute according to their respective interests to the legatee or devisee whose legacy or device has been sold or taken, so as to accomplish an abatement in accordance with the provisions of sec._____ hereof. The court shall, at the time of the hearing on the petition for final distribution, determine the amounts of the respective contributions and whether the same shall be made before distribution or shall constitute a lien on specific property which is distributed.

References: Advisory Committee Minutes:
11/18,19/66 pp. 21 to 23

ORS 117.340

Section 11. Retainer. When a distributee of an estate is indebted to the estate, or if a distributee takes as an heir of a deceased devisee indebted to the estate, the amount of the present worth of the indebtedness, if not due, shall be treated as an offset and retained by the personal representative out of any testate or intestate property of the estate to which the distributee is entitled. The right of offset and retainer shall be prior and superior to the rights of judgment creditors, heirs or assigns of such distributee and shall not be barred by the statute of limitations or by a discharge in bankruptcy.

References: Advisory Committee Minutes
2/18,19/66 p. 6; and Appendix

Section 12. Interest on general legacies. General legacies shall bear interest at the rate of three percent per annum beginning 12 months from the filing of the petition for the appointment of a personal representative until the payment of the legacies, unless a contrary intent is indicated in the will.

References: Advisory Committee Minutes:
11/18/66 p. 23

Section 13. Discharge of personal representative. Upon the filing of receipts, releases and clearances for Oregon income, estate, inheritance, and for personal property taxes on all taxable personal property, and upon the filing of receipts or other evidence satisfactory to the court that distribution has been made as ordered in the final decree, the court shall enter an order of discharge. The discharge so obtained shall operate as a release of the personal representative from further duties and shall operate as a bar to any suit against the personal representative and his sureties unless such suit be commenced within two years from the date of the discharge.

References: Advisory Committee Minutes:
11/18,19/66 pp. 24 and 25; and Appendix

Section 14. Expenses and compensation of personal representative. A personal representative shall be allowed in the settlement of his final account:

(1) All necessary expenses incurred in the care, management and settlement of the estate; and

(2) Any fee paid to an attorney for any party whose rights had to be resolved in order to properly administer the estate.

References: Advisory Committee Minutes:
11/18,19/66 and Appendix
1/20,21/67 pp. 2 to 4
2/17,18/67 pp. 3 to 5

ORS 117.660

REOPENING ESTATES

Section 15. Reopening estate of decedent. Upon the petition of any interested person, the court, with such notice as it may require, may order the estate of a decedent reopened if other property is discovered, if any necessary act remains unperformed or for any other proper cause appearing to the court. The court may reappoint the former personal representative, or appoint another personal representative to administer any additional property or to perform any other acts as are considered necessary. The provisions of law as to the original administration apply, in so far as applicable, to accomplish the purpose for which the estate is reopened, but a claim that already is adjudicated or barred may not be filed in the reopened administration.

References: Advisory Committee Minutes:
11/18,19/66 and Appendix
1/20,21/67 p.2

ORS 117.710

Section 16. Recording of copies of records in other counties wherein real property is situated. If any property belonging to the estate of decedent is situated in any

county other than that in which the estate is being administered, the personal representative shall cause to be recorded in the deed records of those counties, certified copies of:

(1) The will, if any.

(2) The petition for appointment of the personal representative.

(3) The order appointing the personal representative.

(4) The order determining heirship, if any.

(5) The order authorizing sale of property.

(6) The order confirming sale of property.

(7) The order closing the estate.

References: Advisory Committee Minutes:
7/15,16/66 pp. 4 and 5; and Appendix

ORS 116.190

Section 17. Suit to set aside transfer of property. the personal representative may bring suit to set aside and void any transfer or change of interest in property of the decedent which was made or suffered:

(1) To delay, hinder or defraud creditors; or

(2) If it was accomplished in a manner so as to be void or contrary to the laws of this state.

References: Advisory Committee Minutes:
7/15,16/66 pp. 8 to 10; and Appendix

ORS 116.330
116.335
116.340

Section 18. Compensation of personal representative. (1) Upon application to the court the personal representative shall be entitled to receive compensation for his services as provided in this section. If there is more than one personal representative acting concurrently, the compensation shall not be increased, but may be divided among them as they agree or as the court may order. The compensation shall be a commission upon the whole estate accounted for which shall include:

(a) Property inventoried and subject to the jurisdiction of the court.

(b) Additions thereto such as income or realized gains.

(c) Property not included in the appraised value of the estate but reportable for Oregon inheritance or federal estate tax purposes.

(2) The commissions of the personal representative shall be:

(a) Four percent of the first $60,000, but not less than $250.

(b) Two percent of all above $60,000.

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

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

(4) When a decedent by his will has made special provision for the compensation of his personal representative the 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 renunciation of the compensation provided by the will.

References: Advisory Committee Minutes:
11/18,19/66 pp. 3 to 7; and Appendix
2/17,18/66 pp. 3 to 5; and Appendix

ORS 117.660

Section 19. 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 owing 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.

Section 20. 3.340. Probate jurisdiction; summary or plenary action on rejected probate claims. There also is conferred upon, and vested in, the circuit court of a judical district described in ORS 3.310 full, complete, general and exclusive jurisdiction, authority and power in equity, in the first instance, in all matters whatever pertaining to a court of probate, including the construing of, and declaration of rights under, wills and codicils, and therein the determining of question of title to real, personal or mixed properties; and in a probate proceeding in which a claim is rejected by the executor or administrator, the claimant may present such claims to the circuit court, or a judge thereof, for allowance, as provided by ORS[116.525] _____ and [116.530] _____, or he may, and if such executor or administrator demand it in writing, he shall, in the first instance bring a separate plenary action or suit against such executor or administrator on the claim.

Section 21. 3.140. Application of laws governing county courts to circuit courts exercising judicial jurisdiction formerly vested in county courts; power to make rules. (1) The circuit courts and the judges thereof are governed by the existing laws relating to the exercise of the judicial jurisdiction, authority, powers, functions and duties transferred under ORS 3.130, in so far as they are applicable, as though the circuit courts and the judges thereof were originally referred to in the existing laws; except that, in those counties in which probate jurisdiction, authority, powers, functions and duties are transferred under ORS 3.130, the circuit courts and the judges thereof shall have in the first instance exclusive jurisdiction in equity in all matters pertaining to probate, including the construction and declaration of rights under wills and the determination of questions of title to real, personal or mixed property thereunder, and in a probate proceeding in which a claim is rejected by the executor or administrator, the claimant may present the claim to the circuit court for allowance as provided in ORS [116.525] _____ and [116.530] _____, or he may, and if the executor or administrator demands it in writing, he shall, in the first instance bring a separate plenary action or suit against the executor or administrator on the claim.

(2) The judges of the circuit courts may make all rules and regulations, not inconsistent with law, to

facilitate the transaction of business and render effectual the provisions of ORS 3.130, 3.140 and 7.230.

Section 22. 697.695. Assignability of licenses; procedure on death of licensee. (1) Except as provided in subsection (2) of this section, any license granted under ORS 697.610 to 697.655 and 697.660 to 697.785 is a personal privilege and shall not be assignable.

(2) Upon the death of any licensee the commissioner shall have the right to transfer the license of the decedent to the [executor or administrator] personal representative of his estate for the period of the unexpired term of the license and thereupon the court having jurisdiction of the probate of the estate of said decedent may authorize such executor or administrator to continue the business of debt consolidating formerly carried on by the decedent pursuant to the provisions of ORS [166.170 to 166.180] _____, and upon such other terms and conditions as the court may prescribe.

Section 23. 722.385. Penalty provisions inapplicable. The penalty provided in ORS [116.990] _____ does not apply to transactions had under ORS 722.375.

Section 24. 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, are extinguished and barred.]

Section 25. 697.165. License or certificate as personal privilege; procedure on death of licensee. (1) Except as provided in subsection (2) of this section, any certificate or license granted under ORS 697.010 to 697.041, 697.061 to 697.270, 697.290 and 697.440 to 697.470 shall be a personal privilege and shall not be assignable.

(2) Upon the death of any collection agency licensee, the Real Estate Division shall have the right to transfer the license of the decedent to the [executor or administrator] personal representative of his estate for the period of the unexpired term of the license and thereupon the court having jurisdiction of the probate of the estate of said decedent may authorize such [executor or administrator] personal representative to continue the collection agency business of the decedent pursuant to the provisions of ORS [116.170 to 116.180] _____, and upon such other terms and conditions as the court may prescribe.

(3) The death of the operator of a corporate licensee

shall in no way interfere with the continuation of the licensed business providing another licensed operator is placed in management control of the corporate licensee.

Section 26. 419.488. Service of summons and process; travel expenses of person summoned. (1) Summons or other process issuing from the juvenile court may be served without further indorsement in any county of the state by an officer of the county in which the proceeding is pending, by an officer of the county in which the person to be served is found or by any person authorized by the court to serve the process. Except as otherwise provided in ORS 419.472 to 419.587, the provisions of law applicable to summons in civil cases apply to summons issued from juvenile court.

(2) If the parent, parents or guardian required to be summoned as provided in subsection (4) of ORS 419.486 cannot be found within the state, summons may be served on him or them in any of the following ways:

(a) If the address of the parent or guardian is known, by sending him a copy of the summons by registered mail with a return receipt to be signed by the addressee only.

(b) By personal service outside the state in the manner provided in [subsection (3) of ORS 116.750] ORS _____.

(c) If, after reasonable inquiry, the whereabouts of the parent or guardian cannot be ascertained, by publishing a summons in a newspaper having general circulation in the county in which the proceeding is pending. In lieu of the brief statement of facts required by subsection (2) of

ORS 419.486, the published summons shall simply state that a proceeding concerning the child is pending in the court and an order making an adjudication will be entered therein. The summons shall be published once a week for a period of three weeks, making three publications in all. If the names of one or both parents or the guardian are unknown, he or they may be summoned as "The parent (s) or guardian of (naming or describing the child), found (stating the address or place where the child was found)."

(3) Service as provided in this section shall vest the court with jurisdiction over the parents or guardian in the same manner and to the same extent as if the person served were served personally within this state.

(4) The court may authorize payment of travel expenses of any person summoned, as provided in ORS 139.140.

Section 27. 109.330. Notice to nonconsenting parent; notice where child has no parent, guardian or next of kin. (1) In the cases provided for in ORS 109.314, 109.322 and 109.324, where a parent does not consent to the adoption of his child, the court shall order a copy of the petition therefor and citation thereon to be served on him personally, if found in the state, and if not found in the state, then a copy of the citation to be published or served in the manner provided by ORS [116.750] _____ for the service of citation by publication or for personal service outside the state, and a copy of the citation to be deposited forthwith

in the postoffice, directed to such parent at his place of residence, unless it appears that such residence is neither known to the petitioner nor can with reasonable diligence be ascertained by him.

(2) If the child has no living parent and no guardian or next of kin in this state qualified to appear in its behalf, the court may order such notice, if any, to be given as it deems necessary or proper.

Section 28. Repeal of existing statutes. ORS 116.005, 116.010, 116.015, 116.020, 116.025, 116.105, 116.110, 116.115, 116.120, 116.125, 116.130, 116.135, 116.140, 116.150, 116.155, 116.160, 116.165, 116.190, 116.195, 116.305, 116.310, 116.315, 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, 116.835, 116.840, 116.850, 116.860, 116.870, 116.880, 116.890, 116.900 and 116.990 are repealed.

(3) 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 representatives] guardian or conservator or successors in interest.

(4) In case of the transfer of an interest in the action or suit the court may, on motion, allow the action or suit to be continued against the transferor's successors in interest.

Section 3. 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 (2) of ORS 13.080 without presentation of a claim against the estate of the decedent.

Section 4. ORS 121.090 is amended to read:

121.090 Action against representative not to be commenced until claim is presented and rejected; liability on claim presented after four months from notice to creditors. [An] No action, including an action for death by wrongful act, against [an executor or administrator] a personal representative shall [not] be commenced until the claim of the plaintiff has been duly presented to the [executor or administrator] personal representative, and by him rejected. If the claim is presented after the expiration of the period of [six] four months from and after the date of the [published

(3) 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 representatives] guardian or conservator or successors in interest.

(4) In case of the transfer of an interest in the action or suit the court may, on motion, allow the action or suit to be continued against the transferor' successors in interest.

Section 3. 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 (2) of ORS 13.080 without presentation of a claim against the estate of the decedent.

Section 4. ORS 121.090 is amended to read:

121.090. Action against representative not to be commenced until claim is presented and rejected: liability on claim presented after four months from notice to creditors. An action against [an executor or administrator] a personal representative shall not be commenced until the claim of the plaintiff has been duly presented to the [executor or administrator] personal representative, and by him rejected. If the claim is presented after the expiration of the period of [six] four months from and after the date of the [published

notice of his appointment] first publication of notice to creditors, the [executor or administrator] personal representative, in an action therefor, is liable only to the extent of the assets in his hands at the time the summons is served upon him and allocable to the payment of such claim under and pursuant to the provisions of [ORS 116.510] ORS _____ and _____. (Sections 11 and 12, Chapter on Claims.)

Section 5. 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 survivies,] 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.]

Section 6. ORS 116.560, 116.575, 121.030, 121.040, 121.050, 121.060, 121.070, 121.080, 121.100, 121.210, 121.220, 121.230, 121.240, 121.250, 121.260, 121.270, 121.280, 121.290, 121.300, 121.310, 121.320 and 121.330 are repealed.

brought against the personal representative within four months after the first publication of notice to creditors. This conforms to the four months' period adopted in other portions of the code for the priority of claims and other actions against the personal representative.

Subsection (3) is the present language, but covering only disability. It provides for the continuation of the proceeding against the guardian or conservator of the incompetent. Subsection (4) covers transfer of interest. It permits the court to allow the proceeding to be continued against the successors in interest of the transferor.

Section 3. Continuation of action or suit without claim presentation. The committees were advised by Legislative Counsel that upon enactment of this code the amendment to ORS 13.080 would appear in Chapter 13 of the Oregon Revised Statutes where it now appears. He advised the committees that it would be advisable toinclude in the probate code a reference to the latter section. To avoid misunderstanding, the section provides that an action pending on the date of death may be continued without presentation of a claim against the estate.

Section 4. Action against representative not to be commenced until claim is presented and rejected: liability on

claim presented after four months from notice to creditors. This section amends ORS 121.090 to change the priority of the claim filed from six months to four months from the first notice to creditors, to comply with the claims chapter.

Section 5. Effect of death on limitations. This would amend present ORS 12.190 to eliminate the words "and the cause of action survives" as noted. The remainder of the section beginning "the issuing of letters testamentary" was deleted, since it was not considered necessary to extend the Statute of Limitations beyond the one year previously provided.

ADDENDUM

We comment on the proposed repeal of the balance of Chapter 121 as follows:

Except for ORS 121.010, 121.020, 121.080 and 121.090, this chapter has remained in the code without amendment since 1862. ORS 121.040 and 116.565 cover the same subject matter. The personal liability of the personal representative is covered by section 26 of the proposed chapter on Duties and Powers of the Personal Representative. Enforcement of payment of approved claims by the personal representative is covered by section 18 of the proposed chapter on claims, which gives the creditor the right to secure a court order directing the payment of the claim to the extent that funds of the estate are available for such payment.

Your committees felt that, in view of the broad power given by the proposed code to enforce the duties and obligations of the personal representatives, the matters named in ORS 121.050 could be placed in evidence without the benefit of this section.

The committees were agreed that it would be advisable to eliminate the doctrine of "executor of his own wrong", mentioned in ORS 121.060. The proposed code has adopted the approach of the 1967 draft Uniform Probate Code on personal

Proposed revised Oregon probate code
ACTIONS AND SUITS AFFECTING DECEDENTS
ESTATES AND ADMINISTRATIONS
Amended 2nd Draft
March 11, 1968

Prepared by
Stanton W. Allison

Section 1. ORS 121.020 is amended to read:

121.020. What causes of action survive; parties. All causes of action or suit, by one person against another, [whether arising on contract or otherwise,] survive to the personal representative[s] of the former and against the personal representative[s] of the latter. [The executors or administrators may maintain an action thereon against the party against whom the cause of action accrued, or after his death against his personal representatives.]

Section 2. 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 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 to creditors, but not more than one year after his death.

Proposed revised Oregon probate code
ACTIONS AND SUITS AFFECTING DECEDENTS
ESTATES AND ADMINISTRATIONS
2nd Draft
February 13, 1968

Prepared by
Stanton W. Allison

COMMENTS

Section 1. What causes of action survive; parties. The only substantive change by this amendment is to make the section applicable to both actions and suits. The other changes are editorial. However, since this section and Section 3 will be all that will remain of the present Chapter 121, we are including as an addendum an explanation of why the remainder of Chapter 121 can be properly eliminated.

Section 2. Nonabatement of action or suit by death, disability or transfer; continuing proceedings. This section would amend ORS 13.080. Chapter 620, Oregon Laws 1965, repealed the former ORS 121.010, which limited survival of actions, and amended ORS 121.020 (Section 1 above) to delete the word "other" from the reference to causes of action and the words "when the cause of action survives". In deleting the words "if the cause of action survives or continues "from ORS 13.080 and from ORS 12.190, the committees are conforming these sections to ORS 121.020.

In the interest of clarity, your committees felt it desirable to state in separate subsections the nonabatement of the action or suit by death, by disability, and by transfer.

Paragraph (a) of subsection (2) conforms to the present ORS 12.190 and to Section 20 of the proposed chapter on Claims. Paragraph (b) adds the requirement that the action must be

brought against the personal representative within four months after the first publication of notice to creditors. This conforms to the four months' period adopted in other portions of the code for the priority of claims and other actions against the personal representative.

Subsection (3) is the present language, but covering only disability. It provides for the continuation of the proceeding against the guardian or conservator of the incompetent. Subsection (4) covers transfer of interest. It permits the court to allow the proceeding to be continued against the successors in interest of the transferor.

Section 3. Continuation of action or suit without claim presentation. The committees were advised by Legislative Counsel that upon enactment of this code the amendment to ORS 13.080 would appear in Chapter 13 of the Oregon Revised Statutes where it now appears. He advised the committees that it would be advisable to include in the probate code a reference to the latter section. To avoid misunderstanding, the section provides that an action pending on the date of death may be continued without presentation of a claim against the estate.

Section 4. Effect of death on limitations. This would amend present ORS 12.190 to eliminate the words "and the cause of action survives" as noted. The remainder of the section beginning "the issuing of letters testamentary" was deleted, since

it was not considered necessary to extend the Statute of Limitations beyond the one year previously provided.

ADDENDUM

We comment on the proposed repeal of the balance of Chapter 121 as follows.

Except for ORS 121.010, 121.020, 121.080 and 121.090, this chapter has remained in the code without amendment since 1862. ORS 121.040 and 116.565 cover the same subject matter. The personal liability of the personal representative is covered by Section 26 of the proposed chapter on Duties and Powers of the Personal Representative. Enforcement of payment of approved claims by the personal representative is covered by Section 18 of the proposed chapter on claims, which gives the creditor the right to secure a court order directing the payment of the claim to the extent that funds of the estate are available for such payment.

Your committees felt that, in view of the broad power given by the proposed code to enforce the duties and obligations of the personal representatives, the matters named in ORS 121.050 could be placed in evidence without the benefit of this section.

The committees were agreed that it would be advisable to eliminate the doctrine of "executor of his own wrong", mentioned in ORS 121.060. The proposed code has adopted the approach of the 1967 draft Uniform Probate Code on personal

liability of the personal representative. ORS 121.070 was eliminated as having no practical use or effect. The question of rights and liabilities of successor personal representatives is treated in the chapter on Initiation of Probate. ORS 121.080, 121.090 and 121.100 are covered in the chapter on Claims.

ORS 121.210 and 121.220 have been covered by including suits in ORS 121.020.

The balance of this chapter covers the liability of distributees to contribution for the debts of the testator. The general question of abatement is covered in Section 8 of the chapter on Accounting and Distribution. See also Section 4 of the chapter on Partial Distribution. Beyond this, however, your committees considered that the liability of the estate and of its distributees should be limited to the estate assets. The statute of nonclaim in the proposed code is Section 1 of the chapter on Claims.

ORS 121.230 to 121.370 are discussed in Sections 557 and 675, Jaureguy and Love, Oregon Probate Law and Practice. We quote from First National Bank of Portland vs. Connolly, 172 Or. 434, 138 P2d 613, 143 P2d 243.

> "Although these provisions were enacted in 1862, the year of the adoption of the probate code with its statute of nonclaim, this court apparently has never had occasion to determine the circumstances which justify resort to the remedy which they grant, though obviously they were intended to supplement the provisions of the probate code for the collection of claims against the estates of decedents."

The Connolly case makes it abundantly clear that the power of equity to grant relief against the distributees of an estate is not dependent upon the sections above referred to. The court states on page 485:

> "Generally, it is held that a creditor, whose claim is duly proved but never satisfied, or whose claim has come into existence too late to be proved, or after the administration has been closed, may avail himself of the remedy in equity directly against the heir."

See Also two 1960 cases, Harris vs. Harris, 225 Or. 175, and In Re Horger Estate, 225 Or. 492.

Since equitable remedies are available to creditors and are not dependent upon statutory provisions or sanction, your committees felt it desirable to eliminate the remainder of this chapter, which as stated was enacted in 1862, has never been substantially amended, and has been of doubtful utility during the succeeding 106 years.

Proposed revised Oregon probate code
ACTIONS AND SUITS AFFECTING DECEDENTS
ESTATES AND ADMINISTRATIONS
2nd Draft
December 13, 1967

Prepared by
Stanton W. Allison

Section 1. ORS 121.020 is amended to read:

121.020. What causes of action survive; parties. All causes of action or suit, by one person against another, [whether arising on contract or otherwise,] survive to the personal representative[s] of the former and against the personal representative[s] of the latter. [The executors or administrators may maintain an action thereon against the party against whom the cause of action accrued, or after his death against his personal representatives.]

Section 2. 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 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.

(3) 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 representatives] guardian or conservator or successors in interest.

(4) In case of the transfer of an interest in the action or suit the court may, on motion, allow the action or suit to be continued against the transferor's successors in interest.

Section 3. 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 (2) of ORS 13.080 without presentation of a claim against the estate of the decedent.

Section 4. 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.]

Section 5. ORS 116.560, 116.575, 121.040, 121.050, 121.060, 121.030, 121.070, 121.080, 121.090, 121.100, 121.210, 121.220, 121.230, 121.240, 121.250, 121.260, 121.270, 121.280, 121.290, 121.300, 121.310, 121.320 and 121.330 are repealed.

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
ACTIONS AND SUITS AFFECTING DECEDENTS
ESTATES AND ADMINISTRATIONS
1st Draft
April 24, 1967

This draft is based primarily on a report of Thomas Gooding dated July 8, 1966, and action of the committees at the June and July, 1966 meetings.

Section 1. ORS 121.020 is amended to read:

121.020. What causes of action survive; parties. All causes of action and suits in equity, by one person against another, whether arising on contract or otherwise, survive to the personal representatives of the former and against the personal representatives of the latter. The [executors or administrators] personal representative may maintain an action thereon against the party against whom the cause of action accrued, or after his death against his personal representatives.

Section 2. ORS 121.030 is amended to read:

121.030. Several representatives regarded as one person. In an action or suit against several [executors or administrators] personal representatives, they shall all be considered as one person representing [their testator or intestate] the decedent, and judgment or decree may be given and execution issued against all of them who are defendants in the action, although the summons is served only on part of them[, in the same manner and with like effect as if served on all, except as provided in ORS 121.040].

Section 3. ORS 116.560, 116.575, 121.040, 121.050, 121.060, 121.070, 121.080, 121.090, 121.100, 121.210, 121.220, 121.230, 121.240, 121.250, 121.260, 121.270, 121.280, 121.290, 121.300, 121.310, 121.320 and 121.330 are repealed.

References: Advisory Committee Minutes
6/17, 18/66 p. 13
7/15, 16/66 pp. 14 to 20

ORS chapter 121

Proposed revised Oregon probate code
APPORTIONMENT OF ESTATE TAXES
2nd Draft
February 20, 1968

Prepared by

Stanton W. Allison

Section 1. Definitions. For purposes of this chapter:

(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, guardian, conservator and trustee;

(4) "State" means any state, territory, or possession of the United States, the District of Columbia, and the Commonwealth of Puerto Rico;

(5) "Tax" means the federal estate tax and the Oregon estate tax provided by ORS_____ and interest and penalties imposed in addition to the tax;

(6) "Fiduciary" means executor, administrator of any description, or trustee.

Section 2. 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.

Section 3. Apportionment proceedings; jurisdiction; equitable apportionment; penalties and interest; charging fiduciary; court determination of amount of tax.

(1) The court in which the administration of the estate is proceeding may on petition for the purpose determine the apportionment of the tax;

(2) If the court finds that it is inequitable to apportion interest and penalties in the manner provided in section 2, because of special circumstances, it may direct apportionment thereof in the manner it finds equitable.

(3) If the 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 him 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.

Section 4. 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 liabiltiy in the form and amount prescribed by the personal representative.

Section 5. 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 hearing 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 2 hereof, and to that extent no apportionment shall be made against the property. The sentence immediately preceding 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.

Section 6. 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.

Section 7. 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 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 estate was collectible at a time following the death of the decedent but thereafter became uncollectible. 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.

Section 8. Foreign Fiduciaries and Estate; Tax Credits. A personal representative acting in another state or a person required to pay the tax domiciled in another state may inst 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 estate who 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.

Section 9. Construction. Sections 1 to 9 embody the Uniform Estate Tax Apportionment Act and shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

Proposed revised Oregon probate code
APPORTIONMENT OF ESTATE TAXES
2nd Draft
March 29, 1968

Prepared by:
Stanton W. Allison

COMMENTS

This chapter embodies the Uniform Estate Tax Apportionment Act, with minor editorial changes. It provides for apportionment of the federal estate tax and the Oregon estate tax included in subsection (1) of ORS 118.100, unless the will provides for an apportionment of the taxes different from that prescribed by the act.

It was explained to the committees that 25 states now have apportionment statutes and that the tendency was toward equitable apportionment and not to put the whole burden on the residuary estate. It was the consensus of the committees that it was desirable to enact legislation which would provide a legal formula for apportioning these taxes and means of compelling contribution for payment of the taxes so apportioned. We might add that members of our subcommittee considering this subject differed on the application and interpretation of Beatty vs. Cake, 236 Or 498, 387 P2d 355, 242 Or 128, 406 P2d 419.

We find no conflict of the proposed chapter with ORS 118.110 as it applies to the Oregon estate tax.

Section 3 authorizes the court to determine apportionment and gives it discretion to direct apportionment of interest and penalties as it may find equitable if it is inequitable to apportion in the manner provided by section 2.

Section 4 authorizes the personal representative to withhold the amount of tax attributable to the interest distributable to a devisee. It also provides that the personal representative may recover a deficiency from such person and may require the distributee to provide security on a distribution prior to final apportionment.

Section 6 provides that income and temporary interests shall not be subject to apportionment as between such interests and the remainder, but that the tax shall be chargeable against the corpus of the property.

Section 7 provides that if a tax cannot be collected from a person interested in the estate the amount of the tax apportioned to such person shall be equitably apportioned among the other persons subject to apportionment.

Section 8 provides that a personal representative domiciled in another state may recover from a local devisee through the courts of this state the proportionate amount of taxes due from such devisee.

Proposed revised Oregon probate code
DEFINITION OF TERMS
2nd Draft
March 15, 1968

Prepared by
Stanton W. Allison

DEFINITIONS

(1) Abate. "Abate" means to reduce a devise on account of the insufficiency of the estate to pay all claims, expenses and devises in full.

(2) Action. "Action" includes suits and legal proceedings.

(3) Administration. "Administration" means any proceeding relating to the estate of a decedent, whether the decedent dies testate, intestate or partially intestate.

(4) Advancement. "Advancement" is an irrevocable gift in praesenti by the decedent to an heir to enable the donee to anticipate his inheritance to the extent of the gift.

(5) All purposes of intestate succession. "All purposes of intestate succession" means succession by, through or from a person, both lineal and collateral.

(6) Assets. "Assets" include real, personal and intangible property.

(7) Bequeath. "Bequeath" includes the word "devise" when used as a verb.

(8) Bequest. "Bequest" includes the words "devise" and "legacy" when used as a noun.

(9) Claims. "Claims" 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, the expense of a monument, expenses of administration and all estate and inheritance taxes.

(10) Court. "Court" means the circuit court.

(11) Decedent. "Decedent" is any person who has died leaving property that is subject to administration, and the term includes any person whose life was taken by a slayer.

(12) Devise. "Devise" when used as a noun is property disposed of by a will and includes "legacy" and "bequest".

(13) Devise. "Devise" when used as a verb means to dispose of real and personal property by a will.

(14) Devisee. "Devisee" includes "legatee" and "beneficiary".

(15) Distributee. "Distributee" is a person entitled to any property of the decedent under his will or under the statutes of intestate succession.

(16) Domicile. "Domicile" is the place of a person's abode where he intends to remain and to which, if absent, he intends to return.

(17) Estate. "Estate" denotes the real and personal property of a decedent, as from time to time changed in form by sale, reinvestment or otherwise, and augmented by any accretions or additions thereto and substitutions therefor or diminished by any decreases and distributions therefrom.

(34) Specific devise. "Specific devise" is a devise of a specific thing or specified part of a testator's estate which is so described as to be capable of indentification from all others of the same fund. It is a gift of a part of the estate identified and differentiated from all other parts.

(35) Will. "Will" includes codicil; it also includes a testamentary instrument that merely appoints an executor or merely revokes or revives another will.

Proposed revised Oregon probate code
DEFINITION OF TERMS
2nd Draft
March 15, 1968

Prepared by
Stanton W. Allison

COMMENTS

The use of statutory definitions in legislative acts promotes clearness in the meaning of the text of laws dealing with technical matters. The proposed new Oregon Probate Code would follow the pattern of Iowa, Washington, Wisconsin and the Model and 1967 Draft Uniform Probate Codes in placing a comprehensive definitions section at the beginning of the Code. The sources of some of the less obvious definitions are given as follows:

(3) Administration. This definition is adapted from Section 851.01 of the 1967 Wisconsin Code.

(4) Advancement is adapted from 26 C.J.S. Descent and Distribution, Section 91.

(5) All purposes of intestate succession is Section 2-110, 1967 Draft Uniform Probate Code.

(16) Domicile is taken from State vs. Atti, 21 A2d 603, 127 NJL 39.

(26) Net Intestate Estate is adapted from Section 2-101 of the 1967 draft Uniform Code.

The definitions of (19) General Devise and (34) Specific Devise are taken from In re Preston's Estate, 157 Or 631, and In re Boice's Estate, 209 Or 521.

The definitions of (9) Claims, (16) Estate, (20) Heirs, (21) Interested Person, (24) Issue, (25) Net Estate, (27) Obligations, (33) Settlement, and (35) Will are taken or adapted from the definitions in the 1967 Draft Uniform Probate Code.

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
DEFINITION OF TERMS
1st Draft
April 27, 1967

This rough draft is not intended to be final, and it is not intended to include all of the terms that will appear in the sections of definitions in the final draft.

DEFINITIONS

Section 1. Administration.

"Administration" means any proceeding relating to the estate of a decedent whether the decedent dies testate, intestate or partially intestate.

Section 2. Ancillary administration, etc.

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.

Section 3. Bequeath.

"Bequeath" includes the word "devise" when used as a verb.

Section 4. Bequest.

"Bequest" includes the words "devise"and "legacy" when used as a noun.

Section 5. Claims.

"Claims" include liabilities of the decedent which survive, whether arising in contract, in tort or otherwise,

funeral expenses, the expense of a monument, expenses of administration and all estate and inheritance taxes.

Section 6. Court.

"Court" means the circuit court.

Section 7. Decedent.

"Decedent" is any person who has died leaving property that is subject to administration, and the term includes any person whose life was taken by a slayer.

Section 8. Devise.

"Devise" when used as a noun is property disposed of by a will and includes a "legacy", and "bequest".

Section 9. Devise.

"Devise" when used as a verb means to dispose of property by a will.

Section 10. Devisee.

"Devisee" when used as a noun includes "legatee" and "beneficiary".

Section 11. Distributee.

"Distributee" is a person entitled to any property of the decedent under his will or under the statutes of intestate succession.

Section 12. Estate.

"Estate" includes the real and personal property of a decedent, as from time to time changed in form by sale, reinvestment or otherwise and augmented by any accretions or additions thereto and substitutions therefor or diminished by any decreases and distributions therefrom.

Section 13. Funeral.

"Funeral" includes burial or other disposition of the remains of the decedent, including the plot or tomb and other necessary incidents to the disposition of the remains.

Section 14. Intestate succession.

"Intestate succession" means succession to property of a decedent that dies intestate or partially intestate.

Section 15. Involuntary encumbrance.

"Involuntary encumbrance" means encumbrance upon property other than a voluntary encumbrance.

Section 16. Issue.

"Issue" when used to refer to persons who take by intestate succession, includes all lawful lineal descendants, except those who are the lineal descendants of living lineal descendants of the intestate.

Section 17. Legacy.

"Legacy" is property disposed of by a will and includes a "devise" and "bequest".

Section 18. Legatee.

"Legatee" includes "devisee" and "beneficiary".

Section 19. Net estate.

"Net estate" is 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 claims against the estate.

Section 20. Personal property.

"Personal property" includes interests in goods, money, choses in action, evidences of debt and chattels real.

Section 21. Personal representative.

"Personal representative" includes executor, administrator [but does not include special administrator] and special administrator.

Section 22. Property.

"Property" means real and personal property. ["Property" means real, personal or mixed property, whether tangible or intangible.]

Section 23. Real property.

"Real property" includes all land, tenements and hereditaments and rights thereto and all interest therein, in fee simple or for the life of another.

Section 24. Slayer.

"Slayer" is a person who with felonious intent takes or procures the taking of the life of another.

Section 25. Voluntary encumbrance.

"Voluntary encumbrance" means any mortgage, trust deed, security agreement or pledge, or any lien arising from labor or services performed or materials supplied or furnished, or any combination thereof, upon or in respect of property.

Section 26. Will.

"Will" includes a codicil or other instrument executed with the same formalities as a will.

Proposed revised Oregon probate code
DISCHARGE OF ENCUMBRANCES
2nd Draft
January 3, 1968

Prepared by
Stanton W. Allison

Section 1. Discharge of encumbrances. (1) As used in this section:

(a) "Voluntary encumbrance" means any mortgage, trust deed, security agreement or pledge, or any lien arising from labor or services performed or materials supplied or furnished, or any combination thereof, upon or in respect of real or personal property.

(b) "Involuntary encumbrance" means any encumbrance upon real or personal property other than a voluntary encumbrance.

(2) If property upon which an encumbrance exists on the date of the death of the testator is specifically devised, the devisee shall take it subject to the encumbrance, and the personal representative shall not be required to make any payment on account of the obligation secured by the encumbrance, whether or not the testator was personally liable on the obligation secured by the encumbrance, except as provided otherwise in the will, or in subsections (3) or (4) of this section.

(3) Unless the will provides otherwise, the devisee of specifically devised property may require that an encumbrance thereon be fully or partially discharged out of other assets of the estate not specifically devised, if

(a) The encumbrance is an involuntary encumbrance, or

(b) The encumbrance is a voluntary encumbrance and

(A) The will specifically directs full or partial discharge of the encumbrance out of other assets; but a provision

in the will for payment of the debts of the testator does not, of itself, constitute such a direction; or

(B) The personal representative receives rents or profits, or both, from the property and the devisee requests that he apply all or part of the rents or profits, or both, in full or partial discharge of the obligation secured by the encumbrance, in which event the personal representative shall apply the rents or profits, or both, upon principal or interest, or both, owing upon the obligation, as requested; or

(C) Any beneficiary under the will requests, in a writing signed by the beneficiary and delivered to the personal representative, that the obligation secured by the encumbrance be fully or partially discharged out of property, or the proceeds of the sale thereof, which otherwise would pass to the beneficiary.

(4) If a claim based upon an obligation secured by a voluntary encumbrance upon specifically devised property is presented and paid, or if specifically devised real property which is subject to a voluntary encumbrance is redeemed, and the devisee is not entitled to exoneration pursuant to subsection (3), the personal representative shall have a lien upon such property in the amount paid, and the lien shall be administered upon as an asset of the estate.

(5) If property is specifically devised by a will executed before the effective date of this section, and if

an encumbrance upon that property exists on the date of the death of the testator, the rights of the devisee of that property in respect of exoneration thereof out of other assets of the estate shall be determined in accordance with the law in effect on the date the will was executed.

Section 2. Power to redeem estate property. Unless otherwise provided by the will, the personal representative may redeem property of the estate sold on foreclosure of mortgage or upon execution if it appears that the redemption would be for the benefit of the estate and would not be prejudicial to creditors.

Section 3. Encumbered assets. When any assets of the estate are encumbered by an involuntary or voluntary encumbrance, 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 subsection (3) of section 1.

Section 4. Repeal of existing statutes. ORS 116.140, 116.145, 116.150, 116.155, 116.160 and 116.165 are repealed.

Proposed revised Oregon probate code
DISCHARGE OF ENCUMBRANCES
2nd Draft
January 26, 1968

Prepared by
Stanton W. Allison

COMMENTS

The proposed sections on Discharge of Encumbrances would repeal and replace ORS 116.140 to 116.165. The general rule of the proposed chapter is that the devisee shall take specifically devised property subject to the encumbrances existing on this property at the date of the testator's death. The personal representative is not required to satisfy the encumbrance, whether or not the testator was personally liable thereon, and whether the encumbrance was placed on the property before or after the execution of the will, subject, however, to the exceptions provided in the chapter. This differs from the approach of the 1967 draft Uniform Probate Code (Section 2-607) which would entitle the devisee to exoneration if the encumbrance is created subsequent to the execution of the will. Your committees concluded that, in the absence of specific directions in the will for discharge of the encumbrances on the devised property, it was impossible to spell out in the proposed code what might have been the testator's intention, whether the encumbrance was in existence when he made the will or whether he subsequently encumbered the property himself. The same uncertainty would apply to the present distinction in the case law in Oregon between obligations upon which the testator was or was not personally liable. See Oregon Probate Law and Practice, Jaureguy and Love, Section 636, and cases there cited.

The exceptions to the general rule above outlined are: Where exoneration is provided by the terms of the will; where the encumbrance is other than a security instrument or material or labor lien; where the encumbrance is paid from rents and profits from the devised property; or where the encumbrance is discharged at the request of a beneficiary out of property passing to him. We refer to comparable provisions in Section 2-607, 1967 draft Uniform Code, Section 863.13, 1967 Wisconsin Probate Code, Section 278, 1965 Iowa Probate Code, Section 189, Model Code, and Section 11.12.040 1965 Washington Probate Code. Detailed comments follow:

Section 1. Discharge of encumbrances. The purport of this section is covered by the preceding comment. The section conforms to the present ORS 114.150 which states:

> "Encumbrance as a revocation of previous will. 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."

The section provides that the usual clause in a will for payment of debts does not constitute a direction to pay an encumbrance on specifically devised property. The section also provides that the devisee is entitled to exoneration on "involuntary encumbrances", such as taxes, improvement liens, and judgments against the testator. In none of the comparable

sections of other codes cited is the specific devisee required to take property subject to this type of encumbrance, any more than in the present Oregon Revised Statutes. (See ORS 116.165)

Section 2. Power to redeem estate property. Section 2 would cover the general content of ORS 116.140 and 116.165. As is brought out in the discussion in Jaureguy and Love, Oregon Probate Law and Practice, Section 636, these two statutes seem patently inconsistent. The general language is that used in ORS 116.140: "If it appears that such redemption would be for the interest of the estate, and not prejudicial to creditors."

Section 3. Encumbered assets. The language of this section is taken from Section 3-516, 1967 Uniform Probate Code. There are, of course, cases where the estate has a substantial equity in an encumbered asset and it is essential for the preservation of the asset that the encumbrance be paid. In many cases it is also for the benefit of the estate to avoid entry of a deficiency judgment on foreclosure by conveying the estate property in satisfaction of the indebtedness. It is made clear that such payment of the estate indebtedness would not increase the interest of the devisee unless he is entitled to exoneration. By subsection (4) of section 1, the personal representative is given a lien on the devised property for the amount of the encumbrance paid by the estate if the distributee is not entitled to exoneration.

Proposed revised Oregon probate code
DISCHARGE OF ENCUMBRANCES
2nd Draft
January 26, 1968

Proposed by
Stanton W. Allison

COMPARATIVE SECTION TABLE

Draft Sections	ORS Sections
1	114.150
2	116.155, 116.165
3	116.140, 116.145, 116.150, 116.160

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
DISCHARGE OF ENCUMBRANCE
1st Draft
April 20, 1967

This draft is based primarily on a draft of Mr. Mapp and Mr. Riddlesberger (which is Appendix A to the minutes of the December 17, 18, 1965 meeting) and the action of the committees at the November 19, 20, 1965 and June 17, 18, 1966 meetings.

Section 1. (1) As used in this section:

(a) "Involuntary encumbrance" means any encumbrance upon real or personal property other than a voluntary encumbrance.

(b) "Voluntary encumbrance" means any mortgage, trust deed, security agreement or pledge, or any lien arising from labor or services performed or materials supplied or furnished, or any combination thereof, upon or in respect of real or personal property.

(2) If property is specifically devised or bequeathed in a will executed by a testator on or after the effective date of this section, and if an encumbrance upon that property exists on the date of the death of the testator, whether or not the testator was personally liable upon the obligation secured by the encumbrance, the devisee or legatee of that property shall take it subject to the encumbrance, and the personal representative is not required to make any payment on account of the obligation secured by the encumbrance, except as provided otherwise in the will or in subsection (3) or (4) of this section.

(3) (a) Except as provided otherwise in the will,

the devisee or legatee of property specifically devised or bequeathed as provided in subsection (2) of this section may require that a voluntary encumbrance thereon be fully or partially discharged out of other assets of the estate not specifically devised or bequeathed.

(b) Except as provided otherwise in the will, the devisee or legatee of property specifically devised or bequeathed as provided in subsection (2) of this section may require that an involuntary encumbrance thereon be fully or partially discharged out of other assets of the estate not specifically devised or bequeathed if:

(A) The will specifically directs full or partial discharge of the encumbrance out of other assets, but a provision in the will for payment of the debts of the testator does not, of itself, constitute such a direction; or

(B) The personal representative receives rents or profits, or both, from the property and the devisee or legatee requests that all or part of the rents or profits, or both, be applied in full or partial discharge of the obligation secured by the encumbrance, in which event the personal representative shall apply the rents or profits, or both, upon principal or interest, or both, owing upon the obligation, as requested; or

(C) Any beneficiary under the will requests, in a writing signed by the beneficiary and delivered to the personal representative, that the obligation secured by

the encumbrance be fully or partially discharged out of property, or the proceeds of the sale thereof, which otherwise would pass to the beneficiary.

(4) If a claim based upon an obligation secured by a voluntary encumbrance upon property specifically devised or bequeathed as provided in subsection (2) of this section is presented and paid, or if real property upon which there is a voluntary encumbrance is specifically devised as provided in subsection (2) of this section, is redeemed and the beneficiary is not entitled to exoneration, the personal representative has a lien upon such property in the amount paid, and the lien shall be administered upon as an asset of the estate.

(5) If property is specifically devised or bequeathed in a will executed by a testator before the effective date of this section, and if an encumbrance upon that property exists on the date of the death of the testator, the rights of the devisee or legatee of that property in respect of exoneration thereof out of other assets of the estate shall be determined in accordance with the law in effect on the date the will was executed.

References: Advisory Committee Minutes:
11/19, 20/65 pp. 5 to 8
6/17, 18/66 pp. 20 to 23

Section 2. ORS 116.140 is amended to read:

116.140. Right to redeem mortgaged property. If the deceased left any property, [real or personal,] under

mortgage, and did not devise or provide for the redemption of the same by will, the court or judge thereof, upon the application of the [executor or administrator,] personal representative, or the application of an heir or creditor, or other person interested in the estate, may order the [executor or administrator] personal representative to redeem [such] the property out of the proceeds of the other personal property, if it appears that such redemption would be for the interest of the estate, and not prejudicial to creditors.

References: Advisory Committee Minutes:
6/17, 18/66 p. 21

Section 3. ORS 116.165 is amended to read:

116.165. Power to redeem property sold at foreclosure or execution sale. [Any executor or administrator] The personal representative of an estate of any decedent may redeem, for the benefit of the estate, any real estate belonging to the estate which may at any time be sold at public auction, either by decree of court on foreclosure of mortgage or upon judgment, in the same manner and upon the same terms that property may be redeemed by any debtor.

References: Advisory Committee Minutes:
6/17, 18/66 p. 22

Section 4. Repeal of existing statutes. ORS 116.135, 116.145, 116.150, 116.155 and 116.160 are repealed.

References: Advisory Committee Minutes
6/17, 18/66 pp. 20 to 23

Proposed revised Oregon probate code
ESTATES OF ABSENTEES
2nd Draft
January 18, 1968

Prepared by

Stanton Allison

Section 1. Contents of petition for administration of estate of an absentee. Administration may be had upon the estate of an absentee. A petition for administration shall state, in addition to the information 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 domicle;

(3) That, to the best knowledge of the petitioner, and after diligent search, the whereabouts of the absentee is and has been unknown for the period shown by the petitioner of not less than one year, and that the petitioner has reason to believe and believes the absentee to be dead; or

(4) That the death of the absentee at the time, location and circumstance stated in the petition is probable, and that the fact of his death is in doubt solely by reason of the failure to find or identify his remains.

Section 2. Setting date of hearing on petition; notice of hearing. (1) Upon filing the petition for 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:

(a) 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;

(b) By ordinary mail to the devisees and heirs named in the petition.

(2) 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 3. Appointment of person to represent absentee; directing manner of search. 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 publications a notice requesting information from any person having knowledge of the whereabouts of the absentee;

(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 4. Hearing. Upon the hearing the court shall determine whether the absentee has died and if so, the date of his death and whether he died testate or intestate. Upon a

finding that the absentee has died the court shall grant letters accordingly, or, in the absence of such finding, may deny the petition. An appeal may be made from such an order.

Section 5. Effect of finding fact of death. The finding of the fact of death shall be conclusive as to the estate of the absentee only if:

(1) Notice of the hearing on the petition for administration was given as required by section 2.

(2) The court finds that diligent search was made.

Section 6. Mode of procedure. 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. Upon proof that the absentee is alive, letters theretofore granted shall be revoked. Acts of a personal representative 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 except as hereinafter provided. He shall pay claims allowed and proved and shall file 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.

Section 8. Rights of absentee. (1) 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.

(2) 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 9. Substitution of parties. After revocation of letters 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 application or application 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.

Section 10. Costs. The costs, expenses and charges attending the issuance of letters or their revocation shall be paid out of the estate of the absentee. If the petition for letters is not granted the applicant shall pay the costs, expenses and charges.

Section 11. Repeal of existing statutes. ORS 120.310, 120.320, 120.330, 120.340, 120.350, 120.360, 120.370, 120.380, 120.390 and 120.400 are repealed.

COMMENTS
Estates of Absentees
2nd Draft
January 18, 1968

Prepared by

Stanton W. Allison

COMMENTS

The proposed chapter would replace and supersede ORS 120.310 to 120.400. The committees considered that the present ORS requirement that disappearance or absence must continue for seven years before estate proceedings could be commenced was unduly restrictive and rigid. It was also felt that special provision should be made where an accidental death in a missing airplane or fishing boat or loss at sea seemed certain, but could not be confirmed by the finding or identification of the body. It was considered that more effective notice and search requirements should be written into the chapter, so the court would have every opportunity to satisfy itself that the search was thorough and that the absentee was dead in fact. The basic difference between the approaches to the problem is that in Oregon Revised Statutes the court merely finds a legal presumption of death based on an arbitrary period of absence for seven years, whereas the proposed chapter requires the court to make a finding that the absentee has died, based on such actual search for the absentee as the court may require.

The ORS sections on estates of persons presumed to be dead are discussed in Section 862 of Jaureguy and Love, Oregon Probate Law and Practice, which refers to 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 proceedings; and (2) adequate protection to the absentee in the event he is found alive within a reasonable time provided by the statute. Your committees consider that these criteria are met in the proposed chapter.

It should be noted that the proposed code provides for appointment of guardians for the estates of missing persons. Thus where there is reasonable doubt of the fact of death of an absentee, recourse may be had to the guardianship code to administer and protect his property.

Detailed comments follow.

Section 1. Contents of petition for administration of estate of an absentee. Except for subsection (4), this section is based on Section 510 of the 1963 Iowa Probate Code. However, the committees felt a minimum period of one year's absence would be adequate in view of the provisions for notice, search and court findings in the chapter. The section also provides for administration where the death in a specific time place and circumstance is probable but cannot be proved by failure to find or identify the body.

Section 2. Setting the date of hearing on petition; notice of hearing. Section 2 is taken from Sections 511, 512 and 513 of the 1963 Iowa Probate Code. The requirement for forwarding a letter through the Social Security Administration should make

notification possible if there is in existence an address of the absentee. See Section 69(b) Model Probate Code.

Section 3. Appointment of person to represent absentee: directing manner of search. The provision for appointment of a guardian ad litem is taken from Section 514 of the Iowa Probate Code. Since the petitioner will be in many cases an heir, devisee or creditor, the provision for providing a disinterested person to make the search for the missing person seems of value. The remainder of the section follows Section 71 of the Model Probate Code and Section 3-222(b) of the 1967 Uniform Probate Code. The thrust of the section is to substitute an active effective search of the missing person for a legal presumption of death.

Section 4. Hearing. The comment on the corresponding Section 514 of the 1963 Iowa Probate Code reads:

> "Adapted from 634.5 (1962 Code), with the additional provision that the order establishes the death of the absentee as a matter of law. This addition is desirable to establish the rights of the survivors where property is held in joint tenancy. It would also establish the death of the absentee for purposes of social security benefits and claims under life insurance policies."

As noted, this section requires an affirmative finding of fact of death by the court, based upon an adequate search.

Section 5. Effect of finding fact of death. This section is adapted from the Model Probate Code, Section 81. We quote the editorial comment of the Model Probate Code.

"The third exception to the conclusiveness of these

> orders is with respect to the fact of death. According to the decision in the case of Scott v. McNeal, 154 U.S. 34, 14 S.Ct. 1108 (1894), an ordinary probate proceeding in which the alleged decedent is not made a party and is not given notice does not bind him, and he may attack the whole proceeding collaterally. This is because due process requirements have not been complied with. But if reasonable notice is given to the alleged decedent, and he is made a party to the proceeding, he is bound. The form of notice provided for in this Code makes the alleged decedent a party; and if the steps referred to in exception (c) hereof are taken, he would receive reasonable notice. This simply means that he is bound by the proceeding and cannot attack it collaterally. But, according to the provisions of this section, he can recover his property back to the extent that it is in the hands of the personal representative or distributees. He cannot recover it back from creditors, and the personal representative is protected to the extent that he acted in good faith."

Section 6. Mode of procedure. This section is adapted from Section 515 of the 1963 Iowa Probate Code.

Section 7. Revocation of letters; settlement of account upon revocation. This is a rewritten form of ORS 120.380.

Section 8. Rights of absentee. This is a paraphrase of ORS 120.370 and 120.380. The right of the absentee to recover the proceeds of the estate from the distributees is limited to five years after the distribution of the estate as now provided in ORS 120.370.

Section 9. Substitution of parties. This covers the substance of ORS 120.390.

Section 10. Costs. This is ORS 120.400 with editorial changes.

ESTATES OF ABSENTEES
2nd Draft
January 18, 1968

Comparative Section Table

Draft Sections	ORS Sections
1	120.310, 120.320, 120.330
2	120.310
3	
4	120.340, 120,350
5	
6	120.360
7	120.370, 120.380
8	120.380
9	120.390
10	129,400

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
ESTATES OF ABSENTEES
1st Draft (as amended at April 1967 meeting)
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 committees at the February 17, 18, 1967 and March 17, 18, 1967 meeting.

Section 1. Contents of petition for administration of estate of an absentee. Administration may be had upon the estate of an absentee. A petition for 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 not less than one year, and the petitioner believes the absentee to be dead.

Section 2. Administration when circumstances indicate death probable. Administration may be had at any time upon the estate of an absentee when the petition therefor alleges, in addition to the applicable facts required by ORS _____, that his 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. (1) Upon filing the petition for 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:

(a) 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;

(b) To the heirs named in the petition.

(2) 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 publications 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 whether the absentee died and if so, the date of his death and whether he died testate or intestate upon the finding that the absentee has died, the court shall grant letters accordingly, or, in the absence of such finding, may deny the petition. An appeal may be made from such an order.

(2) The finding of the fact of death shall be conclusive as to the estate of 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 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.

(b) The court finds that diligent search was made.

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. Upon proof that the absentee is

alive, letters theretofore granted shall be revoked. 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. After revocation of letters 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 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.

Section 9. Costs when letters granted. The costs, expenses and charges attending the issuance of letters or their revocation shall be paid out of the estate of the absentee.

Section 10. Costs when letters not issued. If the petition for letters is not granted the applicant shall pay the costs, expenses and charges.

Proposed revised Oregon probate code
GUARDIANSHIP OF MISSING PERSONS
2nd Draft
January 18, 1968

Prepared by

Stanton W. Allison

Section 1. ORS 126.006 is amended to read:

126.006. Definitions for ORS 126.006 to 126.565. 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, 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) "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.

[(7)] (8) "Ward" means any person for whom a guardian has been appointed.

Section 2. ORS 126.106 is amended to read:

126.106. Jurisdiction to appoint guardians. 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. Petition for appointment of guardian. 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 postoffice address of the proposed ward.

(2) Whether the proposed ward is an incompetent, minor, missing person or spendthrift, 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 postoffice 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. Issuance of citation. (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 missing person, on the missing person and on such other persons as the court may direct.

[(c)] (d) If the proposed ward is a spendthrift, on the spendthrift.

[(d)] (e) 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.

Section 5. ORS 126.146 is amended to read:

126.146. Service of citation; appearance. (1) The citation issued under ORS 126.131 shall require the person or institution served to appear and show cause:

(a) If served personally within the county in which the proceeding is pending, within 10 days after the date of service.

(b) If served personally within any other county in this

state, within 20 days after the date of service.

(c) If served by publication or if served personally outside this state but within the United States, within four weeks after the date of first publication or after the date of personal service.

(d) If served personally outside the United States, within six weeks after the date of service.

(2) The citation shall be served and returned as summons is served on a defendant and returned in a civil action. If the proposed ward is a missing person, citation shall be served on the missing person by publication, by registered mail to his last-known address and by postage prepaid letter to be forwarded through the United States Social Security Administration to his last-known address available to that agency.

(3) Service of citation is not necessary on a person or an officer of an institution who has signed the petition, has signed a written waiver of service of citation or makes a general appearance.

Section 6. ORS 126.151 is amended to read:

126.151. Order of appointment. If it appears to the court that the allegations of the petition are sufficient and that a guardian should be appointed for the proposed ward, the court shall make an order appointing a guardian. The order shall specify whether the guardian appointed is guardian of the person, guardian of the estate, or both; whether the ward is an incompetent, minor, missing person or spendthrift; and

whether the ward is a resident or nonresident of this state. The court by order shall specify the amount of the bond to be executed and filed by the guardian.

Section 7. ORS 126.166 is amended to read:

126.166. Preferences in appointing guardians. The parents of a minor, or either of them, if qualified and suitable, shall be preferred over all others for appointment as guardian of the person for the minor. Subject to this preference, the court shall appoint as guardian for an incompetent, minor, missing person or spendthrift the qualifed person most suitable who is willing to serve, having due regard, among other factors, to:

(1) Any request for the appointment as guardian for an incompetent contained in a written instrument executed by the incompetent while competent.

(2) Any request for the appointment as guardian for a minor child contained in a will or other written instrument executed by a parent of the minor child.

(3) Any request for the appointment as guardian for a minor 14 years of age or older made by the mimor.

(4) The relationship by blood or marriage of the proposed guardian to the proposed ward.

Section 8. ORS 126.186 is amended to read:

126.186. Letters of guardianship. When a guardian has filed a bond as provided in ORS 126.171, and his name, residence and postoffice address as provided in ORS 126.181, the court shall cause to be issued letters of guardianship to the guardian.

Letters of guardianship may be in the following form:

State of Oregon)
)
) ss.
)
County of_____)

TO ALL WHOM THESE PRESENTS SHALL COME, GREETING:

KNOW YE, That on _____, 19__, the _____
(month) (day)
Court,_____ County, State of Oregon, appointed ____
(name of guardian) guardian of the _____
(person
or estate or person and estate) for _____,
(name of ward)
a(n) _____,
(incompetent [or], minor, missing person or spendthrift)
that the named guardian has qualified and has the authority and shall perform the duties of guardian of the_____
(person or estate
or person and estate) for the named ward as provided by law.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the court at my office on _____
(month)
_____, 19___.
(day)

_____, Clerk of the Court

(Seal) By_____, Deputy

Section 9. ORS 126.338 is amended to read:

126.338. Distribution of copies of accounts; court settlement of accounts. (1) Before filing any account other than

his final account, a guardian of the estate shall cause a copy of the account to be mailed or delivered:

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

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

(c) If the ward is a minor 14 years of age or older or a spendthrift, to the ward.

(d) If the ward is a minor, a missing person or an incompetent, to the ward's spouse who is not under legal disability and to those of the ward's children, parents, brothers or sisters who are not under legal disability and have presented a written request for a copy to the guardian and filed a copy of the request in the guardianship proceeding before the filing of the account.

(2) A guardian of the estate shall file with each account other than his final account his affidavit or other proof satisfactory to the court that copies of the account have been mailed or delivered as provided in subsection (1) of this

section, showing the names of the persons to whom, and the addresses to or at which, the copies were mailed or delivered.

(3) A guardian of the estate shall cause a copy of his final account to be mailed or delivered to a ward not under legal disability, each person to whom copies of other accounts are required to be mailed or delivered as provided in subsection (1) of this section, the executor or administrator of a deceased ward's estate and a successor guardian. Within 10 days after the date of the mailing or delivery, any such person may make and file in the guardianship proceeding written objections to the final account.

(4) The court, before settlement of any account, may provide for inspection of the balance of the property of the ward on hand. The court shall settle each account filed by a guardian of the estate by allowing or disallowing, either in whole or in part, or surcharging such account; but without prejudice to objections thereto at the time and in the manner that objections may be made to a final account.

Section 10. ORS 126.411 is amended to read:

126.411. Petition for sale, mortgage or lease. 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 postoffice address of the ward.

(2) Whether the ward is an incompetent, minor, missing person or spendthrift.

(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 11. ORS 126.426 is amended to read:

126.426. Sale, mortgage or lease for more than five years of real property; issuance of citation. (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 missing person, on the missing person and on such other persons as the court may direct.

[(d)] (e) If the ward is a spendthrift, on the spendthrift.

Section 12. ORS 126.431 is amended to read:

126.431. Service of citation; appearance. (1) The citation

issued under ORS 126.426 shall require the person or institution served to appear and show cause:

(a) If served personally within the county in which the proceeding is pending, within 10 days after the date of service.

(b) If served personally within any other county in this state, within 20 days after the date of service.

(c) If served by publication or if served personally outside this state but within the United States, within four weeks after the date of first publication or after the date of personal service.

(d) If served personally outside the United States, within six weeks after the date of service.

(2) The citation shall be served and returned as summons is served on a defendant and returned in a civil action. If the ward is a missing person, citation shall be served on the missing person by publication, by registered mail to his last-known address and by postage prepaid letter to be forwarded through the United States Social Security Administration to his last-known address available to that agency.

(3) Service of citation is not necessary on a person or an officer of an institution who has signed the petition, has signed a written waiver of service of citation or makes a general appearance.

Section 13. ORS 126.476 is amended to read:

126.476. Exchange, partition, sale or surrender of ward's

property. (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 postoffice address of the ward.

(b) Whether the ward is an incompetent, minor, missing person or spendthrift.

(c) The name and address of any person or institution having the care, custody or control of a ward who is an incompetent or minor.

(d) The name and address of the offeror.

(e) A specific description of the property, interest or estate to be exchanged, partitioned, sold or surrendered, and the price or property to be received therefor.

(f) Such other information as the petitioner may consider necessary to enable the court to be fully informed in respect of the subject matter.

(4) If the property, interest or estate to be exchanged, partitioned, sold or surrendered consists solely of personal property or an interest or estate therein, the provisions of ORS 126.416 shall apply, except that no return of his proceedings need be made and filed by the guardian.

(5) If the property, interest or estate to be exchanged, partitioned, sold or surrendered consists in whole or in part of real property or an interest or estate therein, the provisions of ORS 126.426 and 126.431 and subsection (1) of ORS 126.471 shall apply, except that no return of his proceedings need

be made and filed by the guardian.

(6) Upon the entry of an order of the court authorizing acceptance of an offer under subsection (1) or (2) of this section, the guardian may execute such instruments as are appropriate to effect such exchange, partition, sale or surrender. If the guardian executes a conveyance of real property or an interest or estate therein, the provisions of ORS 126.461 and 126.466 and subsections (3) and (4) of ORS 126.471 shall apply.

(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 14. ORS 126.495 is amended to read:

126.495. Transfer of ward's property not an ademption. 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 the ward [,] 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 specifically devised by the ward who 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].

Section 15. Repeal of existing statutes. ORS 127.010, 127.020, 127.030, 127.040, 127.050, 127.060, 127.070, 127.080, 127.090, 127.100, 127.110, 127.120, 127.130, 127.140, 127.150, 127.160, 127.170, 127.180, 127.190, 127.310, 127.320, 127.330, 127.340 and 127.350 are repealed.

GUARDIANSHIP OF MISSING PERSONS
2nd Draft
January 18, 1968

Prepared by
Stanton W. Allison

COMMENTS

The proposed amendments to the guardianship code, chapter 126, would supersede, replace and repeal the present chapter 127 Oregon Revised Statutes covering the matter of conserving property of missing persons. The effect of the amendments would be to provide very simply that the present guardianship code would cover guardianships of the estates of missing persons, in addition to the present coverage of minors, incompetents and spendthrifts.

The bulk of chapter 127 covering conserving property of missing persons was enacted in 1937. The latter portion of the chapter covering persons missing during war was enacted in 1945. It is apparent from the annotations to the Oregon Revised Statutes that this chapter has been very little used since its enactment. The chapter was considered in the recent case of Esson v. Flickinger, 237 Or 462, 391 P2d 769 (1964). This decision would indicate that it may well be that the power given guardians to represent wards in the guardianship code is much broader than the powers provided by chapter 127. (See ORS 126.725.)

It would seem that the broad and familiar procedural and notice provisions of the 1961 guardianship code would provide a superior vehicle for administration and conservation of the

property of missing persons than does the somewhat limited present chapter 127.

It is apparent that the proposed amendments to the guardianship code do not in any way change the content of the present guardianship code but merely include in its provisions the additional category of ward, namely, "missing persons". It should be noted, however, that because of the unusual nature of the problem more adequate notice requirements are provided for notice to the missing person. Thus not only is publication required, but it is required that notice be given by registered mail and also by mail to be forwarded by the United States Social Security Administration which, as is well known, has a very complete system of nationwide information on the beneficiaries of the Social Security Act. Furthermore, it is provided that notice be given to such additional persons as the court might find interested and entitled.

In view of the fact that the proposed amendments would repeal that portion of chapter 127 covering persons missing during war, it should be noted that definition of missing persons specifically includes one "who is known to be unable to return to his usual place of abode and is unable to manage his affairs during his absence." It is obvious that this portion of the definition would cover those persons referred to in ORS 127.310 to 127.350 inclusive.

Proposed revised Oregon probate code
GUARDIANSHIPS AND CONSERVATORSHIPS
1st Draft
March 25, 1968

Prepared by
Stanton W. Allison

Section 1. ORS 126.111 is amended to read:

126.111. Venue for appointment of guardians. The venue for the appointment of a guardian shall be:

(1) The county where the proposed ward resides; or

(2) [If the proposed ward does not reside in this state,] Any county in which any property of the proposed ward is located, or any county in which the proposed ward is physically present.

Section 2. ORS 126.146 is amended to read:

126.146. Service of citation; appearance. (1) The citation issued under ORS 126.131 shall require the person or institution served to appear and show cause why a guardian should not be appointed for the proposed ward:

(a) If served personally within the county in which the proceeding is pending, within 10 days after the date of service.

(b) If served personally within any other county in this state, within 20 days after the date of service.

(c) If served by publication or if served personally outside this state but within the United States, within four weeks after the date of first publication or after the date of personal service.

(d) If served personally outside the United States, within six weeks after the date of service.

(2) The citation shall be served and returned as summons is served on a defendant and returned in a civil action. If

the proposed ward is a missing person, citation shall be served on the missing person by publication, by registered mail to his last-known address and by postage prepaid letter to be forwarded through the United States Social Security Administration to his last-known address available to that agency.

(3) Service of citation is not necessary on a person or an officer of an institution who has signed the petition, has signed a written waiver of service of citation or makes a general appearance.

Section 3. ORS 126.171 is amended to read:

126.171. Bond of guardian. Except as otherwise provided by law, every guardian shall, before entering upon his duties as guardian, execute and file in the guardianship proceeding a bond, with [sufficient] a corporate surety [or sureties] authorized to transact surety business in the State of Oregon in such amount as the court determines necessary for the protection of the ward and the estate of the ward, [and] conditioned upon the faithful discharge by the guardian of his authority and duties according to law. [The bond shall be approved by the court.] The bond shall run to all interested persons and shall be for the security and benefit of such persons. [Sureties shall be jointly and severally liable with the guardian and with each other.]

Section 4. Effective term of bond; new or additional bond. (1) The bond of the guardian shall continue in effect until his final account is approved and an order of discharge is entered, but the surety may terminate its obligation upon notice in writing to the guardian and the court specifying a date, not less than 30 days after the date of such notice, when such termination is to become effective. Prior to the date so specified the guardian shall execute and file in the proceeding a new bond by a qualified surety in like amount and upon the same conditions. If he shall fail so to do, his authority as guardian shall cease at the effective date of termination of the obligation of the surety on his bond. The letters of guardianship shall thereupon be cancelled and the guardian shall make and file his final account.

(2) The court may at any time increase or reduce the amount of the bond required for the protection of the ward and the estate of the ward, either upon its own motion or on the motion of the guardian or any party in interest.

Section 5. ORS 126.230 is amended to read:

126.230. Inventory and appraisal of ward's property. (1) Within 60 days after the date of his appointment, or, if necessary, such further time as the court may allow, a guardian of the estate shall make and file in the guardianship proceeding a verified inventory of all the property of the ward which comes to his possession or knowledge.

(2) Whenever any property of the ward not mentioned in the inventory comes to the possession or knowledge of a guardian of the estate, he shall either make and file in the guardianship proceeding a verified supplementary inventory within 30 days after the property comes to his possession or knowledge, or include the property in his next accounting, but the court may order which of the two methods the guardian shall follow.

(3) The court may order all or any part of the property of the ward appraised as provided in [ORS 116.420 to 116.435] ORS _____ to _____.

Section 6. ORS 126.245 is amended to read:

126.245. Discovery of debts or property. Upon the filing of a petition in the guardianship proceeding by the guardian, the ward or any other interested person, alleging that any person is indebted to the ward, or has, or is suspected of having, concealed, embezzled, converted or disposed of any property of the ward, or has possession or knowleged of any such property or of any writing relating to such property, the court may require such person to appear and answer under oath concerning the matter, and proceed as provided in [ORS 116.310 and 116.315] ORS _____ and _____.

Section 7. ORS 126.265 is amended to read:

126.265. Borrowing money for ward. A guardian of the estate, with prior approval of the court by order, may borrow money for the account of the ward and may mortgage or pledge any property of the ward as security therefor. If the court determines that the borrowing is necessary or proper, the court shall make an order approving the borrowing. The order approving the borrowing may authorize one or more separate loans thereunder. The order shall prescribe the maximum amount of, the maximum rate of interest on and the date of final maturity of the loan or loans, and shall describe the property, if any, to be mortgaged or pledged to secure the loan or loans. Any part of any such loan at any time not fully secured is a general charge upon the estate of the ward but one who acquires an interest in any of the assets of the ward's estate for value and without actual knowledge of such charge takes free from it. [This section does not affect the application of ORS 126.406 to 126.495, so far as they relate to mortgages; but, so far as possible, the proceedings with respect to the loan or loans may be combined with the proceedings, if any, with respect to mortgages as security therefor.]

Section 8. ORS 126.406 is amended to read:

126.406. Sale or lease of ward's property; purposes. A guardian of the estate, with prior approval of the court by order, may sell[, mortgage] or lease any of the property of the ward:

(1) For the purpose of paying claims against the ward, the guardianship estate or the guardian of the estate as such.

(2) For the purpose of providing for the proper care, maintenance, education and support of the ward and of any person to whom the ward owes a legal duty of support.

(3) For the purpose of investing the proceeds.

(4) For any other purpose that is in the best interests of the ward.

Section 9. ORS 126.411 is amended to read:

126.411. Petition for sale or lease. 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 postoffice address of the ward.

(2) Whether the ward is an incompetent, minor, missing person or spendthrift.

(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 10. ORS 126.416 is amended to read:

126.416. Sale or lease of personal property. Except as provided in ORS 126.471, if the court, upon the filing of a petition under ORS 126.411 for the sale[, mortgage] or lease of personal property, determines that the sale[, mortgage] or lease is necessary or proper for any purpose referred to in ORS 126.406, the court shall order the sale[, mortgage] or lease to be made subject to such terms and conditions as the court may consider necessary or proper. The court may, in its discretion, order a hearing upon such petition and with such notice as the court may order or without notice. If the proceeds

of the sale [or mortgage] exceed $1,000, the guardian, within 15 days after the date of the sale [or mortgage], shall make and file in the guardianship proceeding a return of his proceedings concerning the sale [or mortgage], but such sale [or mortgage] need not be confirmed by the court.

Section 11. ORS 126.426 is amended to read:

126.426. Sale or lease for more than five years of real property; issuance of citation. (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 missing person, on the missing person and on such other persons as the court may direct.

[(d)] (e) If the ward is a spendthrift, on the spendthrift.

Section 12. ORS 126.431 is amended to read:

126.431. Service of citation; appearance. (1) The citation issued under ORS 126.426 shall require the person or institution served to appear and show cause why an order for the sale or lease should not be made:

(a) If served personally within the county in which the proceeding is pending, within 10 days after the date of service.

(b) If served personally within any other county in this state, within 20 days after the date of service.

(c) If served by publication or if served personally outside this state but within the United States, within four weeks after the date of first publication or after the date of personal service.

(d) If served personally outside the United States, within six weeks after the date of service.

(2) The citation shall be served and returned as summons is served on a defendant and returned in a civil action. If the ward is a missing person, citation shall be served on the

missing person by publication, by registered mail to his last-known address and by postage prepaid letter to be forwarded through the United States Social Security Administration to his last-known address available to that agency.

(3) Service of citation is not necessary on a person or an officer of an institution who has signed the petition, has signed a written waiver of service of citation or makes a general appearance.

Section 13. ORS 126.436 is amended to read:

126.436. Order for sale or lease; terms and conditions. If it appears to the court that the sale[, mortgage] or lease referred to in ORS 126.426 is necessary or proper for any purpose referred to in ORS 126.406, the court shall order the sale[, mortgage] or lease to be made. A [mortgage] sale or [surface] lease ordered shall be made subject to such terms and conditions as the court may consider necessary or proper. [An order authorizing the execution of a lease or other instrument for the purpose of exploring or prospecting for and extracting, removing and disposing of oil, gas and other hydrocarbons, and all other minerals or substances, similar or dissimilar, that may be produced from a well drilled by the lessee, shall require a minimum of one-eighth royalty and shall set forth the annual rental, if any rental is required to be paid, the period of the lease which shall be for a primary term of 10 years and so long thereafter as oil, gas, other hydrocarbons or other leased substances are produced in paying

quantities from the leased premises or lands pooled or unitized therewith, or mining or drilling operations are conducted on the leased premises or lands pooled or unitized therewith, and may authorize such other terms and conditions as the court may consider necessary or proper including, without limitation, a provision empowering the lessee to enter into any agreement authorized by ORS chapter 520 with respect to the land covered by the lease, including provisions for pooling or unitization by the lessee. A sale ordered shall be made as provided in ORS 126.441 to 126.466, and subject to such additional terms and conditions as the court may consider necessary or proper.]

Section 14. ORS 126.441 is amended to read:

126.441. Public or private sale of real property; sale on credit. (1) The order for the sale of real property under ORS 126.436 or 126.471 shall direct that the sale be public or, if the court determines that it is in the best interests of the ward, private. If public, the sale shall be made in the same manner as like property is sold on execution, or, if the court determines that it is in the best interests of the ward, the court may order the property to be sold on the premises or elsewhere.

[(2) Except as otherwise provided in this subsection, before proceeding to sell real property at private sale, the

guardian shall cause a notice of the sale to be published in a newspaper published in the county in which the property is situated, or if no newspaper is published in such county, then in a newspaper of general circulation therein, once a week for four successive weeks, or four publishings in all. The notice shall include a description of the property, the place where bids will be received, the terms and conditions of the sale and that on and after a designated day certain, which day shall be not less than one week after the date of last publication, the guardian will proceed to sell the property. When the court determines from the inventory or otherwise that the value of the property does not exceed $1,000, the court may order the sale without the publication of notice of the sale.]

[(3)] (2) When the sale of real property is upon credit, the guardian may take the promissory note of the purchaser for the deferred balance of the purchase money, with a mortgage upon the property to secure the payment thereof, or the guardian may sell the property on contract of sale, with title reserved until the deferred balance of the purchase price and interest thereon, if any, are paid.

Section 15. ORS 126.456 is amended to read:

126.456. Confirming or vacating sale of real property. (1) Upon the hearing under ORS 126.451 of objections to the

sale of real property or in the absence of objections, the court shall make an order confirming the sale and directing the execution of a proper conveyance to the proper person by the guardian, unless the court determines that:

(a) There was substantial irregularity in the sale;

(b) The sum bid for the property is unreasonably less than the value of the property; or

(c) By reason of another bid, a net price can be obtained for the property which exceeds by at least 10 percent the net price to be obtained from the sale returned.

(2) If the court determines that there was substantial irregularity in the sale, the court shall make an order vacating the sale and directing that the property be resold as though no prior sale had been made.

(3) If the court determines that the sum bid for the property is unreasonably less than the value of the property, the court shall make an order vacating the sale and directing that the property be resold [without further notice of sale, but] subject to confirmation as provided in this section.

(4) If the court determines that, by reason of another bid, a net price can be obtained for the property which exceeds by at least 10 percent the net price to be obtained from the sale returned, the court shall make an order vacating the sale, and either directing that the property be resold to the

higher bidder without further order [or notice of sale], or directing that the property be resold [without further notice of sale, but] subject to confirmation as provided in this section.

Section 16. ORS 126.471 is amended to read:

126.471. Sale or lease of property of spendthrift ward. (1) If the court, upon the filing of a petition under ORS 126.411 for the sale[, mortgage] or lease of any of the property of a ward who is a spendthrift, determines that the ward is competent and consents to the sale[, mortgage] or lease and that the sale[, mortgage] or lease is necessary or proper for any purpose referred to in ORS 126.406, the court may order the sale[, mortgage] or lease to be made subject to such terms and conditions as the court may consider necessary, without the issuance of citation[, publication of notice of sale] or confirmation by the court. If the proceeds of the sale [of mortgage] exceed $1,000, the guardian, within 15 days after the date of the sale [or mortgage,] shall make and file in the guardianship proceeding a return of his proceedings concerning the sale [or mortgage].

(2) In the absence of a determination by the court that the ward who is a spendthrift is competent and consents to the sale[, mortgage] or lease of his property, such sale[, mortgage] or lease may be made only as otherwise provided in ORS 126.406 to 126.495.

(3) A conveyance of real property executed by a guardian under subsection (1) of this section shall set forth the book and page of the journal of the court where the order for the sale is entered. The effect of the conveyance shall be the same as though made by the ward while not under legal disability.

(4) Within 60 days after the date of the order under subsection (1) of this section for the sale of real property of the ward situated in any county other than the county in which the order for the sale was made, the guardian shall cause to be recorded in the record of deeds of such other county a copy of the order for the sale certified by the clerk of the court.

Section 17. ORS 126.540 is amended to read:

126.540. Discharge of guardian; exoneration of sureties; vacating order. After hearing objections to the final account filed pursuant to ORS 126.338, the court, upon settlement of the final account [of a guardian of the estate] and determination that property of the ward has been delivered to the person lawfully entitled thereto, shall discharge the guardian and exonerate the [sureties] surety on his bond. [The discharge terminates the authority and duties of the guardian not previously terminated. The discharge and exoneration do not relieve the guardian or the sureties on his bond from liability

for previous acts or omissions of the guardian.] The court may, in its discretion, and upon such terms as may be just, within one year after notice thereof, vacate the order discharging the guardian and exonerating the surety when it appears that failure to object to the final account resulted from mistake, inadvertence, surprise or excusable neglect.

Section 18. ORS 126.636 is amended to read:

126.636. Conservatorship governed as guardianship of estate. Except as otherwise provided in ORS 126.606 to 126.675, a conservator shall:

(1) Have the same qualifications as a guardian of the estate;

(2) Unless otherwise provided in the petition for his appointment and by the order appointing him, be bonded as required of a guardian of the estate;

(3) Have the authority and perform the duties of a guardian of the estate; and

(4) Be subject to all other provisions of law relating to a guardian of the estate.

Section 19. ORS 126.646 is amended to read:

126.646. Sale, mortgage, lease and other disposition of ward's property. (1) Any property of the ward may be sold, exchanged, surrendered, partitioned, mortgaged, pledged or leased by a conservator in the same manner as provided by law

for the sale, exchange, surrender, partition, mortgage, pledge or lease of any property of a spendthrift for whom a guardian of the estate has been appointed.

(2) The court, by order, may authorize the conservator to continue any business of the ward solely or jointly with one or more of the ward's partners or joint venturers or as a corporation of which the ward is or becomes a shareholder. Such order may be made upon the petition for the appointment of the conservator and that he shall be so authorized or upon the petition of the conservator and citation or consent as upon sale or lease of property of a spendthrift for whom a guardian of the estate has been appointed.

(3) The court, by order, may authorize the conservator to:

(a) Make reasonable gifts to charitable or religious institutions on behalf of the ward,

(b) Provide for or contribute to the care,maintenance, education or support of persons who are or have been related to the ward by blood or marriage, or

(c) Pay or contribute to the payment of reasonable expenses of remedial care and treatment for and reasonable funeral and burial expenses of persons who are or have been related to the ward by blood or marriage

Such order may be made upon the petition for the

appointment of the conservator and that he be so authorized or upon the petition of the conservator and citation or consent as upon sale or lease of property of a spendthrift for whom a guardian of the estate has been appointed.

Section 20. Accounting by conservator. (1) A conservator shall make and file a written verified account of his administration at the times and of the kind required of guardians of the estates by ORS 126.336.

(2) Before filing an account other than his final account, the conservator shall cause a copy thereof to be mailed or delivered to the ward. If the ward is incompetent, the conservator shall cause a copy thereof to be mailed or delivered to the ward's spouse who is not under legal disability and to those of the ward's children, parents, brothers or sisters who are not under legal disability and have presented a written request for a copy to the conservator and filed a copy of the request in the conservatorship proceeding before the filing of the account. Proof by affidavit of such mailing or delivery shall be filed with the account.

(3) A copy of the final account of the conservator shall be served on the ward, if living and competent, otherwise on the guardian of his estate or his personal representative and on each person to whom copies of other accounts are required to be mailed or delivered as provided in subsection (1) of

of this section. Objections thereto may be made within 30 days after service and shall be heard and disposed of by the court. When no objection is made or all just objections are satisfied, the court shall discharge the conservator and exonerate the surety on his bond. The court may, in its discretion and upon such terms as may be just, at any time within one year after entry of the order discharging the conservator, vacate such order to permit recovery against the conservator or his surety or either of them when it appears that the failure to object to the final account of the conservator resulted from mistake, inadvertence, surprise or excusable neglect.

Section 21. Repeal of existing statutes. ORS 126.011, 126.176 and 126.446 are repealed.

Proposed revised Oregon probate code
GUARDIANSHIPS AND CONSERVATORSHIPS
1st Draft
March 29, 1968

Prepared by
Stanton W. Allison

COMMENTS

It was the consensus of the committees that procedural amendments to the guardianship and conservatorship chapters should be enacted to bring these sections into harmony with the philosophy of the probate sections of the proposed code. Comments have been prepared discussing the amendments to have the chapter include guardianships of the estates of missing persons.

The chapter on Powers and Jurisdiction of the Probate Court provides that the Probate Commissioner may act upon uncontested petitions for appointment of guardians and conservators to the extent authorized by rule of court. The chapter also provides that jurisdiction in guardianships and conservatorships is vested in the circuit court.

The amendments, repeals and the new matter replacing the repealed sections are commented on as follows:

Section 1 amends the venue provision to simplify the initiation of guardianships. This amendment conforms to the simplified venue provisions in the proposed probate code.

Section 2 amends ORS 126.146 to supply an obvious omission in the present statute.

Section 3 requires that a guardian's bond shall be a corporate surety bond, conformable to the provisions in the probate code with respect to bonds of personal representatives. This would permit the deletion of the requirement that the bond be approved by the court.

Section 4 would replace ORS 126.176. The principal change is to enlarge the provision for termination of liability of the surety and to spell out the effect of failure to provide a substitute bond.

Section 7 amends ORS 126.265 to provide protection to a bona fide purchaser who acquires property or an interest therein which is subject to the general charge on the ward's assets provided by this section.

The amendment eliminates the reference to ORS 126.406 to 126.495 as affecting the procedure for approval of a mortgage of the ward's property. We do not see why there should be the present parallel provisions for authorizing mortgages of the ward's property. ORS 126.265 seems entirely adequate to cover the procedure for approval of mortgages of the ward's property. For this reason sections 8, 9, 10, 11, 13 and 16 are amendments to limit these sections to proceedings for sale or lease of the ward's property. The procedure for approval of mortgages is therefore covered solely by ORS 126.265.

Section 17 amends ORS 126.540 to grant finality to the discharge with a provision to protect parties who fail to object to the final account by reason of mistake, inadvertence, surprise or excusable neglect. The language is that used in ORS 18.160 concerning vacation of default judgments.

Section 18 gives the court the option of waiving the necessity of a bond in the appointment of a conservator.

Section 19 embodies in the conservatorship chapter provisions from the guardianship code authorizing the court to permit the conservator to continue the business of the ward and to apply the estate of the ward to charitable gifts and to support of relatives, as a guardian is authorized to do.

Section 20 would include in the conservatorship chapter provisions similar to those in the guardianship code covering the filing and mailing of copies of interim accounts and final account. It also includes a similar provision granting finality to the effect of the final account and relieving from a failure to object resulting from mistake, inadvertence, surprise or excusable neglect.

ORS 126.011 is repealed because this section is now outdated.

It is proposed to repeal ORS 126.446 covering the time limitation on the order for sale of real property. The present time limitation has probably caused more problems than most of the other provisions of the guardianship code. In view of the time consuming requirements for the petition, citation and order on sale of real property it seems an unnecessary burden to have to require recourse to the court for an extension of this authority.

The only other substantial amendment is that contained in section 14 which amends ORS 126.441 to delete the requirement

for publication of notice of sale of real property. Since the proposed probate code does not require any publication of notice of sale it would seem advisable that the guardianship sale provisions conform.

Proposed revised Oregon probabe code
INHERITANCE TAX
2nd Draft
March 21, 1968

Prepared by

Stanton W. Allison

INHERITANCE TAX

Section 1. ORS 118.230 is amended to read:

118.230 Lien of tax; liability for payment; limitation. (1) Every tax imposed by ORS 118.005 to 118.840 is a lien upon the property embraced in any inheritance, devise, [bequest, legacy] or gift until paid, and the person to whom such property is transferred, and the [administrators, executors] personal representatives and trustees of every estate embracing such property are personally liable for such tax until its payment, to the extent of the value of such property.

(2) However, in all estates, excepting those of nonresident deceased, if all inheritance taxes are not sued for within six years after the amount of such taxes is determined by the [probate court and the notice of such determination has been served upon the] State Treasurer, as provided in [ORS 118.690,] ORS _____, they are conclusively presumed to be paid and cease to be a lien against the estate, or any part thereof, except that as to property not previously reported to the State Treasurer, the time limitation shall run only from the time of the reporting thereof. In estates of nonresident deceased, such limitation period shall not apply until one year has elapsed after official notice of the death of

the nonresident deceased, with description and probable value of the estate, has been filed with the State Treasurer.

Section 2. ORS 118.280 is amended to read:

118.280 Power to sell for payment of tax; tax lien transferred to proceeds when property of estate sold or mortgaged. (1) Every [executor, administrator or trustee] personal representative has power to sell as much of the property embraced in any inheritance [,] or devise [,bequest or legacy,] as will enable him to pay the tax imposed by ORS 118.005 to 118.840, in the same manner as he is authorized to do for the payment of the debts of a decedent.

(2) Any part of the gross estate sold [pursuant to an order of the court or by virtue of a power conferred by will] for the payment of claims against the estate and expenses of administration, for the payment of the tax imposed by ORS 118.005 to 118.840, or for purposes of distribution, shall be divested of the lien of such tax, and such lien shall be transferred to the proceeds of such sale. A mortgage on property executed [pursuant to an order of court or by virtue of a power conferred by will] for payment of claims against the estate and expenses of administration and for payment of the tax imposed by ORS 118.005 to 118.840 shall constitute a lien upon said property prior and superior to the inheritance tax lien, which inheritance tax lien shall attach to the proceeds of such mortgage.

Section 3. ORS 118.300 is amended to read:

118.300 Deferred payment; bond. Any person or corporation beneficially interested in any property chargeable with a tax under ORS 118.010, and [executors, administrators] personal representatives and trustees thereof, may elect, within six months from the death of the decedent, not to pay such tax until the person or persons beneficially interested therein shall come into actual possession or enjoyment thereof. If it is personal property, the person or persons so electing shall give a bond to the state in the penalty of three times the amount of such tax, with such sureties as the [probate judge of the proper county] State Treasurer may approve, conditioned for the payment of such tax and interest thereon, at such time and period as the person or persons beneficially interested therein may come into actual possession or enjoyment of such property, which bond shall be executed and filed, and a full return of such property [upon oath] made to the [probate court] State Treasurer within six months from the date of transfer thereof, as in this section provided. Such bond must be renewed every five years.

Section 4. ORS 118.350 is amended to read:

118.350 Compromise and compounding tax; approval by court; proceedings in case of actions or suits involving title to real property. (1) Whenever an estate, devise, legacy or beneficial interest therein, charged or sought to be charged with the inheritance tax is of such nature or is so disposed

that the liability of the same is doubtful, or the value thereof cannot with reasonable certainty be ascertained under the provisions of law, the State Treasurer may, with the written approval of the Attorney General setting forth the reasons therefor, compromise with the beneficiaries or representatives of such estates, and compound the tax thereon; [but the settlement must be approved by the court having jurisdiction of the estate,] and [after such approval] the payment of the amount of the taxes so agreed upon shall discharge the lien against the property of the estate.

(2) In any suit or action in the circuit court of the state involving the title to real property only, in which it appears, by the pleadings or otherwise, that an inheritance tax is or might be payable to the State of Oregon by reason of the death of any person whose estate has not been administered in Oregon, such circuit court shall direct that a copy of the pleadings in such cause be served upon the State Treasurer, such service to be made as summons is served in any cause in the circuit court of this state. Thereupon, further proceedings in the cause shall be suspended until the State Treasurer has had an opportunity to appear therein, such appearance to be made within the time that is required by the service of summons upon a private person or corporation. The State Treasurer shall appear in the cause and present the claims of the state, if any, to an inheritance tax, and it is the duty

of the Attorney General of the state to represent the state and the State Treasurer in such proceedings, and the State Treasurer may, with written approval of the Attorney General setting forth the reasons therefor, compromise and compound the tax claimed to be due upon the passing of such real property. Such settlement and compromise shall be entered of record in the journal of the proceedings of such court. Thereafter the payment of the amount of taxes so agreed upon shall discharge the inheritance tax lien against the property. If a compromise is not effected, the amount of tax, if any, due upon the passing of the real property shall be determined by the circuit court as are other questions involved in such litigation, and subject to the same right of appeal to the Supreme Court. The decree of the circuit court or of the Supreme Court, if there is an appeal, is conclusive as to the amount of taxes due upon the passing of the real property and payment thereof shall discharge the lien against the property.

Section 5. ORS 118.640 is amended to read:

118.640 Evaluating particular interests. (1) [Every inheritance, devise, bequest, legacy or gift, upon which a tax is imposed under ORS 118.005 to 118.840, shall be appraised at its full and true value immediately upon the death of the decedent, or as soon thereafter as may be practicable] The personal representative of the estate of a decedent shall

inventory the property of the estate as provided in ORS _____;
provided, that when [such] the interest is contingent, defeasible
or of such/nature that its [full and] true cash value cannot
be ascertained at the date [of decedent's death] the inventory
is filed it shall be appraised at the time when [such] the
value first becomes ascertainable, at its [full and] true cash
value as of the date of decedent's death and without diminution
for or on account of any valuation made or tax paid thereto-
fore upon the particular estates upon which the devise [, be-
quest, legacy] or gift may have been limited.

(2) Whenever a gift or devise of real property which is subject to inheritance tax passes to or vests in a husband and wife as tenants by the entirety, the inheritance tax thereon shall be determined in the same manner as though [each of such tenants by the entirety took an undivided one-half of the property as tenants in common] the grantees or devisees took undivided halves of the real property as tenants in common.

(3) Whenever any estate or interest is so limited that it may be divested by the act or omission of the devisee [or legatee, such] the estate or interest shall be taxed as [if] though there were no possiblity of such divesting.

(4) The value of [every] a limited estate, income, interest or annuity dependent upon any life or lives in being shall be determined by the rules or standards of mortality and of value used by the "Actuaries' or Combined Experience Tables,"

except that the rate of interest on computing the present value of all [such] limited estates, incomes, interests or annuities shall be four percent per year. The value of the interest or estate remaining after [such] the limited estate, income, interest or annuity shall be determined by deducting the amount found to be the value of [such] the limited estate, income, interest or annuity from the value of the entire property in which [such] the limited estate, income, interest or annuity exists.

Section 6. ORS 118.660 is amended to read:

118.660 Delivery to State Treasurer of tax return and copy of inventory and appraisement. (1) Every [executor, administrator or trustee] personal representative of any estate subject to an inheritance tax under the laws of this state, whether or not any such tax may be payable, [as soon as practicable after the appraisement or reappraisement of the estate and] before the court authorizes any [payment or] distribution to the [legatees or to any parties entitled to a beneficiary interest therein] devisees, shall deliver to the State Treasurer a copy of each inventory and appraisement duly certified to be such by the clerk of the court, or by the [executor, administrator] personal representative [or trustee personally] or [by] his attorney of record, and shall file with the clerk proof of [such] the delivery.

(2) Every [such executor, administrator or trustee] personal representative, or, if the estate is not administered, a trustee or heir of the decedent acceptable to the State Treasurer, shall, as soon as practicable, [make and] file with the State Treasurer a [schedule, list or statement,] verified return [by his oath and] in a form to be prescribed by the State Treasurer, which [schedule] shall include a statement of the name, age and relationship to the deceased of each person entitled to any [beneficiary] beneficial interest in the estate, together with the [full and] true cash value of [such] the interest, a list and description of all transfers of property, in trust or otherwise, made by the decedent in his lifetime as a division or distribution of his estate in contemplation of death or intended to take effect at or after his death, [and] such other data as the State Treasurer deems appropriate in the determination of inheritance taxes, and a computation of any tax payable. [If the estate of the decedent is subject to a tax, whether or not any such tax may be payable, but the estate will not be probated or administered, an heir of decedent, acceptable to the State Treasurer, shall file with the State Treasurer a like schedule, list or statement, containing also therein a description of the assets and the properties of the estate, the full and true values

thereof, and the items that may properly be deducted in the determination of inheritance taxes due therefrom as provided in ORS 118.070.]

Section 7. Determination of tax by State Treasurer; notice. The State Treasurer shall examine the return, and, if a copy is delivered to him, the inventory and appraisement, and shall determine the amount of the tax to which the estate is liable. If he determines that there is a deficiency in the amount of the tax as computed by the return, he shall give notice of the deficiency to the personal representative, trustee or heir who filed the return.

Section 8. ORS 118.700 is amended to read:

118.700. Filing objections to determination of tax; redetermination by court; appeal. (1) Within 60 days after the [assessment and] determination by the [probate court] State Treasurer of any tax imposed by ORS 118.005 to 118.840, or within such additional time thereafter as may be fixed by written stipulation of the parties or as may be allowed by the court, [the State Treasurer, or] any person interested therein, may file with the court objections thereto in writing, and pray for a [reassessment and] redetermination of [such] the tax.

(2) Upon [any objection] objections being so filed, the [probate] court shall appoint a time for the hearing thereof,

and cause notice of [such] the hearing to be given by mail to the State Treasurer, and to all other parties interested, at least 10 days before the hearing [thereof]. At the time appointed in [such] the notice, the court shall proceed to hear [such objection,] the objections and any evidence which may be offered in support thereof or opposition thereto. All evidence [heard on such reappraisement] shall be reduced to writing and filed with the clerk of court. [If,after such hearing, the court finds the amount at which the property is appraised is its full and true value, and the appraisement was made fairly and in good faith, it shall approve such appraisement; but if it finds that the appraisement was made at a greater or smaller sum than the full and true value of the property, or that the same was not made fairly or in good faith, it shall, by order, set aside the appraisement and determine such value.] If, upon the hearing, the court finds that the determination by the State Treasurer of any tax imposed by ORS 118.005 to 118.840 was erroneous the court shall, by order redetermine the tax.

(3) The State Treasurer [,] or anyone interested in the [property appraised, may appeal to the circuit court from the judgment, order and decree of the county court in the premises, and] determination of the tax may appeal to the Supreme Court from the order, [judgment, or decree] of the [circuit] probate court in the [same] manner [as is]

provided by law [for appeals from the county and circuit courts]. All appeals taken from the [judgment or decree] order of the court shall be had and tried on appeal in the same manner and with like effect as appeals in suits in equity are heard and tried.

Section 9. Repeal of existing statutes. ORS 118.420, 118.480, 118.500, 118.610, 118.620, 118.630, 118.650, 118.670, 118.680 and 118.690 are repealed.

Proposed revised Oregon probate code
INHERITANCE TAX
2nd Draft
March 21, 1968

Prepared by

Stanton W. Allison

COMMENTS

The proposed amendments and repeals of the present Inheritance Tax chapter are purely procedural. No change is proposed in the present sections on taxable property, deductions, or rates. Similarly, no changes are proposed in the chapter covering lien; payment; or compromise of tax, except as follows: in addition to purely editorial amendments, ORS 118.230 is amended to reflect the proposed determination of the tax by the State Treasurer rather than by the probate court. ORS 118.280 is amended to conform to the power of sale granted to the personal representative without court order except in certain cases.

The section on Administration of Inheritance Tax Act is not amended. However, it is proposed that ORS 118.420, 118.480, and 118.500 be repealed. ORS 118.460 now provides that full information on estates filed be furnished the State Treasurer. The need for ORS 118.420 would be eliminated by the proposed provision that the determination of the tax be made by the administrative agency and not by the probate court. The provision for applying for letters in the chapter on Initiation of Probate would permit the State Treasurer to make application as an interested person. The present provisions for furnishing information to theS tate Treasurer would make ORS 118.480 unnecessary. ORS 118.500 would not be applicable under the

proposed code since all probate jurisdiction is vested in the Circuit Court.

The only portion of the Inheritance Tax chapter on which substantial amendment is proposed is that headed Appraisal and Judicial Approval. The proposed amendments would provide for filing inheritance tax returns directly with the State Treasurer and for an administrative determination of the tax in the first instance by the State Treasurer and not by the Probate Court. The Probate Court would not be involved in the determination of the tax unless objections were filed to the taxes found owing by the administrative agency. The proposed amendments would provide that if objections were made to the determination of the tax by the administrative agency the matter would be set for hearing by the probate court upon due notice to the State Treasurer and to interested parties, and the court would then make a redetermination of the amount of the inheritance tax. Appeal would be from the determination by the circuit court as is now provided.

It is proposed to repeal ORS 118.610, 118.620, 118.630, and 118.650, covering inventory and appraisement, since the same subject matter is covered by Sections 9 to 14 inclusive of the chapter on Powers and Duties of the Personal Representative.

The amendments to ORS 118.640 are purely editorial.

The amendment of ORS 118.660, in addition to editorial changes, such as using the word "return" in place of "schedule,

list or statement", provides that the return shall include a computation of the tax payable. ORS 118.670, 118.680 and 118.690 can be repealed because the determination of the tax would be made in the first instance by the administrative agency and not by the probate court.

Section 7 provides for a determination of the amount of the tax by the State Treasurer and for giving notice to the party filing the return if the State Treasurer finds that a deficiency exists in the tax as computed in the return.

ORS 118.700 is amended to provide for filing objections to the tax determined by the State Treasurer and for hearing and redetermination of the tax by the probate court.

addresses of the devisees and any pretermitted children, and the birth dates of any who are minors.

(6) If the decedent died wholly or partially intestate, the names, relationship to decedent, and postoffice addresses of the heirs, and the birth dates of any who are minors.

(7) A statement of the extent and nature of estate assets to enable the court to set the amount of bond of the personal representative.

Section 5. Establishing foreign wills. (1) The written will of a testator who died domiciled outside this state, which upon probate may operate upon property in this state, may be admitted to probate, upon petition therefor, by filing a certified copy of the will and a certified copy of the order admitting the will to probate or evidencing its establishment in the jurisdiction where the testator died domiciled.

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

Section 6. Filing objections to petition for appointment of personal representative. Any interested person may file written objections to a petition for probate of a will or for appointment of a personal representative at any time before the court admits the will to probate or makes an appointment pursuant to the petiton.

Section 7. Testimony of attesting witnesses to will. (1) Upon the hearing of a petition for the appointment of a personal

representative, if the hearing is ex parte, before contest is filed, and involves the proof of a will, an affidavit of an attesting witness and may be used instead of the personal presence of the witness in court. The witness may give evidence of the execution of the will by attaching to his affidavit a photographic or photostatic copy of the will, and may identify the signature of the testator and witnesses to the will by use of the copy. The affidavit shall be received in evidence by the court and have the same weight as to matters contained in the affidavit as if the testimony were given by the witness in open court. The affidavit of the attesting witness may be made at the time of execution of the will or at any time thereafter.

(2) However, upon motion of any person interested in the estate filed within 30 days after the order admitting the will to probate is made, the court may require that the witness making the affidavit be brought before the court. If the witness is outside the reach of a subpoena, the court may order that the deposition of the witness be taken in the manner provided by ORS chapter 45.

(3) If the evidence of none of the attesting witnesses

to intestate estates, ORS 115.320 contains rather complicated provisions specifying the time in which preferred classes of persons may petition for administration of the estate. Although the following section preserves the preference rights, it was the unanimous decision of the two committees that the provision that any person may file the petition would eliminate many of the problems involved in the present statute. The 1967 Draft Uniform Probate Code (Section 3-205) provides that the petition may be filed by any person interested. The 1965 Washington Probate Code (section 11.28.110) does not specify who should petition for the appointment. Your committees considered that any person who paid the fees and filed a petition complying with this section would of necessity be an interested person.

The proposed section is more specific than ORS 115.020. Subsections (1) and (6) require that additional facts be included in the petition. The utility of this additional information to the court is obvious.

Section 5. Establishing foreign wills. This section would replace ORS 115.160. Reference is made to Section 13 of the chapter on Powers and Jurisdiction of the Probate Court, covering certification of documents from foreign jurisdictions. Subsection (1) is adapted from Section 1 and subsection (2) is adapted from Section 5, Uniform Probate of Foreign Wills Act. Subsection (2) replaces ORS 115.180(2). The proposed section

avoids the difficulty in complying with ORS 115.160 which requires "copies of such will and of the probate thereof". The question arises how much of the probate proceeding must be authenticated and filed with the copy of the will. The proposed section provides that a certified copy of the will and of the order of the foreign jurisdiction admitting it to probate is sufficient evidence that the will has been probated in such jurisdiction.

Section 583, Oregon Probate Law and Practice, Jaureguy and Love, states, in discussing the ORS section: "There is, however, no express provision in the Code for admitting any such foreign will to probate. In fact, there is no provision for ancillary administration in the Code, although such administration is had, as a matter of course."

The proposed Code provides that a certified copy of the will and of the order admitting it to probate may be presented for probate in this state by petition in the same manner as an original will, and the foreign will may be admitted to probate in the same manner as a local will. The section provides that it may be contested on the same grounds as a local will.

In this connection, Section 10 of the chapter on Accounting and Distribution provides for distribution to a foreign personal representative where the Oregon proceeding is an ancillary probate.

Section 6. Filing objections to petition for appointment of personal representative. This language is adapted from Section 1-208 of the 1967 Draft Uniform Code. It supplements Section 12 of the chapter on Powers and Jurisdiction of the Probate Court. It provides suitable opportunity to file objection to an ex parte petition for probate.

Section 7. Testimony of attesting witnesses to will. Section 5 is a revision of ORS 115.170, with minor editorial changes. However, the last sentence of subsection (1) is new. This points out that the affidavit of the attesting witness may be made at the time of execution of the will or at any time thereafter. The present ORS section does not specify when the affidavit should be made. Since the memory of the attesting witness is fresher at the time of the execution of the will,

Section 11. Removal of personal representative. (1) When a personal representative ceases to be qualified as provided in ORS_____, or becomes incapable of discharging his duties, the court shall remove him. When a personal representative has been unfaithful to or neglectful of his trust, the court may remove him. When grounds of removal appear to exist, the court on its own motion or on the petition of any person interested, shall order the personal representative to appear and show cause why he should not be removed. A copy of the order to show cause and of the petition, if any, shall be served upon the personal representative and upon his surety, or, if the personal representative after due diligence cannot be found within the state, service may be made on his attorney and his surety.

Section 12. 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.

Section 13. Appointment of successor personal representative. (1) When a personal representative dies, is removed by the court, or resigns and his resignation is accepted by the court, the court may appoint, and, if he was the sole or the

last surviving personal representative and administration is not completed, the court shall appoint another personal representative in his place.

(2) If, after a will has been proven and letters

The language in the suggested forms of letters has been somewhat simplified from the present suggested forms.

Section 11. Removal of Personal Representative. This section would replace ORS 115.470 and 115.480. The language is generally taken from Section 857.15 of the 1967 Wisconsin Probate Code. It covers the situations where the personal representative ceases to be qualified, as provided in Section 7, or becomes incapable of discharging his duties, when the court has the affirmative duty to remove him, and also where there has been neglect of duty or a breach of trust, in which case the court requires a hearing upon either its own motion or upon petition filed with the court. However, when a petition is filed with the court, it is not required to cite the personal representative to appear and show cause unless it feels that grounds of a removal appear to exist.

Section 12. Powers of surviving personal representative. This is taken verbatim from Section 3-419, 1967 Draft Uniform Probate Code. It replaces similar provisions in ORS 115.500, subsection (1), and ORS 115.510.

Section 13. Appointment of successor personal representative. Subsections (1) and (4) have been drafted from the 1967 Wisconsin Probate Code (sections 857.21 and 857.23) which in turn are based upon the Model Probate Code (sections 98, 99 and 100). Subsections (2) and (3) are the same as ORS

115.200 and 115.340.

Section 14. Notice by successor personal representative. This is a new section which spells out when a successor personal representative is required to publish a notice of his appointment. The present code contains no guidelines for the procedure by a successor personal representative. There has been uncertainty as to whether the new administrator or administrator with the will annexed is required to republish a notice to creditors and whether in such case the time under the original publication is extended. The section makes clear that if the successor personal representative is appointed during the four month period for creditors to file their claims, he must republish the

danger of loss, injury or deterioration pending the appointment of a personal representative.

(3) Upon the appointment and qualification of a personal representative the powers of the special administrator shall cease and he shall make and file his account and deliver to the personal representative assets of the estate in his possession. If the personal representative objects to the account of the special administrator, the court shall hear the objections, and, whether or not objections are made, shall examine the account. To the extent approved by the court, the compensation of the special administrator and expenses properly incurred by him, including a reasonable fee of his attorney, shall be paid as expenses of his administration.

Section 4. Petition for appointment of personal representative. Any interested person may petition for the appointment of a personal representative. The petition shall include the following information, so far as known:

(1) The name, age, domicile, postoffice, date and place of death, and Social Security account number or Treasurer's identification number of decedent.

(2) Whether the decedent died testate or intestate.

(3) The facts relied upon to establish venue.

(4) The name and postoffice address of the person nominated as personal representative and the facts which show that he is qualified to act.

(5) If the decedent died testate, the names and postoffice

addresses of the devisees and any pretermitted children, and the birth dates of any who are minors.

(6) If the decedent died wholly or partially intestate, the names, relationship to decedent, and postoffice addresses of the heirs, and the birth dates of any who are minors.

(7) A statement of the extent and nature of estate assets to enable the court to set the amount of bond of the personal representative.

Section 5. Testimony of attesting witnesses to will. (1) Upon the hearing of a petition for the appointment of a personal representative, if the hearing is ex parte, before contest is filed, and involves the proof of a will, an affidavit of an attesting witness may be used instead of the personal presence of the witness in court. The witness may give evidence of the execution of the will by attaching to his affidavit a photographic or photostatic copy of the will, and may identify the signature of the testator and witnesses to the will by use of the copy. The affidavit shall be received in evidence by the court and have the same weight as to matters contained in the affidavit as if the testimony were given by the witness in open court. The affidavit of the attesting witness may be made at the time of execution of the will or at any time thereafter.

(2) However, upon motion of any person interested in the estate filed within 30 days after the order admitting the will to probate is made, the court may require that the witness making the affidavit be brought before the court. If the witness is outside

the reach of a subpena, the court may order that the deposition of the witness be taken in the manner provided by ORS chapter 45.

(3) If the evidence of none of the attesting witnesses

Section 11. Notice to State Land Board. If it appears from the petition for appointment of a 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 a copy of the published notice to creditors.

Section 12. Removal of personal representative. (1) When a personal representative ceases to be qualified as provided in ORS _____, or becomes incapable of discharging his duties, the court shall remove him. When a personal representative has been unfaithful to or neglectful of his trust, the court may remove him. When grounds of removal appear to exist, the court on its own motion or on the petition of any person interested, shall order the personal representative to appear and show cause why he should not be removed. A copy of the order to show cause and of the petition, if any, shall be served upon the personal representative and upon his surety, or, if the personal representative after due diligence cannot be found within the state, service may be made on his attorney and his surety.

Section 12(a). 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.

Section 13. Appointment of successor personal representative. (1) When a personal representative dies, is removed by the court, or resigns and his resignation is accepted by the court, the court may appoint, and, if he was the sole or the last surviving personal representative and administration is not completed, the court shall appoint another personal representative in his place.

(2) If, after a will has been proven and letters

COMMENT

Section 12(a). Powers of surviving personal representative. This is taken verbatim from Section 3-419, 1967 Draft Uniform Probate Code. It replaces similar provisions in ORS 115.500, subsection (1), and ORS 115.510.

Proposed revised Oregon probate code
INITIATION OF PROBATE OR ADMINISTRATION
3rd Draft
November 21, 1967

Prepared by:

Stanton Allison

INITIATION OF PROBATE OR ADMINISTRATION

Section 1. Venue. (1) The venue for a proceeding seeking the appointment of a personal representative and for a proceeding to probate a will is:

(a) In the county where the decedent had his domicile or where he had his place of abode at the time of his death;

(b) In any county where property of the decedent was located at the time of his death; or

(c) In the county in which the decedent died.

(2) Filing a proceeding in a county other than specified in subsection (1) of this section does not constitute a jurisdictional defect.

Section 2. Proceedings commenced in more than one county. (1) If proceedings seeking the appointment of a personal representative of the same estate or proceedings to probate a will of the same decedent are commenced in more than one county, they shall be stayed, except in the county where first commenced, until final determination there of venue. A proceeding is deemed commenced by the filing of a petition. In determining venue, if the court finds that transfer to another county where a proceeding has been commenced is for the best interest of the estate, it may in its discretion order such transfer.

(2) If the proper venue is determined to be in another county, the clerk of the court shall transmit to the clerk of

the court of the other county a transcript of the proceeding with all the original papers filed therein, and the court thereupon shall acquire exclusive jurisdiction of the proceeding to the same extent and with like effect as though the proceeding were in the court on original jurisdiction.

Section 3. Special administrators. (1) If, prior to appointment and qualification of a personal representative, property of decedent is in danger of loss, injury or deterioration, or disposition of the remains of a decedent is required, the court may appoint a special administrator to take charge of the property or the remains. The petition for appointment shall state the reasons for special administration and specify the property, so far as known, requiring administration, and the danger to which it is subject. The special administrator shall qualify by filing bond in the amount ordered by the court, conditioned upon the faithful performance of his trust. The special administrator may:

(a) Incur expenses for the funeral, burial, or other disposition of the remains of decedent in a manner suitable to his condition in life; and

(b) Incur expenses for the protection of the property of the estate; and

(c) Sell perishable property of the estate, whether or not listed in the petition, if necessary to prevent loss to the estate.

(2) The special administrator shall not approve or reject claims of creditors or pay claims or expenses of administration or take possession of assets of the estate other than those in

danger of loss, injury or deterioration pending the appointment of a personal representative.

(3) Upon the appointment and qualification of a personal representative the powers of the special administrator shall cease and he shall make and file his account and deliver to the personal representative assets of the estate in his possession. If the personal representative objects to the account of the special administrator, the court shall hear the objections, and, whether or not objections are made, shall examine the account. To the extent approved by the court, the compensation of the special administrator and expenses properly incurred by him, including a reasonable fee of his attorney, shall be paid as expenses of his administration.

Section 4. Petition for appointment of personal representative. Any person may petition for the appointment of a personal representative. The petition shall include the following information, so far as known:

(1) The name, age, domicile, postoffice address, date and place of death, and Social Security account number or Treasurer's identification number of decedent.

(2) Whether the decedent died testate or intestate.

(3) The facts relied upon to establish venue.

(4) The name, residence and postoffice address of the person nominated as personal representative and the facts which show his eligibility for appointment as personal representative.

(5) The names, relationship to decedent, residence and postoffice address of heirs, devisees and legatees of the decedent,

and the birth dates of any who are minors.

(6) A statement of the extent and nature of estate assets to enable the court to set the amount of bond of the personal representative.

Section 5. Testimony of attesting witnesses to will. (1) Upon the hearing of a petition for the appointment of a personal representative, if the hearing is ex parte, before contest is filed, and involves the proof of a will, an affidavit of an attesting witness may be used instead of the personal presence of the witness in court. The witness may give evidence of the execution of the will by attaching to his affidavit a photographic or photostatic copy of the will, and may identify the signature of the testator and witnesses to the will by use of the copy. The affidavit shall be received in evidence by the court and have the same weight as to matters contained in the affidavit as if the testimony were given by the witness in open court. The affidavit of the attesting witness may be made at the time of execution of the will or at any time thereafter.

(2) However, upon motion of any person interested in the estate filed within 30 days after the order admitting the will to probate is made the court may require that the witness making the affidavit be brought before the court. If the witness is outside the reach of a subpena, the court may order that the deposition of the witness be taken in the manner provided by ORS chapter 45.

(3) If the evidence of none of the attesting witnesses

is available, the court may allow proof of the will be testimony or other evidence that the signature of the testator or at least one of the witnesses is genuine.

(4) In the event of contest of the will, or of probate thereof in solemn form, proof of any facts shall be made in the same manner as in a suit in equity.

Section 6. Preference in appointing personal representative. Upon the filing of the petition, if there is no will, or, if a will, when the will has been proved, the court shall appoint a qualified person it finds suitable as personal representative, giving preference as follows:

(1) To the executor named in the will.

(2) To the surviving spouse or his nominee.

(3) To the nearest of kin or his nominee.

Section 7. Persons not qualified to act. A person is not qualified to act as personal representative who is:

(1) An incompetent.

(2) A minor.

(3) A person who has been convicted of a felony.

(4) A person suspended for misconduct or disbarred from the practice of law, during the period of suspension or disbarment.

(5) A person who has resigned from the Oregon State Bar when charges of professional misconduct are under investigation or when disciplinary proceedings are pending against him, until he is reinstated.

(6) A nonresident of this state, except that a nonresident

named executor in the will may qualify if he appoints a resident agent to accept service of summons and process in all actions affecting the estate, files the appointment in the probate proceeding, and files a bond as provided in ORS_____.

(7) A judge of the district court, circuit court, tax court or Supreme Court of the State of Oregon.

Section 8. Necessity and amount of bond; bond notwithstanding will. (1) Unless a testator declares that no bond shall be required of his executor, the personal representative shall not act or shall letters be issued to him until he files with the clerk a bond executed by a surety company authorized to transact surety business in the State of Oregon. The court may, in its discretion, require a bond notwithstanding any provision in a will that no bond is required, and shall require a nonresident executor to give bond. The bond shall be for the security and benefit of all persons interested and shall be conditioned upon the personal representative faithfully performing the duties of his trust.

(2) The amount of the bond set by the court shall be adequate to protect interested parties but in no event shall it be less than $1,000. In setting the amount of the bond the court shall consider:

(a) The nature, liquidity and apparent value of the assets.

(b) The anticipated income during administration.

(c) The probable indebtedness and taxes.

(3) Nothing in this section shall affect the provisions

of ORS 709.230 and 709.240, relating to a trust company acting as personal representative.

Section 9. Increasing, decreasing or requiring new bond. The court may increase or reduce the amount of bond, or require a new bond, if it appears to the court that the bond was inadequate or excessive or a new bond is necessary. The surety may be discharged from liability by an order made pursuant to ORS 33.510 and 33.520.

Section 10. Letters testamentary or of administration. Letters testamentary or letters of administration shall be issued to the personal representative appointed by the court upon his filing with the clerk the bond, if any, required by the court. The letters may be in the following form:

(1)

LETTERS TESTAMENTARY

No._____

THIS CERTIFIES that the will of_____ deceased, has been proved and_____ has (have) been appointed and is (are) at the date hereof the duly appointed, qualified and acting_____
(Executor(s) or Administrator(s)
_____ of the will and estate of said decedent.
with the Will Annexed)

IN WITNESS WHEREOF, I, as Clerk of the Circuit Court of the State of Oregon for the County of_____, in which proceedings for administration upon said estate are pending, do hereto subscribe my name and affix the seal of the said court this _____day of _____, 19____.

_____Clerk of the Court

By _____
Deputy

(Seal)

(2)

LETTERS OF ADMINISTRATION

No._____

THIS CERTIFIES that_____has (have) been appointed and is (are) the duly appointed, qualified and acting administrator(s) of the estate of_____, deceased, and that no will of said decedent has been proved in this court.

IN WITNESS WHEREOF, I, as Clerk of the Circuit Court of the State of Oregon for the County of_____ in which proceedings for administration upon said estate are pending, do hereto subscribe my name and affix the seal of the said court this_____day of_____, 19___.

_____Clerk of the Court

By_____
Deputy

(Seal)

Section 11. Notice to State Land Board. If it appears from the petition for appointment of a 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 a copy of the published notice to creditors.

Section 12. Removal of Personal Representative. When a personal representative ceases to be qualified as provided in ORS_____, or becomes incapable of discharging his duties, the court shall remove him. When a personal representative has been unfaithful to or neglectful of his trust, the court may remove him. When grounds of removal appear to exist, the court on its own motion or on the petition of any person interested, shall order the personal representative to appear and show cause why he should not be removed. A copy of the order to show cause and of the petition, if any, shall be served upon the personal representative and upon his surety, or, if the personal representative after due diligence cannot be found within the state, service may be made on his attorney and his surety.

Section 13. Appointment of successor personal representative. (1) When a personal representative dies, is removed by the court, or resigns and his resignation is accepted by the court, the court may appoint, and, if he was the sole or the last surviving personal representative and administration is not completed, the court shall appoint another personal representative in his place.

(2) If, after a will has been proven and letters

testamentary or of administration with the will annexed have been issued thereof, such will is set aside, declared void or inoperative, such letters shall be revoked, and letters of administration issued.

(3) If, after administration has been granted, a will of the deceased is found and proven, the letters of administration shall be revoked and letters testamentary or of administration with the will annexed shall be issued.

(4) When a successor personal representative is appointed, he has all the rights and powers of his predecessor or of the executor designated in the will, except that he shall not exercise powers given in the will which by its terms are personal to the personal representative therein designated.

Section 14. Notice by successor personal representative. (1) If the personal representative dies, is removed by the court, or resigns after the notice of appointment required by ORS _____ has been published but before the time for presenting claims required by the notice has expired, the successor personal representative shall cause notice of his appointment to be published as if he were the original personal representative. The republished notice shall state that the original personal representative died, was removed by the court, or resigned, the date of death, removal or resignation, and the date of appointment of the new personal representative. The period of time between the death, removal or resignation and the date of the first republication of the notice shall be added to the period required for presentation of claims by the original notice of

appointment.

(2) No such notice by the successor personal representative shall be required if the period for filing claims expired prior to the death, removal, or resignation of the original personal representative.

Section 15. Designation of attorney to be filed. If the personal representative has employed an attorney to represent him in the administration of the estate he shall file in the estate proceedings the name and postoffice address of the attorney.

Section 16. Contest of will. When a will has been admitted to probate, any person interested may, at any time within four months after the date of the entry in the court journal of the order of court admitting the will to probate, contest the probate of the will or the validity of the will.

Section 17. ORS 93.190 is amended to read:

93.190. (1) Every conveyance, deed of trust, mortgage or devise of an interest in or lien [in or] upon real or personal property to two or more persons as trustees or [executors] personal representatives, creates a joint tenancy in such interest or lien in the trustees or [executors] personal representatives unless it is expressly declared in the conveyance, deed of trust, mortgage or devise that the trustees or [executors] personal representatives shall take or hold the property as tenants in common or otherwise.

(2) If the conveyance, deed of trust, mortgage or devise

provides for filling any vacancy in the office of trustee or [executor] personal representative, it may be filled as therein provided excepting that a court of competent jurisdiction may fill a vacancy in the trusteeship according to the established rules and principles of equity. In whichever way the vacancy is filled, the new trustee shall hold the property with all powers, rights, and duties of an original trustee unless otherwise directed by conveyance, deed of trust, mortgage or devise, or order or decree of the court. [No vacancy in an executorship shall be filled without an order therefor by a county court sitting in probate as in the case of an original appointment of an executor.]

Section 18. Repeal of existing statutes. ORS 115.010, 115.020, 115.110, 115.120, 115.130, 115.140, 115.150, 115.160, 115.170, 115.180, 115.190, 115.200, 115.210, 115.220, 115.310, 115.320, 115.330, 115.340, 115.350, 115.410, 115.420, 115.430, 115.440, 115.450, 115.460, 115.470, 115.480, 115.490, 115.500, 115.510, 115.520 and 115.990 are repealed.

Proposed revised Oregon probate code
INITIATION OF PROBATE OR ADMINISTRATION
3rd Draft
November 21, 1967

Prepared by

Stanton Allison

COMMENTS

Section 1. Venue. The present provisions for venue are contained in ORS 115.140 and 115.310. These sections are discussed in 2 Jaureguy & Love, Oregon Probate Law and Practice §573 (1958). There the authors suggest that these two sections might better be combined in a single section governing the particular county in which the probate court has jurisdiction to probate a will or grant letters of administration. The authors also criticize the use of the word "inhabitant" rather than "domicile." They point out that domicile is not synonymous with residence and that inhabitant "has a narrower and more limited significance than domicile." The litigation arising out of the present statutory language is commented on by the authors. They call attention to decisions where administration proceedings had been held void through failure to comply with the provisions of these statutes. They state:

> "It is of course clear than an estate can only be administered in one county. If there be an attempt to administer it in a second county, the proceedings there, unless the letters of administration in the first proceedings were improvidently granted and are revoked, are a nullity." (Citing Slate's Estate, 40 Or. 349; Oh Chow v. Brockway, 21 Or. 440)

In this connection, your committee has considered the proposed 1967 Uniform Probate Code (section 3-204); the 1963 Iowa Probate Code (section 12); the Model Probate Code, which has been adopted in the 1967 Wisconsin Probate Code (section 856.01);

and the 1965 Washington Probate Code (section 11.16.050).

The proposed section has been drafted to eliminate the problems inherent in our present code. It has eliminated different venue for a person not domiciled in the state at time of death and a person domiciled in this state. It has eliminated difference in treatment between real property, personal property and intangible property. It has eliminated the use of the word "inhabitant." It gives the petitioner the choice of probating the estate in the county of domicile, in the county where the decedent has his place of abode, in the county where he left assets or in the county in which he died. The section provides that filing a proceeding in the wrong county does not constitute a jurisdictional defect which might result in the probate proceeding being subsequently held void. Provision is made for the court to transfer the proceedings for the best interest of the estate where two or more proceedings are instituted in different counties, or to retain jurisdiction where originally filed.

Thus, the proposed revision would meet the proper convenience of the interested parties in choosing the place of administration and give the court the power to determine the place of administration for the better interest of the estate when a conflict develops by filings in different counties.

Section 2. Proceedings commenced in more than one county. This section would give the probate court of the county to which the proceeding had been transferred the same status and jurisdiction as if the proceeding had been completed in the original jurisdiction. The language is taken from

ORS 109.345. Our present code does not contain specific language providing for and regulating the transfer to another county, although there are adequate sections dealing with the transfer of causes and the effect thereof. In view of the fact that the court is given discretion to determine the venue on the basis of the best interests of the estate, it seems essential that such a provision be included.

Section 3. Special administrators. This section is a revision of ORS 115.330. The only substantive change is to provide for appointment of a special administrator when it is necessary to handle the burial of unclaimed bodies in the possession of the coroner and necessary other details in connection with the disposal of the body. Judge Dickson explained to the committees the very real problem involved when the coroner was holding unclaimed bodies. The only other substantive change from the present statute is the inclusion of provisions for accounting by the special administrator and for payment of the expenses he has incurred, his compensation and attorney's fee.

Section 4. Petition for appointment of personal representative. This section replaces ORS 115.020 and 115.120 of the present code. It will be noticed that the present law is changed materially in that the proposed section provides that any person may file a petition for the appointment of a personal representative. ORS 115.120 now provides that "Any executor, devisee, or legatee named in any will, or any other person interested in the estate" may petition. In regard

to intestate estates, ORS 115.320 contains rather complicated provisions specifying the time in which preferred classes of persons may petition for administration of the estate. Although the following section preserves the preference rights, it was the unanimous decision of the two committees that the provision that any person may file the petition would eliminate many of the problems involved in the present statute. The 1967 Draft Uniform Probate Code (section 3-205) provides that the petition may be filed by any person interested. The 1965 Washington Probate Code (section 11.28.110) does not specify who should petition for the appointment. Your committees considered that any person who paid the fees and filed a petition complying with this section would of necessity be an interested person.

The proposed section is more specific than ORS 115.020. Subsections (1) and (6) require that additional facts be included in the petition. The utility of this additional information to the court is obvious.

Section 5. Testimony of attesting witnesses to will. Section 5 is a revision of ORS 115.170, with minor editorial changes. However, the last sentence of subsection (1) is new. This points out that the affidavit of the attesting witness may be made at the time of execution of the will or at any time thereafter. The present ORS section does not specify when the affidavit should be made. Since the memory of the attesting witness is fresher at the time of the execution of the will,

it seems helpful that this matter be brought to attention.

Subsection (3) is also new. In the opinion of the two committees it seemed unwise, in an ex parte proceeding particularly, to allow a will to fail because the evidence of attesting witnesses is not available. It seemed necessary that means be provided, when the instrument is admitted to be the last will and testament of the deceased, so that it will not be denied probate through a technical failure of proof by reason of the death or unavailability of the attesting witnesses.

Section 6. Preference in appointing personal representative. This would replace ORS sections 115.190 and 115.310. Your committee felt that the first requirement in appointment must be that no unqualified persons be appointed and that no unsuitable persons be appointed. The right of the court to use its discretion in all cases is not clearly indicated or provided by the present statute. However, subject to this proper and essential discretion in the court, the preference provisions of the present statute are generally preserved. One element, however, has been added. Provision is made for a surviving spouse to nominate another person to be appointed and the next of kin is given the same right of nomination. This would be useful in an intestate estate with substantial assets where the widow does not wish to serve as administrator. In this case, she could nominate another person or a bank to be appointed in her place. Your committees believe that this provision will provide a flexibility not now present in Oregon Revised Statutes.

Section 7. Persons not qualified to act. This section would rewrite and replace ORS 115.410. The only substantive changes from the present statute are found in subsections (5) and (6). Subsection (5) is required by the present rules on disciplinary proceedings of the Oregon State Bar which permit a resignation by an attorney when disciplinary proceedings are pending. The circumstances requiring disqualification under subsection (4) would similarly apply where an attorney had resigned from the bar "under fire." The other substantive change is the exception which would permit a nonresident executor named in a will to serve if he appoints a resident agent in the same manner as provided for nonresident corporations under the general law. A typical case would be where a testator had nominated a Vancouver, Washington, resident as executor where the estate had extensive property in both Washington and Oregon. Another situation would be where a Portland resident nominated as executor a close relative living in Washington. It was felt that this provision would in many cases carry out the wishes of the testator and provide more efficient administration of the testate estate.

The present statute disqualifies "judicial officers, other than Justices of the Peace." The proposed language is predicated on the assumption that probate jurisdiction will be vested in the circuit court. The proposed section would disqualify only those judicial officers who are given jurisdiction in probate matters.

Section 8. Necessity and amount of bond; bond notwithstanding will. This section replaces and changes materially ORS 115.430. The principal change is that the revised section eliminates any provision for the personal surety, and requires a surety company bond in all cases except where the bond requirement has been waived by the will. It also provides that in all cases the bond be not less than $1,000. Your committees agree that the protection afforded in a defalcation situation by a bond with personal sureties is completely illusory. In view of the nominal cost of a surety bond of $1,000, it was felt that actual protection should be afforded innocent heirs at law and families of the deceased by a required surety bond. The expense where larger estates are involved can be avoided by provisions of the will.

The section also indicates guidelines for the court in setting the amount of the bond and within these guidelines gives the court more discretion in fixing of the necessary amount of the bond than is provided by the present ORS 115.430.

Section 9. Increasing, decreasing or requiring new bond. Section 9 replaces the present provisions of subsection (4) of ORS 115.430, 115.450, and 115.460. Rather than include the somewhat complicated language of these sections, the provisions of ORS 33.510 and 33.520, covering the general subject of discharge of surety, are incorporated by reference.

Section 10. Letters testamentary or of administration. This section will replace ORS 115.190, 115.210, and 115.350.

The language in the suggested forms of letters has been somewhat simplified from the present suggested forms.

Section 11. Notice to State Land Board. Section 11 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 merely provides for mailing notice to the State Land Board by the personal representative. Under this code no notice is required to be given to heirs, devisees, and legatees prior to the appointment of the personal representative. 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 a copy of the notice to creditors.

Section 12. Removal of Personal Representative. This section would replace ORS 115.470 and 115.480. The language is generally taken from Section 857.15 of the 1967 Wisconsin Probate Code. It covers the situations where the personal representative ceases to be qualified, as provided in section 7,

or becomes incapable of discharging his duties, when the court has the affirmative duty to remove him, and also where there has been neglect of duty or a breach of trust, in which case the court requires a hearing upon either its own motion or upon petition filed with the court. However, when a petition is filed with the court, it is not required to cite the personal representative to appear and show cause unless it feels that grounds of a removal appear to exist.

Section 13. Appointment of successor personal representative. Subsections (1) and (4) have been drafted from the 1967 Wisconsin Probate Code (sections 857.21 and 857.23) which in turn are based upon the Model Probate Code (sections 98, 99 and 100). Subsections (2) and (3) are the same as ORS 115.200 and 115.340.

Section 14. Notice by successor personal representative. This is a new section which spells out when a successor personal representative is required to publish a notice of his appointment. The present code contains no guidelines for the procedure by a successor personal representative. There has been uncertainty as to whether the new administrator or administrator with the will annexed is required to republish a notice to creditors and whether in such case the time under the original publication is extended. The section makes clear that if the successor personal representative is appointed during the four month period for creditors to file their claims, he must republish the

notice, together with information which would advise the creditors not only the name of the new personal representative, but the information about the circumstances requiring the appointment of the replacement. In such case, the initial period for filing claims is extended to cover the period between the death, resignation, or removal of the previous personal representative and the first republication of the notice by the replacement. The section further provides that a successor personal representative appointed after the expiration of the four month period for presentation of claims under the original notice does not have to publish notice of his appointment. This provision is taken from the 1963 Washington Probate Code (section 11.40.010).

Section 15. Designation of attorney to be filed. This is a new section which requires the personal representative to file in the estate proceedings the name and address of the attorney for the estate. This section will be useful not only to furnish information to the clerk and the probate judge, but to give necessary information in case of litigation with the estate and the personal representative. The section is taken from the 1963 Iowa Probate Code, (section 82). The Iowa Bar Committee comment is as follows:

> "New. In other provisions of the Code, notices may be served upon the attorney for the fiduciary in certain circumstances. This section is necessary in order to facilitate the use of such provisions."

Section 16. Contest of Will. This section is the same

as ORS 115.180, except that the time for the will contest has been shortened from six months to four months to conform to the shortening of the period of the notice to creditors from six months to four months.

Proposed revised Oregon probate code
INITIATION OF PROBATE OR ADMINISTRATION
3rd Draft
November 21, 1967

Prepared by

Stanton Allison

COMPARATIVE SECTION TABLE

Draft Sections	ORS Sections
1	115.140, 115.310
2	115.140, 126.116
3	115.330
4	115.020, 115.120
5	115.170
6	115.190, 115.310, 115.320
7	115.410, 115.420
8	115.430, 115.440
9	115.430, 115.450, 115.460
10	115.190, 115.210, 115.350
11	115.310
12	115.470, 115.480, 115.490
13	115.200, 115.340, 115.500, 115.510, 115.520
14	
15	
16	115.180
17	93.190
18	Repealer

Proposed revised Oregon probate code
INITIATION OF PROBATE OR ADMINISTRATION
2nd Draft
July 5, 1967

Prepared by
Stanton W. Allison

INITIATION OF PROBATE OR ADMINISTRATION

Section 1. Venue. (1) The venue for a proceeding seeking the appointment of a personal representative and for a proceeding to probate a will is:

(a) In the county where the decedent had his domicile or where he had his place of abode at the time of his death;

(b) In any county in which the decedent left assets; or

(c) In the county in which the decedent died.

(2) Filing a proceeding in a county other than specified in subsection (1) of this section does not constitute a jurisdictional defect.

References: Advisory Committee Minutes:
1/14,15/66, pp. 25 to 27
6/16,17/67, pp. 12 and 13

Gilley Report, 1/14/66

ORS 115.140
115.310

Section 2. Proceedings commenced in more than one county. (1) If proceedings seeking the appointment of a personal representative of the same estate or proceedings to probate a will of the same decedent are commenced in more than one county, they shall be stayed, except in the county where first commenced, until final determination there of venue. A proceeding is deemed commenced by the filing of a petition. In determining venue the court, in its discretion, may find that transfer to another county where a proceeding has been commenced is for

the best interest of the estate.

(2) If the proper venue is determined to be in another county, the clerk of the court shall transmit to the clerk of the court of the other county a transcript of the proceeding with all the original papers filed therein.

References: Advisory Committee Minutes:
1/14,15/66, pp. 25 to 27
6/16,17/67, pp. 12 and 13

Gilley Report
1/14/66

ORS 115.140
126.116

Section 3. Pleadings and mode of procedure. No particular pleadings or forms thereof are required in the exercise of jurisdiction of probate courts. The mode of procedure in the exercise of jurisdiction is in the nature of a suit in equity except as otherwise provided by statute. The proceedings shall be in writing and upon the petition of a party in interest or the order of the court. All petitions, reports and accounts shall be verified by at least one of the persons making them or his attorney, or in case of a corporation by its agent. The court exercises its powers by means of:

(1) A petition of a party in interest.

(2) A citation to a party.

(3) A subpoena to a witness.

(4) Orders and decrees.

(5) An execution or warrant to enforce its orders and decrees.

References: Advisory Committee Minutes:
1/14,15/66, pp. 18 and 19
6/16,17/67, p. 14

Gilley Report
1/14/66

ORS 115.010

[Draftsman's Note: In final form it is intended to place section 3 in the chapter headed "Jurisdiction and Powers of Probate Courts."]

Section 4. Special administrators. (1) If, prior to appointment and qualification of a personal representative, property of decedent is in danger of loss, injury or deterioration, or disposition of the remains of a decedent is required, the court may appoint a special administrator to take charge of the property or the remains. The petition for appointment shall state the reasons for special administration and specify the property, so far as known, requiring administration, and the danger to which it is subject. The special administrator shall qualify by filing bond in the amount ordered by the court, conditioned upon the faithful performance of his trust. The special administrator may:

(a) Incur expenses for the funeral, burial, or other disposition of the remains of decedent in a manner suitable to his condition in life; and

(b) Incur expenses for the protection of the property of the estate; and

(c) Sell perishable property of the estate, whether or not listed in the petition, if necessary to prevent loss to the estate.

(2) The special administrator shall not approve or reject claims of creditors or pay claims or expenses of administration or take possession of assets of the estate other than those in danger of loss, injury or deterioration pending the appointment of a personal representative.

(3) Upon the appointment and qualification of a personal representative the powers of the special administrator shall cease and he shall make and file his account and deliver to the personal representative assets of the estate in his possession. If the personal representative objects to the account of the special administrator, the court shall hear the objections, and, whether or not objections are made, shall examine the account. To the extent approved by the court, the compensation of the special administrator and expenses properly incurred by him, including a reasonable fee of his attorney, shall be paid as expenses of his administration.

References: Advisory Committee Minutes:
2/18/66, pp. 19 to 22
3/18,19/66, pp. 18 to 20
6/16,17/67, p. 14

Gilley Report
1/14/66

ORS 115.330

Section 5. Contents of petition for appointment of personal representative. Any person may petition for the appointment of a personal representative. The petition shall include the following information, so far as known:

(1) The name, age, domicile, postoffice address, date and place of death, and Social Security account number or Treasurer's

identification number of decedent.

(2) Whether the decedent died testate or intestate.

(3) The facts relied upon to establish venue.

(4) The name, residence and postoffice address of the person nominated as personal representative and facts showing his qualification to serve.

(5) The names, relationship to decedent, residence and postoffice address of heirs, devisees and legatees of the decedent, and the birth dates of any who are minors.

(6) A statement of the extent and nature of estate assets to enable the court to set the amount of bond of the personal representative.

References: Advisory Committee Minutes:
1/14,15/66, pp. 19 to 21
6/16,17/67, pp. 15 and 16

Gilley Report
1/14/66

ORS 115.120
115.020

Section 6. Testimony of attesting witnesses to will. (1) Upon the hearing of a petition for the appointment of a personal representative, if the hearing is ex-parte, before contest is filed, and involves the proof of a will, an affidavit of an attesting witness may be used instead of the personal presence of the witness in court. The witness may give evidence of the execution of the will by attaching to his affidavit a photographic or photostatic copy of the will, and may identify the signature of the testator and witnesses to the will by use of the copy. The affidavit shall be received in evidence by the

court and have the same weight as to matters contained in the affidavit as if the testimony were given by the witness in open court. The affidavit of the attesting witness may be made at the time of execution of the will or any time thereafter.

(2) However, upon motion of any person interested in the estate filed within 30 days after the order admitting the will to probate is made the court may require that the witness making the affidavit be brought before the court. If the witness is outside the reach of a subpoena, the court may order that the deposition of the witness be taken in the manner provided by ORS chapter 45.

(3) If the evidence of none of the attesting witnesses is available, the court may allow proof of the will by testimony or other evidence that the signature of the testator or at least one of the witnesses is genuine.

(4) In the event of contest of the will, or of probate thereof in solemn form, proof of any facts shall be made in the same manner as in a suit in equity.

References: Advisory Committee Minutes:
2/18,19/66, p. 9
6/16,17/67, pp. 17 and 18

Gilley Report
1/14/66

ORS 115.170

Section 7. Preference in appointing personal representative. Upon the filing of the petition, if there is no will, or, if a will, when the will has been proved, the court shall appoint a qualified person it finds suitable as personal representative,

giving preference as follows:

(1) To the executor named in the will.

(2) To the surviving spouse or his nominee.

(3) To the nearest of kin or his nominee.

References: Advisory Committee Minutes:
1/14,15/66, pp. 21 to 24

Gilley Report
1/14/66

ORS 115.190
115.310

Section 8. Persons not qualified to act. A person is not qualified to act as personal representative who is:

(1) An incompetent.

(2) A minor.

(3) A person who has been convicted of a felony.

(4) A person suspended for misconduct or disbarred from the practice of law, during the period of suspension or disbarment.

(5) A person who has resigned from the Oregon State Bar when charges of professional misconduct are under investigation or when disciplinary proceedings are pending against him, until he is reinstated.

(6) A nonresident of this state, except that a nonresident named executor in the will may qualify if he appoints a resident agent to accept service of summons and process in all actions affecting the estate, files the appointment in the probate proceeding, and files a bond as provided in section 9 of this draft.

(7) A judge of the district court, circuit court, tax

court or Supreme Court of the State of Oregon.

References: Advisory Committee Minutes:
1/14,15/66, pp. 23 to 25
2/18,19/66, pp. 28 and 29
3/18,19/66, pp. 31 to 33; and Appendix
4/15,16/66, p. 19
6/16,17/66, p. 17

Gilley Report
1/14/66

ORS 115.410
115.420

Section 9. Necessity and amount of bond; bond notwithstanding will. (1) Unless a testator declares that no bond shall be required of his executor, the personal representative shall not act nor shall letters be issued to him until he files with the clerk a bond executed by a surety company authorized to transact surety business in the State of Oregon. The court may, in its discretion, require a bond notwithstanding any provision in a will that no bond is required, and shall require a nonresident executor to give bond. The bond shall be for the security and benefit of all persons interested and shall be conditioned upon the personal representative faithfully performing the duties of his trust.

(2) The amount of the bond set by the court shall be adequate to protect interested parties but in no event shall it be less than $1,000. In setting the amount of the bond the court shall consider:

(a) The nature, liquidity and apparent value of the assets.

(b) The anticipated income during administration.

(c) The probable indebtedness and taxes.

(3) Nothing in this section shall affect the provisions of ORS 709.230 and 709.240, relating to a trust company acting as personal representative.

References: Advisory Committee Minutes:
2/18,19/66, pp. 29 to 33; and Appendix
3/18,19/66, pp. 33 to 35; and Appendix
6/16,17/67, pp. 18 and 19

Gilley Report
1/14/66

ORS 115.430

Section 10. Increasing, decreasing or requiring new bond. The court may increase or reduce the amount of bond, or require a new bond, if it appears to the court that the bond was inadequate or excessive or a new bond is necessary. The surety may be discharged from liability by an order made pursuant to ORS 33.510 and 33.520.

References: Advisory Committee Minutes:
2/18,19/66, pp. 29 to 35
3/18,19/66, pp. 33 to 35; and Appendix
6/16,17/67, p. 19

Gilley Report
1/14/66

ORS 115.430
115.440
115.450
115.460

(Confer ORS 33.510, 33.520)

Section 11. Letters testamentary or of administration. Letters testamentary or letters of administration shall be issued to the personal representative appointed by the court upon his filing with the clerk the bond, if any, required by the court. The letters may be in the following form:

(1)

LETTERS TESTAMENTARY

No._____

THIS CERTIFIES that the will of_____ deceased, has been proved and _____has (have) been appointed and is (are) at the date hereof the duly appointed, qualified and acting_____
(Executor(s) or

_____ of the will and
Administrator(s) with The Will Annexed)

estate of said decedent.

IN WITNESS WHEREOF, I, as Clerk of the_____ Court of the State of Oregon for the County of_____, in which proceedings for administration upon said estate are pending, do hereto subscribe my name and affix the seal of the said court this_____day of_____, 19___.

_____Clerk of the Court

By_____
Deputy

(Seal)

(2)

LETTERS OF ADMINISTRATION

No._____

THIS CERTIFIES that_____has (have) been appointed and is (are) the duly appointed, qualified and acting administrator(s) of the estate of_____, deceased, and that no will of said decedent has been proved in this court.

IN WITNESS WHEREOF, I, as Clerk of the _____Court of the State of Oregon for the County of_____, in which proceedings for administration upon said estate are pending, do hereto subscribe my name and affix the seal of the said court this_____ day of _____, 19__.

_____Clerk of the Court

By_____
Deputy

References: Advisory Committee Minutes:
2/18,19/66, pp. 10 to 12
4/15,16/66, pp. 7 and 8
6/16,17/67, p. 20

Gilley Report
1/14/66

ORS 115.210

Section 11A. 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.

References: Advisory Committee Minutes:
3/18,19/66, pp. 20 to 30; and Appendix
6/16,17/67, pp. 20 and 21

Gilley Report
1/14/66

ORS 116.505

[Draftsman's Note: It is my intention to transfer section 11A from "Initiation of Probate or Administration" to become section of "Claims."]

Section 12. Notice to State Land Board. If it appears from the petition for appointment of a 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 a copy of the published notice to creditors.

References: Advisory Committee Minutes:
3/18,19/66, pp. 21 to 28
2/18,19/66, p. 14
6/16,17/67, pp. 20 and 21

Gilley Report
1/14/66

ORS 115.310

Section 13. Removal of Personal Representative. When a personal representative ceases to be qualified as provided in section 8 of this draft, or becomes incapable of discharging his duties, the court shall remove him. When a personal representative has been unfaithful to or neglectful of his trust, the court may remove him. When grounds of removal appear to exist, the court on its own motion or on the petition of any person interested, shall order the personal representative to appear and show cause why he should not be removed. A copy of the order to show cause and of the petition, if any, shall be served upon the personal representative and upon his surety, or, if the personal representative after due diligence cannot be found within the state, service may be made on his attorney

and his surety.

References: Advisory Committee Minutes:
2/18,19/66, pp. 12 to 16
3/18,19/66, pp. 35 to 37
6/16,17/67, p. 22

Gilley Report
1/14/66

ORS 115.470
115.480

Section 14. Appointment of successor personal representative. (1) When a personal representative dies, is removed by the court, or resigns and his resignation is accepted by the court, the court may appoint, and if he was the sole or the last surviving personal representative and administration is not completed, the court shall appoint another personal representative in his place.

(2) If, after a will has been proven and letters testamentary or of administration with the will annexed have been issued thereon, such will is set aside, declared void or inoperative, such letters shall be revoked, and letters of administration issued.

(3) If, after administration has been granted, a will of the deceased is found and proven, the letters of administration shall be revoked and letters testamentary or of administration with the will annexed shall be issued.

(4) When a successor personal representative is appointed, he has all the rights and powers of his predecessor or of the executor designated in the will, except that he shall not exercise powers given in the will which by its terms are

personal to the personal representative therein designated.

References: Advisory Committee Minutes;
2/18,19/66, pp. 10, 11 and 17
3/18,19/66, p. 19
3/18,19/66, pp. 35 to 39; and Appendix
6/16,17/67, p. 22

Gilley Report
1/14/66

ORS 115.500
115.510
115.520

Section 15. Notice by successor personal representative. (1) If the personal representative dies, is removed by the court, or resigns after the notice of appointment required by section 11A of this draft has been published but before the time for presenting claims required by the notice has expired, the successor personal representative shall cause notice of his appointment to be published as if he were the original personal representative. The republished notice shall state that the original personal representative died, was removed by the court, or resigned, the date of death, removal or resignation, and the date of appointment of the new personal representative. The period of time between the death, removal or resignation and the date of the first republication of the notice shall be added to the period required for presentation of claims by the original notice of appointment.

(2) No such notice by the successor personal representative shall be required if the period for filing claims expired prior to the death, removal, or resignation of the original personal

representative.

References: Advisory Committee Minutes:
3/18,19/66, pp. 28 to 30
6/16,17/67, pp. 16 and 17

Section 16. Designation of attorney to be filed. If the personal representative has employed an attorney to represent him in the administration of the estate he shall file in the estate proceedings the name and postoffice address of the attorney.

Section 17. Contest of will. When a will has been admitted to probate, any person interested may, at any time within four months after the date of the entry in the court journal of the order of court admitting the will to probate, contest the probate of the will or the validity of the will.

References: Advisory Committee Minutes:
2/18,19/66, pp. 9 and 10

ORS 115.180

Section 18. ORS 93.190 is amended to read:

93.190. (1) Every conveyance, deed of trust, mortgage or devise of an interest in or lien [in or] upon real or personal property to two or more persons as trustees or [executors] personal representatives creates a joint tenancy in such interest or lien in the trustees or [executors] personal representatives unless it is expressly declared in the conveyance, deed of trust, mortgage or devise that the trustees or [executors] personal representatives shall take

or hold the property as tenants in common or otherwise.

(2) If the conveyance, deed of trust, mortgage or devise provides for filling any vacancy in the office of trustee or [executor] personal representative, it may be filled as therein provided excepting that a court of competent jurisdiction may fill a vacancy in the trusteeship according to the established rules and principles of equity. In whichever way the vacancy is filled the new trustee shall hold the property with all powers, rights and duties of an original trustee unless otherwise directed by conveyance, deed of trust, mortgage or devise, or order or decree of the court. [No vacancy in an executorship shall be filled without an order therefor by a county court sitting in probate as in the case of an original appointment of an executor.]

References: Advisory Committee Minutes:
6/16,17/67, p. 24

Section 19. Power of court to control conduct of personal representative. The court has discretionary power to direct and control the conduct of personal representatives and settle their accounts.

[Draftsman's Note: Section 19 is included at this place for information only. It will be incorporated as part of the chapter headed "Jurisdiction and Powers of Probate Courts."]

See ORS 115.490 and 5.040.

Section 20. Repeal of existing statutes. ORS 115.010,

115.020, 115.110, 115.120, 115.130, 115.140, 115.150, 115.160, 115.170, 115.180, 115.190, 115.200, 115.210, 115.220, 115.310, 115.320, 115.330, 115.340, 115.350, 115.410, 115.420, 115.430, 115.440, 115.450, 115.460, 115.470, 115.480, 115.490, 115.500, 115.510, 115.520 and 115.990 are repealed.

Proposed revised Oregon probate code
INITIATION OF PROBATE OR ADMINISTRATION
2nd Draft
July 5, 1967

Prepared by
Stanton W. Allison

COMMENTS

Section 1. Venue. (July 12, 1967)

The present provisions for venue are ORS 115.140 and 115.310. These sections are discussed in 2 Jaureguy & Love, Oregon Probate Law and Practice § 573 (1958). There the authors suggest that these two sections might better be combined in a single section governing the particular county in which the probate court has jurisdiction to probate a will or grant letters of administration. The authors also criticize the language which uses the word "inhabitant" rather than "domicile." The authors point out that domicile is not synonomous with residence, but that inhabitant "has a narrower and more limited significance than domicile." The litigation arising out of interpretations of the present language is described and listed by the authors. The authors also call attention to the various decisions where administration proceedings had been held void through failure to comply with the various provisions of these statutes. They state:

> "It is of course clear that an estate can only be administered in one county. If there be an attempt to administer it in a second county, the proceedings there, unless the letters of administration in the first proceedings were improvidently granted and are revoked, are a nullity." (Citing Slate's Estate, 40 Or. 349; Oh Chow v. Brockway, 21 Or. 440)

In this connection, your committee has considered the proposed Uniform Probate Code (section 323); the 1963 Iowa

Probate Code (section 12); the Model Probate Code, which has been adopted in the proposed Wisconsin Probate Code (section 856.01); and the 1965 Washington Probate Code (section 11.16.050).

The proposed section has been drafted for the purpose of eliminating the criticisms referred to of our present statutes. It has eliminated any different venue for a person not domiciled in the state at time of death and a person domiciled in this state. It has eliminated any difference in treatment between real property, personal property and intangible property. It has eliminated the use of the word "inhabitant." It gives a choice to the petitioner to probate the estate in the county of domicile, in the county where the decedent has his place of abode, in the county where he left assets or in the county in which he died. The section also provides specifically that filing a proceeding in the wrong county does not constitute a jurisdictional defect which would result in the probate proceeding being subsequently held void. In the next section a specific provision is made for the court to transfer the proceedings for the best interest of the estate where two or more proceedings are instituted in different counties or to retain jurisdiction where originally filed. This would eliminate the problem of voiding the proceedings in the second county referred to by the decisions referred to above.

Thus, the general effect of the proposed revision would be to meet the proper convenience of the interested parties in choosing the place of administration and to also give the

court the power to determine the place of administration for the better interest of the estate where a conflict develops by filings in different counties.

Section 2. Proceedings commenced in more than one county. (July 11, 1967)

It was necessary to redraft section 2, headed "Proceedings commenced in more than one county," to embody the changes in the venue section voted by the joint meeting on June 16, 1967. That meeting voted that either for a domiciliary or non-domiciliary proceeding, the petitioner would have the choice of the county of domicile, the county of abode, the county in which assets were located, or the county of death. In view of this it became necessary to give the court where the original petition was filed the discretion to transfer the proceeding to another county which would meet the venue requirement if for the best interest of the estate.

It should be noted that the March 27 draft made clear that a proceeding can only be transferred to another county in which another petition had been filed. I assume it was not desired to give the court arbitrary power to transfer a proceeding to "another county" unless a petition had already been filed in that other county.

I have omitted the last sentence of the proposed March 27th draft. The previous language would give the court the power to transfer the proceeding even though the original petition was "legally commenced." The Model Probate Code states: "Probate

proceedings concerning a particular decedent shall not be maintained in more than one county." This proposition seems inherent in the general language of section 2 as does the proposition that the probate proceeding can be carried on in only one county. It seemed advisable to include in this section language which would give to the probate court of the county to which the proceeding had been transferred the same status and jurisdiction as if the proceeding had been completed in the original jurisdiction. I have therefore adopted the language from ORS 109.345 to accomplish this purpose and supplement subsection (2) of section 1.

The whole venue and transfer section is generally based on the proposed Wisconsin Probate Code (section 856.01(2) and 856.01(3)). Our present code does not contain specific language providing for and regulating the transfer to another county, although, as noted, there are adequate sections dealing with the transfer of causes and the effect thereof. In view of the fact that the court is given discretion to determine the venue on the basis of the best interests of the estate, it seems essential that such a provision be included.

Section 3. Pleading and mode of procedure. (July 25, 1967)

Section 3 is identical with ORS 115.010 with minor editorial changes. The only actual change from the ORS section is that the proposed section 3 provides for a verification by an attorney for a petitioner or by the agent of a corporation.

Section 4. Special administrator. (July 18, 1967)

I found it necessary to redraft the first subsection of this matter. By reference to page 16 of the minutes of February 18, 1966, it will be noted that Judge Dickson stressed the frequent need for a special administrator to handle burial and other details involved when the coroner has the unclaimed body of a decedent. To cover this situation, paragraph (a) was added to the section. However, the present draft in subsection (1) calls for the appointment only in the case of danger of property. It was therefore necessary to provide for appointment either in the case of danger to property of the estate or the necessity of taking care of the body. The other changes are verbal.

This section is a revision of ORS 115.330. The only substantive change in the new section is to provide for appointment of a special administrator when it is necessary to handle the burial of unclaimed bodies in the possession of the coroner and necessary other details in connection with the disposal of the body. Judge Dickson explained to the committees the very real problem involved when the coroner was holding unclaimed bodies. The only other substantive change from the present statute is the inclusion of provisions for accounting by the special administrator and for payment of the expenses he has incurred, and his compensation and attorney's fee.

Section 5. Contents of petition for appointment of personal representative. (July 18, 1967)

This section replaces ORS 115.020 and 115.120 of the present code. It will be noticed that the present law is changed materially in that the proposed section provides that any person may file a petition for the appointment of a personal representative. ORS 115.120 now provides that "Any executor, devisee, or legatee named in any will, or any other person interested in the estate" may petition. In regard to intestate estates, ORS 115.320 provides rather complicated provisions specifying the time in which preferred classes of persons may petition for administration of the estate. Although as will be noted the next section preserves the preference rights, it was the unanimous decision of the two committees that the general provision providing that any person may file the petition would eliminate many of the problems involved in the present statute. For reference, Model Probate Code (section 64), provides that the petition may be filed by any interested person. The 1965 Washington Probate Code (section 11.28.110) does not specify who should petition for the appointment. Your committee has agreed that the term "interested person" obviously raises the question as to who might be an interested person. Your committees considered that any person who paid the fees and filed a petition complying with this section would of necessity be an interested person.

The proposed section is more specific than ORS 115.020. Certain additional facts are required in the petition by subsection (1) and (6). The practical utility of this additional information to the court is obvious.

Section 6. Testimony of attesting witnesses to will. (July 12, 1967)

Section 6 is a revision of ORS 115.170. Except as hereinafter noted, the language of this section is identical to the present ORS section, with minor editorial changes. However, the last sentence of subsection (1) is new. This points out that the affidavit of the attesting witness may be made at the time of execution of the will or any time thereafter. The present ORS section does not specify when the affidavit should be made. Since obviously the knowledge and memory of the attesting witness is fresher at the time of the execution of the will, it seems helpful that this matter be brought to attention.

Subsection (3) is also new. In the opinion of the two committees it seemed unwise, in an ex parte proceeding particularly, to allow a will to fail because the evidence of attesting witnesses is not available. It seemed essential that means be provided, where in fact the instrument is admitted to be the last will and testament of the deceased, that it not be denied probate through a purely technical failute of proof by reason of the death or unavailability of the attesting witnesses.

Section 7. Preference in appointing personal representative. (July 18, 1967)

The above simple provision would replace ORS sections

115.190 and 115.310. Your committee felt that the first requirement in appointment must be that no unqualified persons be appointed and that no unsuitable persons be appointed. An examination of the present replaced sections will indicate that the right of the court to use its discretion in all cases is not clearly indicated or provided by the present statute. However, subject to this proper and essential discretion in the court, the preference provisions of the present statute are generally preserved. One essential element, however, has been added. Note that specific provision is made for a surviving spouse to nominate another person to be appointed and the next of kin is given the same right of nomination. The obvious situation will occur in an intestate situation of substantial assets where the widow does not wish to serve as administrator. In this case, she could nominate another person or a bank to be appointed in her place. Your committees believe that this provision will provide a flexibility which is not present in our present statute.

With reference to subsection (2) of ORS 115.190, this provision as well as subsection (2) of ORS 115.500 is now covered by ORS 709.330 with particular reference to subsection (4) of that section.

Section 8. Persons not qualified to act. (July 18, 1967)

This section would rewrite and replace ORS 115.410. The only substantive changes from the present statute are found in subsections (5) and (6). Subsection (5) is required by

the present Rules on Disciplinary Proceedings of the Oregon State Bar which permit a resignation when disciplinary proceedings are pending. It is felt the circumstances giving rise to the last provision of the present statute, subsection (4) of the rewritten section, would apply where an attorney had resigned from the bar "under fire" until he had been reinstated. The other substantive change is the exception to the nonresident rule which would permit a nonresident executor named in a will to serve if he appoints a resident agent in the same manner as provided for nonresident corporations under the general law. A typical case would be where a testator had nominated a Vancouver, Washington, resident as executor where extensive property might have been located in both Washington and Oregon. Another situation would be where a Portland resident had a close relative nominated by the will who was living in Washington. It was felt that this provision would in many cases carry out the obvious wishes of the testator and might provide much more efficient administration of the testate estate.

The present statute disqualifies "judicial officers, other that Justices of the Peace." The proposed language is predicated on the assumption that probate jurisdiction will be removed from the county court and vested in the circuit court. The proposed language would exclude municipal judges

who obviously would never have conflict of interests since they are not involved in probate proceedings. The proposed section, in the opinion of your committees, would disqualify only those judicial officers who are given jurisdiction in probate matters.

Section 9. Necessity and amount of bond; bond notwithstanding will. (July 12, 1967)

This section replaces and changes materially ORS 115.430. The principal change is that the revised section entirely eliminates any provision for the personal surety, and requires a surety company bond in all cases except where the bond requirement has been waived by the will. It also provides that in all cases the bond be not less than $1,000. Your committees agree that the protection afforded in a defalcation situation by a bond with personal sureties is completely illusory. In view of the nominal cost of a surety bond of $1,000, it was felt that actual practical protection should be afforded innocent heirs at law and families of the deceased by a required surety bond. The expense in the cases where larger estates are involved can always be avoided by provisions of the will.

The section also indicates some practical guidelines for the court in setting the amount of the bond and within these guidelines gives the court a great deal more discretion in fixing of the necessary amount of the bond than is provided by the present ORS 115.430.

Section 10. Increasing, decreasing or requiring new bond. (July 12, 1967)

Section 10 replaces the present provisions of subsection (4) of ORS 115.430, and ORS 115.450 and ORS 115.460. Rather than incorporate the somewhat complicated language of these sections, ORS 33.510 and 33.520, covering the general subject of discharge of surety, are incorporated by reference. It is considered sensible that the procedure in these ORS sections be applied to the release of surety in the probate code.

Section 11. Letters testamentary or of administration. (July 14, 1967)

Section 11, covering issuance and form of letters of administration and letters testamentary will replace ORS 115.190, 115.210, and 115.350. The language in the suggested forms of letters has been somewhat simplified from the present ORS suggested forms.

Section 12. Notice to State Land Board. (July 14, 1967)

Section 12 replaces and changes subsection (2) of ORS 115.310. The change from the present statute is that, whereas ORS 115.310 provides that no order appointing a personal representative can be granted by the court until there has been filed proof of service of the possible escheat upon the State Land Board. The proposed section provides for notice by the personal representative. It should be noted that in

the usual estate proceeding in common form provided in these sections, no notice is given to heirs, devisees, and legatees prior to the appointment of the personal representative. 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 we had living heirs. Your committee felt that there was every advantage in having a personal representative appointed who could be placed upon the duty of giving due notification to the State Land Board and with whom the State Land Board would be able to communicate and check upon. The change in this section therefore would make it obligatory upon the personal representative to notify the State Land Board by mail by sending them a copy of the petition as now required and also for the information of the State Land Board to send them a copy of the notice to creditors.

I have found it necessary to redraft Section 12. It was voted at the June meeting to eliminate the first part of the former Section 14, providing for copies of the published notice to be mailed to the heirs, devisees, and legatees. I found it necessary to redraft the provision for service on the State Land Board for the following reasons. In 1 Jaureguy and Love, Oregon Probate Law and Practice § 201 two problems are noted which I do not think were covered by the present language of the first draft. The authors call attention to

to the fact that there is an important qualification to the death of an intestate with no known heirs, namely that what is meant is heirs competent to take, and if the heir is disqualified by alienage or because he was guilty of murder of the decedent, the property would still escheat. The authors also call attention to the fact that total intestacy is not a prerequisite because escheat can take place in the case of partial intestacy. I also was concerned about the broad language "there are no known heirs of the decedent." I felt it very important that the jurisdiction of the State Land Board should attach as it now spelled out in ORS 115.310 upon the filing of the petition and based upon the allegations of the petition. If felt it important therefore that the present jurisdictional arrangement be preserved and that the service on the State Land Board should be contingent on the allegations of the petition and not as to whether or not there were in actuality any known heirs. (For example, unknown to whom or by whom). The same criticism would apply to the requirement that a statement be made that "There are no known heirs of the decedent." I also think the State Land Board would be better advised if it was in possession of the copy of the petition for appointment of the representative and I have therefore adopted the present requirement of sending a copy of the petition.

Section 13. Appointment of successor personal representative. (July 14, 1967)

I have redrafted former subsection (4) of former section 14 to make it a separate section. The former draft contained some awkward language which did not make clear the right of the court to act upon its own motion. I decided it would be better to redraft this section from the Wisconsin Code (section 857.15) which is itself based upon the Model Probate Code (section 98). The Wisconsin Probate Code seems to cover the material in a clean draft.

This section would replace ORS 115.470 and ORS 115.480. The Wisconsin Probate Code covers both situations, first where the personal representative ceases to be qualified as provided in section 8 or becomes incapable of discharging his duties when the court has the affirmative duty to remove him, and the second situation where there has been neglect of duty or a breach of trust where the court requires a hearing upon either its own motion or upon petition filed with the court. However, upon petition filed with the court, it does not need to cite the personal representative to appear and show cause, unless the court feels that grounds of a removal appear to exist. The other language in the two ORS sections replaced is taken care of by the language in the proposed section: "When a personal representative ceases to be qualified" with a reference to the previous section.

Section 14. Issuance of letters of administration.

(July 14, 1967)

Section 14, subsections (1) and (4) have been drafted from the Wisconsin Probate Code (section 857.21 and section 857.23) which in turn are based upon the Model Probate Code (sections 98, 99 and 100). Subsections (2) and (3) of section 14 are verbatim copies of ORS 115.200 and 115.340.

Section 15. Notice by successor personal representative. (July 14, 1967)

Section 15 is a new section which spells out when a successor personal representative has to publish a new notice to creditors. The present code contains no guidelines for the procedure by a successor personal representative and there has been a great deal of uncertainty as to whether the new administrator or administrator with the will annexed is required to republish a notice to creditors and whether the time under the original publication is extended in such case. The proposed section 15 makes clear first that if the successor personal representative is appointed during the four month period permitted to creditors to file their claims, he must republish the notice, together with information which would advise the creditors not only the name of the new personal representative, but the information about the circumstances requiring the appointment of the replacement. In such case, the period for filing claims is extended to cover the period between the death, resignation, or removal of the previous executor or administrator and the first

republication of the notice by the replacement. The section further spells out that after the four month period for presentation of claims under the original notice has expired, a replaced personal representative appointed after such time does not have to republish notice to creditors. This general provision is taken from the Washington Probate Code (section 11.40.010)

Section 16. Designation of attorney to be filed. (July 14, 1967)

Section 16 is a new section which requires the personal representative to file in the estate proceedings the name and address of the attorney for the estate. This section seems useful not only for the information of the clerk and the probate judge, but is necessary information for a third party suit may have to deal with the estate and the personal representative. The section is taken from the 1963 Iowa Probate Code, (section 82), and the Bar Committee comment under this section reads as follows:

> "New. In other provisions of the Code, notices may be served upon the attorney for the fiduciary in certain circumstances. This section is necessary in order to facilitate the use of such provisions."

Section 17. Contest of will. (July 14, 1967)

Section 17, "Contest of Will," is the same as ORS 115.180, except that the time for the will contest has been shortened from six months to four months to comply with the shortening of the period of the notice to creditors from 6 months to 4 months.

Section 19. Power of court to control conduct of personal representative; duty of court to supervise. (July 14, 1967)

At the July meeting I was directed to check the cases appearing in the ORS annotations under the last sentence of ORS 115.490. A check of these sections would indicate that the following language which follows closely the present provisions of ORS 5.040 would be more consistent with the reported cases: "The court has discretionary power to direct and control the conduct of personal representatives and settle their accounts." I think that this section properly should belong in the chapter under Powers of Court in Probate, draft #2 in the present book. The cases to which I was referred seemed to interpret ORS 115.490 as granting to the court a discretionary power rather than pinning a duty of supervision on the court.

Proposed revised Oregon probate code
INITIATION OF PROBATE OR ADMINISTRATION
2nd Draft
July 5, 1967

Prepared by
Stanton W. Allison

COMPARATIVE SECTION TABLE

Draft Sections	ORS Sections
1	115.140, 115.310
2	115.140, 126.116
3	115.010
4	115.330
5	115.020, 115.120
6	115.170
7	115.190, 115.310, 115.320
8	115.410, 115,420
9	115.430, 115.440
10	115.450, 115.460
11	115.190, 115.210, 115.350
11A	116.505
12	115.310
13	115.470, 115.480, 115.490
14	115.200, 115.340, 115.500 115.510, 115.520
15	
16	
17	115.180
18	93.190
19	5.040, 115.490
20	Repealer

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
INITIATION OF PROBATE OR ADMINISTRATION
1st Draft
March 27, 1967

INITIATION OF PROBATE OR ADMINISTRATION

Section 1. Venue. The venue for the appointment of a personal representative shall be:

(1) In the county of domicile of the decedent or other place of abode if the decedent was domiciled in this state; or

(2) In the county where decedent died or where any of his assets are situated if decedent was not domiciled in this state.

References: Advisory Committee Minutes
1/14,15/66 pp. 25 to 27; and Appendix

ORS 115.140
126.116

Section 2. Proceedings commenced in more than one county. If proceedings for the appointment of a personal representative for the same estate are commenced in more than one county, they shall be stayed except in the county where first commenced until final determination of venue in the county where first commenced. If the proper venue is finally determined to be in another county, the court shall cause a transcript of the proceedings and all original papers filed therein, all certified by the clerk of the court, to be sent

to the clerk of the court of the proper county. A proceeding is considered commenced by the filing of a petition. The proceeding first legally commenced for the appointment of a personal representative of an estate extends to all the property of the estate in this state.

References: Advisory Committee Minutes
1/14,15/66 pp. 25 to 27; and Appendix

ORS 115.140
126.116

Section 3. Pleadings and mode of procedure. No particular pleadings or forms thereof are required in the exercise of jurisdiction of probate courts. The mode of procedure in the exercise of jurisdiction is in the nature of a suit in equity except as otherwise provided by statute. The proceedings shall be in writing and upon the petition of a party in interest or the order of the court. All petitions, reports and accounts shall be verified by at least one of the persons making them or his agent or attorney.

The court exercises its powers by means of:

(1) A citation to a party.

(2) A verified petition of a party in interest.

(3) A subpena to a witness.

(4) Orders and decrees.

(5) An execution or warrant to enforce its orders and decrees.

References: Advisory Committee Minutes
1/14,15/66 pp. 18 and 19; and Appendix

ORS 115.010

Section 4. Appointment of special administrator. (1) If any property of a decedent is in danger of being lost, injured or deteriorating before the appointment and qualification of a personal representative of the estate of the decedent, the court may appoint a special administrator to take charge of that property. The petition for appointment shall specify the property, so far as known, subject to danger and the danger to which it is subject. The personal representative shall qualify by filing bond in the amount ordered by the court, conditioned upon the faithful performance of his trust. The special administrator may:

(a) Incur expenses for the funeral, burial, or other disposition of the remains of decedent in a manner suitable to the condition of life of the decedent.

(b) Incur expenses for the protection of any property of the estate of the decedent against danger of loss or injury.

(c) Sell any perishable property of the estate of the decedent, whether or not listed in the petition, to prevent loss, injury or deterioration.

(2) A special administrator shall not approve or reject claims of creditors or pay claims or expenses of administration or take possession of assets of the estate of the decedent other than those which are in danger of being lost, injured or deteriorated pending the appointment and qualification of a personal representative.

(3) Upon the appointment and qualification of a personal representative of the decedent the powers of the special administrator shall cease and he shall make and file his account and deliver to the personal representative assets of the estate in his possession. If the personal representative objects to the final account of the special administrator, the court shall hear the objections, and whether or not objections are made, the court shall examine the final account. To the extent approved by the court, the reasonable fees of the special administrator and all expenses properly incurred by him, including reasonable fees of his attorneys, shall be paid to the special administrator as expenses of his administration.

References: Advisory Committee Minutes
1/14,15/66 Appendix
2/18/66 pp. 19 to 22
3/18,19/66 pp. 18 to 20; and Appendix

ORS 115.330

Section 5. Petition for appointment of personal representative. Any person may file a petition for the appointment of a personal representative. The petition shall include, so far as known, [by petitioner,] the following information:

(1) The name, age, domicile, post-office address, date of death, place of death, and wage earner Social Security number or Treasurer's identification number of decedent.

(2) The name, residence and post-office address of the petitioner, and that the petitioner is qualified to serve.

(3) The facts relied upon to [give the court jurisdiction and] establish venue.

Comment: Are bracketed portions necessary?

(4) The facts relied upon to give the petitioner the right to petition.

(5) The names, relationships to decedent, ages, residence and post-office address of decedent's heirs, devisees and legatees.

(6) The estimated value of the property belonging to the decedent and any other information that would be of assistance to the court in fixing the amount of the bond of the personal representative.

References: Advisory Committee Minutes
1/14,15/66 pp. 19 to 21; and Appendix

ORS 115.020
115.470

Section 6. Qualification of personal representative.

Any qualified person whom the court finds suitable may serve as personal representative. A person is not qualified to serve as personal representative who is:

(1) An incompetent.

(2) A minor.

(3) A person who has been convicted of a felony.

(4) A person suspended for misconduct or disbarred from the practice of law, during the period of suspension or disbarment.

(5) A person who has resigned from the Oregon State Bar when charges of professional misconduct are under investigation or when disciplinary proceedings are pending against him, until he is reinstated.

(6) A nonresident of this state who has not appointed a resident agent to accept service of summons and process in all actions, suits and proceedings with respect to the estate and has caused the appointment to be filed in the probate proceedings.

References: Advisory Committee Minutes
1/14,15/66 Appendix
2/18,19/66 pp. 28 and 29
3/18,19/66 pp. 31 to 33; and Appendix

ORS 115.410
115.420

Section 7. Preference in appointing personal representative. In appointing a personal representative the court shall give preference as follows:

(1) The person named in the will.

(2) The surviving spouse of decedent.

(3) The nearest of kin.

(4) The nominee of the nearest of kin.

References: Advisory Committee Minutes 1/14,15/66 pp. 21 to 24; and Appendix

ORS 115.190
115.310

Section 8. Testimony of attesting witnesses to will. (1) Upon the hearing of a petition for the appointment of a personal representative if the hearing is ex-parte, before contest is filed, and involves the proof of a will, an affidavit of an attesting witness may be used instead of the personal presence of the witness in court. The witness may give evidence of the execution of the will by attaching to his affidavit a photographic or photostatic copy of the will, and may identify the signature of the testator and witnesses to the will by use of the copy. The affidavit shall be received in evidence by the court and have the same weight as to matters contained in the affidavit as if the testimony were given by the witness in open court. The affidavit of the attesting witness may be made at the time of execution of the will or any time thereafter.

(2) However, upon motion of any person interested in the estate, filed within 30 days after the order admitting the will to probate is made [, or in the discretion of the court within that time,] the court may require that the witness making the affidavit be brought before the court.

[for further examination.] If the witness is outside the reach of a subpena, the court may order that the deposition of the witness may be taken in the manner provided by ORS chapter 45. [for the taking of a deposition.] [and upon notice to the proponent or his attorney.]

Comment: Are bracketed portions necessary?

(3) In the event of contest of the will or a petition that the probate be conducted in solemn form, proof of any facts shall not be made by affidavit and proof shall be made in the same manner as facts in a suit in equity.

(4) If the evidence of none of the attesting witnesses is available, by affidavit, deposition or testimony, the court may allow proof of the will by testimony or other evidence that the signatures of the testator and at least one of the witnesses are genuine.

References: Advisory Committee Minutes
1/14,15/66 Appendix
2/18,19/66 p. 9

ORS 115.170

Section 9. Hearing when no will. If there is no will the court shall hold a hearing on the petition of the personal representative and appoint a qualified person to act in that capacity.

Comment: Added by Legislative Counsel.

Section 10. Necessity and amount of bond; bond notwithstanding will. The personal representative shall not act in

that capacity until he files with the clerk of court a bond executed by a surety company authorized to transact surety business in the State of Oregon. [and approved by the endorsement thereon of the Judge.] The bond shall be in favor of all interested parties and conditioned upon the personal representative faithfully performing the duties of his trust. The court shall have the discretion of setting the amount of the bond notwithstanding any provision in a will that no bond be required. The bond shall be in an amount adequate to protect interested parties. In no event shall the amount of the bond be set at less than $1,000. In setting the amount of the bond the court shall take into consideration:

(1) The size of the estate.

(2) The anticipated income during administration.

(3) The character and liquidity of the assets.

(4) The probable indebtedness and taxes.

References: Advisory Committee Minutes
2/18,19/66 pp. 29 to 33; and Appendix
3/18,19/66 pp. 33 to 35; and Appendix

ORS 115.430

Section 11. Increasing, decreasing or requiring new bond. The court may increase, reduce the amount of bond, or require new bond, if it appears to the court that the bond was inadequate or excessive or new bond is necessary. When a new bond has been [approved and] filed the court may order the surety on the former bond be discharged from any future acts or

omissions by the personal representative. *

References: Advisory Committee Minutes
2/18.19/66 pp. 29 to 35; and Appendix
3/18.19/66 pp. 33 to 35; and Appendix

ORS 115.430
115.440
115.450
115.460

* (Confer ORS 33.510, 33.520)

Section 12. Letters testamentary or of administration.

(1) When a will is proved letters testamentary shall be issued to the persons therein named or to those of them that give notice of their acceptance of the trust and are otherwise qualified. If the persons named in the will are disqualified or decline to accept their trust, or in the event there is no will, letters of administration shall be issued to the person or persons qualified.

(2) When a bank or trust company is named in a will as personal representative, or is the petitioner for letters of administration, and the company has converted, consolidated with another bank or has sold its trust and fiduciary business or department to another bank or trust company, pursuant to law, letters may be issued to the converted, consolidated or purchasing company if otherwise qualified.

References: Advisory Committee Minutes
3/18,19/66 pp. 34,35,39 and 40

Section 12a. Forms of letters of testamentary and of administration. Letters testamentary and letters of administration may be issued to the personal representative in the following form:

"LETTERS TESTAMENTARY"

No._____

"THIS CERTIFIES that the will of_____deceased, has been proved and _____has (have) been appointed and is (are) at the date hereof the duly appointed, qualified and acting _____
(Executor (s) or Administrator (s) with The Will Annexed)
of the will and estate of said decedent.

"IN WITNESS WHEREOF, I, as Clerk of the _____Court of the State of Oregon for the County of_____, in which proceedings for administration upon said estate are pending, do hereto subscribe my name and affix the seal of the said court this____day of_____, 19___.

_____Clerk of the Court

By_____
Deputy"

(Seal)

References: Advisory Committee Minutes
4/15,16/66 p. 7

ORS 115.210

"LETTERS OF ADMINISTRATION"

No._____

"THIS CERTIFIES that _____has (have) been appointed and is (are) the duly appointed, qualified and acting administrator (s) of the estate of_____, deceased, and that no will of said decedent has been proved in this court.

"IN WITNESS WHEREOF, I, as Clerk of the _____Court of the State of Oregon for the County of_____, in which proceedings for administration upon said estate are pending, do hereto subscribe my name and affix the seal of the said court this____day of_____, 19___.

_____Clerk of the Court

(Seal)

By_____
Deputy"

References: Advisory Committee Minutes
1/14,15/66 Appendix
2/18,19/66 pp. 10 to 12
4/15,16/66 pp. 7 and 8

ORS 115.210

Section 13. 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 probate proceeding is pending; or

(b) If no newspaper is published in the county where the probate proceeding is pending, in a newspaper designated by the court.

(2) The notice as provided in subsection (1) of this section shall include:

(a) The name of the decedent.

(b) The names and post-office address of the personal representative and his attorneys, if any.

(c) Whether a will of the decedent has been admitted to probate.

(d) A statement requiring all persons having claims against the estate of the decedent to present their verified claims to the personal representative at the address stated in the notice within four months from the date of first publication of notice.

(e) 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.

References: Advisory Committee Minutes
1/14,15/66 Appendix
3/18,19/66 pp. 20 to 30; and Appendix

ORS 116.505

Section 14. Notice to heirs, devisees and legatees.

(1) A personal representative shall cause a copy of the published notice provided for in section ____ to be mailed to each known heir of the decedent at his last known address, if the decedent died intestate. If the decedent died testate the personal representative shall cause a copy of the published notice provided for in section ____ to be mailed to the spouse and lineal heirs of the testator who are not provided for by the will and to each devisee and legatee named therein at their last known address. If the personal representative is an heir, devisee or legatee, no mailing to him is required. If the personal representative is not able to ascertain the address of any of the parties to whom notice is to be given, the mailing of notice to those parties is excused.

(2) If the decedent died intestate and there are no known heirs of the decedent, the personal representative shall cause a copy of the published notice provided for in section ____ and a statement that there are no known heirs of the decedent to be mailed to the clerk of the State Land Board.

References: Advisory Committee Minutes
1/14,15/66 Appendix
3/18,19/66 pp. 21 to 28

ORS 115.220

(4) Any person interested in the estate may file a petition for the removal of the personal representative on the grounds that he has become disqualified for appointment

or has been unfaithful to or neglectful of his trust. Upon the petition being filed the court shall issue an order directing the personal representative to appear and show cause why he should not be removed as personal representative. A copy of the petition and order to show cause shall be served upon the personal representative and his surety, or, if the personal representative after due diligence cannot be found within the state, service may be made on the attorney and surety of the personal representative. Upon the hearing the court may order removal of the personal representative and revocation of his letters.

References: Advisory Committee Minutes
1/14,15/66 Appendix
2/18,19/66 pp. 12 to 16
3/18,19/66 pp. 35 to 37

ORS 115.470
115.480

Section 15. Appointment of successor personal representative. (1) When a personal representative ceases to qualify, dies, is removed by the court, or resigns and the resignation is accepted by the court, the court shall appoint a new personal representative.

(2) When one or more joint personal representatives ceases to qualify, dies, is removed by the court, or resigns and the resignation is accepted by the court, the remaining

personal representative or representatives shall continue to administer the estate.

(3) Every power exercisable by a former personal representative shall be exercisable by a new personal representative appointed as provided in subsection (1) of this section or by the remaining personal representative or representatives of joint personal representatives referred to in subsection (2) of this section. However, when the terms of a will clearly indicate that powers given by the will are to be the personal powers of a particular person or persons, those powers shall not be exercised by anyone but that person or persons.

References: Advisory Committee Minutes
3/18,19/66 pp. 35 to 39; and Appendix

ORS 115.500 115.520
115.510

Section 16. Notice by new personal representative. When a new personal representative is appointed as provided in ORS_____, and the original personal representative gave the notice required by ORS_____, and the time for filing claims has expired, the new personal representative does not have to give notice as required by ORS_____. However, if notice was not given or the time had not expired for filing claims, the new personal representative shall give notice as if he was the original personal representative as provided by ORS_____. In addition the notice shall provide that the original personal representative ceased to qualify, died, was

removed by the court or resigned, the date of death, removal or resignation and the date of appointment of the new personal representative. Proof of notice shall be made as provided in ORS_____.

References: Advisory Committee Minutes
3/18,19/66 pp. 28 to 30

Section 17. Proceedings when will found after administration granted. If, after administration has been granted upon an estate, a will of the deceased is found and proven, the letters of administration shall be revoked and letters testamentary issued.

References: Advisory Committee Minutes
1/14,15/66 Appendix
2/18,19/66 page 17

ORS 115.340

Section 18. Designation of attorney to be filed. The designation of the attorney or attorneys employed by the personal representative, if any, to assist him in the administration of the estate, shall be filed in the probate proceedings and shall include the name and post-office address of the attorney or attorneys.

Section 19. Duty of court to supervise. It is the duty of the court to exercise supervisory control over a personal representative to insure that he faithfully and diligently performs the duties of his trust.

ORS 115.490

Section 20. Contest of will. When a will has been admitted to probate, any person interested may, at any time within six months after the date of the entry in the court journal of the order of court admitting the will to probate, contest probate or the validity of the will.

References: Advisory Committee Minutes
1/14,15/66 Appendix
2/18,19/66 pp. 9 and 10

ORS 115.180

Section 21. ORS 93.190 is amended to read:

93.190. (1) Every conveyance, deed of trust, mortgage or devise of an interest or lien in or upon real or personal property to two or more persons as trustees or [executors] personal representatives creates a joint tenancy in such interest or lien in the trustees or [executors] personal representatives unless it is expressly declared in the conveyance, deed of trust, mortgage or devise that the trustees or [executors] personal representatives shall take or hold the property as tenants in common or otherwise.

(2) If the conveyance, deed of trust, mortgage or devise provides for filling any vacancy in the office of trustee or [executor] personal representative, it may be filled as therein provided excepting that a court of competent jurisdiction may fill a vacancy in the trusteeship

according to the established rules and principles of equity. In whichever way the vacancy is filled the new trustee shall hold the property with all powers, rights and duties of an original trustee unless otherwise directed by conveyance, deed of trust, mortgage or devise, or order or decree of the court. [No vacancy in an executorship shall be filled without an order therefor by a county court sitting in probate as in the case of an original appointment of an executor.]

Section 22. Repeal of existing statutes. ORS 115.010, 115.110, 115.120, 115.130, 115.140, 115.150, 115.160, 115.170, 115.180, 115.190, 115.200, 115.210, 115.220, 115.310, 115.320, 115.330, 115.340, 115.350, 115.410, 115.420, 115.430, 115.440, 115.450, 115.460, 115.470, 115.480, 115.490, 115.500, 115.510, 115.520 and 115.990 are repealed.

Proposed revised Oregon probate code
INTESTATE SUCCESSION
Amended 3rd Draft
March 15, 1968

Prepared by
Stanton W. Allison

Section 1. 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. Share of surviving spouse if decedent leaves issue. If the decedent leaves a surviving spouse and issue, the surviving spouse shall have a one-half interest in the net intestate estate.

Section 3. Share of surviving spouse when decedent leaves no issue. If the decedent leaves a surviving spouse and no issue, the surviving spouse shall have all of the net intestate estate.

Section 4. 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 the surviving parents of the decedent.

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 present 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.

Section 1. Net intestate estate. Section 1 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.

Section 2. Share of surviving spouse if decedent leaves issue. This section increases the amount passing to the widow or widower where there is surviving issue in that it gives the

spouse one-half the real property in fee in lieu of the present dower or curtesy interest, as well as one-half the personal property as now provided. 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.

Section 3. Share of surviving spouse when decedent leaves no issue. Section 3 preserves existing Oregon statutory law regarding the share of the surviving spouse when decedent leaves no issue. See ORS 111.020(2) and 111.030(4).

Section 4. Share of others than surviving spouse. This section is taken from Section 2-103 of the 1967 Uniform Probate Code, except as to subsection (5). It involves changes in Oregon law which modernize it to be more consonant with current thoughton the distributional schemes most likely to approximate the wishes of the average intestate. Section 5 describes the

Proposed revised Oregon probate code
INTESTATE SUCCESSION
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COMPARATIVE SECTION TABLE

Draft Sections	ORS Sections
1	111.020, 111.030
2	111.020, 111.030
3	111.020, 111.030
4	111.020, 111.030
5	111.010(4)
6	111.010(5)
7	111.020(5)
8	111.040
9	111.231
10	111.020(4)

Proposed revised Oregon probate code
INTESTATE SUCCESSION
3rd Draft
December 1, 1967

Prepared by

Stanton Allison

INTESTATE SUCCESSION

Section 1. Definitions and rules of construction. (Temporary Placement Only) As used in this code, unless otherwise required by context, the following words and phrases shall be construed as follows:

(1) Obligations - include liabilities of the decedent which survive, whether arising in contract, in tort or otherwise, funeral expenses, the expense of a monument, expenses of administration and all estate and inheritance taxes.

(2) Estate - the real and personal property of a decedent, as from time to time changed in form by sale, reinvestment or otherwise and augmented by an accretions or additions thereto and substitutions therefor or diminished by any decreases and distribution therefrom.

(3) Issue - when used to refer to persons who take by intestate succession, includes all lineal descendants, except those who are the lineal descendants of living lineal descendants of the intestate.

(4) Net estate - 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.

(5) Personal property - includes all property other than real property.

(6) Personal representative - includes executor, administrator and special administrator.

(7) Property - includes both real and personal property.

(8) Real property - includes all legal and equitable interests in land in fee and for life.

Section 2. 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 3. Share of surviving spouse if decedent leaves issue. If the decedent leaves a surviving spouse and issue, the surviving spouse shall have a one-half interest in the net intestate estate.

Section 4. Share of surviving spouse when decedent leaves no issue. If the decedent leaves a surviving spouse and no issue, the surviving spouse shall have all of the net intestate estate.

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 the surviving parents of the decedent.

(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.

(6) If no person takes under the preceding subsections, the net intestate estate shall escheat to the State of Oregon.

Section 6. Representation defined. Representation means the method of determining distribution when the distributees are in unequal degrees of kinship to the decedent. It is accomplished as follows: 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 7. Time of determining relationships: After-born heirs: The relationships existing at the time of the death of the decedent govern the inheritance of his net intestate estate, but persons conceived before his death and born alive thereafter inherit as though they were alive at the time of his death.

Section 8. Requirement that heir survive decedent for five days. 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.

Section 9. Persons of the half-blood. Persons of the half-blood inherit the same share that they would inherit if they were of the whole blood.

Section 10. Illegitimate children. 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 109.070; or

(b) The father has acknowledged himself to be the father in writing signed by him.

Section 11. 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 12. Repeal of existing statutes. ORS 111.010, 111.020, 111.030, 111.040 and 111.231 are repealed.

Proposed revised Oregon probate code
INTESTATE SUCCESSION
3rd Draft
December 1, 1967

Prepared by

Stanton Allison

COMMENTS

Summary of Chapter.

This chapter is a major revision of the existing Oregon law of intestate succession. In the drafting of these proposals, the committees were 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; 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.

This chapter is designed primarily for the small estate with normal family relationships; persons in the middle and uppper 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 wills and 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 the varying desires, facts and circumstances which surround testamentary dispositions. 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. 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 present 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.

Section 1. Definitions and rules of construction. 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.

Section 2. Net intestate 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. The definition is that used in the 1967 draft Uniform Probate Code Section 2-101.

Section 3. Share of surviving spouse if decedent leaves issue. This section increases the amount passing to the widow where there is surviving issue in that it gives the spouse one-half the real property as well as one-half the personal property as now provided. 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.

Section 4. Share of surviving spouse when decedent leaves no issue. 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).

Section 5. Share of others than surviving spouse. This section is taken from Section 2-103 of the 1967 Uniform Code, except as to subsection (5). It involves 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. Under existing Oregon law the rights of lineal descendants, where decedent leaves a spouse, are subject to a right of dower and curtesy with respect to the real property, and in cases of intestacy to inheritance of one-half of 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 interest of the surviving spouse in the net estate.

Subsection (2) preserves existing Oregon law; see ORS 111.020(2) and 111.030(3).

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 providing succession to 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). Bones v. Lollis, 192 Or 376, 234 P2d 788; Andrews v. First Nat. Bank of Eugene, 192 Or 230, 234 P2d 791; and Op. Atty. Gen. 1934-36, 602, 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) represents a change from present law. Under existing Oregon Law (ORS 111.020(5), if a decedent is not survived by spouse, lineal descendants, parent, brother or sister, the property descends to the next of kin in equal degree who would be the surviving grandparents. Under subsection (4) the grandparents would take only if there were no surviving brothers or sisters or surviving issue of deceased brothers and sisters. Furthermore, unlike the existing law, not only the surviving grandparents, but also the issue of deceased grandparents would take. Thus descent is provided to both paternal and maternal grandparents and to their issue if they are deceased.

This subsection limits inheritance to relatives claiming through the intestate's grandparents and thus excludes more

remote relatives claiming through great-grandparents.

In recent years there has been a trend toward limiting inheritance by remote relatives under the intestacy laws. New York, by chapter 712, effective September 1, 1963, has adopted new rules of descent and distribution which eliminate collaterals in lines more remote than that of the grandparent. Also see the 1967 Probate Code of Wisconsin, section 852.01(2). 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. Few people can 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 naming those he wishes to favor.

(b) Conversely the remote relative has no claim on a decedent's property. He is not likely to have rendered 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, since 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 though they have no possible moral claim to a share in the estate. A statute limiting inheritance by remote relatives thus may reduce 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. The decedent can prevent an escheat by making a will leaving the property as he pleases to remote relatives, to friends or to charity.

(f) Two other archaic doctrines are eliminated by the present provision. First, such remnants 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 of 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 (5) provides that where a married couple inherits as parents or grandparents they take the real property by the entireties and the personal property jointly with rights of survivorship. This accords with the present rule that devises of real property to a husband and wife create them tenants by the entirety. (See C.J.S. Wills, Section 908). Your committee believes this accords with the usual desire of married couples that they take and hold property jointly.

Section 6. Representation defined. This section defines "representation" in more detail than ORS 111.010(4) and is consistent with present Oregon law. See I Jaureguy and Love, Oregon Probate Law and 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 the 1967 draft Uniform Probate Code, section 2-106 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 of representation may differ depending upon the stirpital level chosen as the root generation, it is desirable to specify the level in the definition.

Section 7. Time of determining relations: After born heirs: Section 7 is consistent with the rule of construction in existing Oregon law laid down by section 111.010(5).

Section 8. Requirement that heir survive decedent for five days. This section is taken from the 1967 draft Uniform Probate Code, section 2-104. For a similar provision, see the 1967 Wisconsin Probate Code, Section 852.01(2).

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;.... 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."

Section 9. Persons of the half-blood. Section 9 is consistent with present Oregon law in ORS 111.040.

Section 10. Illegitimate children. 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.

Section 11. Persons related to decedent through two lines. This is section 2-112 of the 1967 draft Uniform Probate Code. For example, under the provision for inheritance by issue of the grandparents on both the maternal and paternal sides, marriage of cousins might otherwise entitle their issue to inherit from both sets of grandparents. In any event only one intestate share should be permitted to be inherited.

Proposed revised Oregon probate code
INTESTATE SUCCESSION
3rd Draft
ADDENDUM to Comments
March 29, 1968

Prepared by
Stanton W. Allison

ADDENDUM

The proposed code would repeal ORS 111.070 headed "Right of Nonresident Alien to take Property by Succession or Testamentary Disposition." This statute was held unconstitutional by Zschernig vs. Miller, 389 U. S. 429, 19 L.ed.2d 683, 88S.Ct. 664, decided January 15, 1968.

We quote the comment of Mr. Rowland L. Young on the above decision appearing in his Review of Recent Supreme Court Decisions in the March, 1968, American Bar Association Journal:

> "This decision held unconstitutional an Oregon statute that required alien heirs of Oregon property to show that their native countries granted reciprocal rights of inheritance to United States citizens. The court said that, as applied, the statute intruded on questions of foreign relations reserved to the Federal Government.
>
> "The case involved the estate of an Oregon resident who died intestate in 1962, leaving as her only heirs the appellees, who were residents of East Germany.***
>
> "The Oregon Supreme Court ruled that the appellants could take the real property involved, but not the personalty, by reason of Article IV of the 1923 treaty with Germany. The court relied on Clark v. Allen, 331 U.S. 503 (1947), which held that the 1923 treaty did not apply to personalty located in the United States 'which an American citizen undertakes to leave to German nationals'.
>
> "The Supreme Court reversed in an opinion by Mr. Justice Douglas. The Court refused the invitation of the Justice Department, which appeared as amicus curiae, to reexamine Clark v. Allen, saying that 'the history and operation of this Oregon statute make clear that

[it] is an intrusion by the State into the field of foreign affairs which the Constitution entrusts to the President and Congress'.

"The Court noted that Oregon courts and other state courts with similar statutes have launched detailed inquiries into the types of governments of various foreign nations in construing the statutes and that their decisions 'radiate some of the attitudes of the' cold war, 'where the search is for the 'democracy quotient' of a foreign regime as opposed to the Marxist theory'. 'It seems inescapable that the type of probate law that Oregon enforces affects international relations in a persistent and subtle way', the Court said, and it thus has a direct impact upon foreign relations that might adversely affect the power of the central government to deal with those problems.***"

Proposed revised Oregon probate code
INTESTATE SUCCESSION
3rd Draft
December 1, 1967

Prepared by

Stanton Allison

COMPARATIVE SECTION TABLE

Draft Sections	ORS Sections
1	111.010
2	111.020, 111.030
3	111.020, 111.030
4	111.020, 111.030
5	111.020, 111.030
6	111.010(4)
7	111.010(5)
8	111.020(5)
9	111.040
10	111.231
	111.020(4)

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/grandparents both 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.

Proposed revised Oregon probate code
INTESTATE SUCCESSION
3rd Draft
October 30, 1967

Prepared by

Stanton Allison

Section 5. Share of others than surviving spouse. The part of the net intestate estate not passing to a surviving spouse shall pass:

(1) To the issue of the decedent equally if they are in the same degree of kinship or, if in unequal degree, to the issue of more remote degree by representation.

(2) If no issue survives the decedent, to the surviving parents of the decedent;

(3) If no issue or parent survives the decedent, to the issue of either parent by representation;

(4) If no issue, parent, or issue of either parent survives the decedent, to the surviving grandparents of the decedent and the issue of any deceased grandparent 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;

(6) If no issue, parent, issue of either parent, or grandparent survives the decedent, equally [without representation] to the issue of the deceased grandparents [in the nearest] if they are in the same degree of kinship to the decedent, [to and including the fifth degree as

provided in ORS_____] or, if in unequal degree, to the issue of more remote degree by representation.

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 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.

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 the 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.

Proposed revised Oregon probate code
INTESTATE SUCCESSION
(with comments)
2nd draft
June 16, 1967

Prepared by
Stanton Allison

This second draft embodies the changes and suggestions following consideration of the first draft by the Advisory Committee on May 19 and 20, 1967. It also includes redrafting of sections 5, 6, 7 and 11.

DESCENT AND DISTRIBUTION OF REAL AND PERSONAL PROPERTY

Section 1. Definitions and rules of construction. (Temporary Placement Only)

As used in this chapter, unless otherwise required by context, the following words and phrases shall be construed as follows:

(1) Obligations - include liabilities of the decedent which survive, whether arising in contract, in tort or otherwise, funeral expenses, the expense of a monument, expenses of administration and all estate and inheritance taxes.

(2) Estate - the real and personal property of a decedent, as from time to time changed in form by sale, reinvestment or otherwise and augmented by any accretions or additions thereto and substitutions therefor or diminished by any decreases and distribution therefrom.

(3) Issue - when used to refer to persons who take by intestate succession, includes all lineal descendants, except those who are the lineal descendants of living lineal descendants of the intestate.

(4) Net estate - the real and personal property of a decendent, except property used for the support of his surviving spouse and children and for the payment of obligations of the estate.

(5) Personal property - includes all property other than real property.

(6) Personal representative - includes executor, administrator and special administrator.

(7) Property - includes both real and personal property.

(8) Real property - includes all legal and equitable interests in land in fee and for life.

Comment: Section 1 of proposal #2 is only temporarily placed with the intestate succession provisions, and will ultimately be included in the definition section of chapter 111. All definitions are retained from proposal #2 except that legislative counsel's proposed change of "net estate" has been adopted. The committee must review its decisions on support rights, exempt property, family allowance and homestead property to determine if the new phraseology in describing the net estate includes adequately all of the property set apart. Legislative counsel's suggestions regarding the definition of "issue" are rejected; the previous definition was agreed by the committee and is consistent with the model and uniform probate codes.

Section 2. Net intestate estate. Any part of the net estate of a decedent which is not effectively disposed of by will constitutes the net intestate estate and shall descend and be distributed as prescribed in the following sections.

References: Section 8, Proposal #2

Advisory Committee Minutes
8/13, 14/65, pp. 10 and 11

Comment: This new section changes section 2 of the proposal #2 and adopts instead section 201 of the first tenative draft of the model's uniform probate code (July 10, 1966). This new section also makes it unnecessary to have a separate section 8 (as in proposal #2) on partial intestacy.

Section 3. Share of surviving spouse if decedent leaves issue. If the decedent leaves a surviving spouse and issue, the surviving spouse shall have a one-half interest in the net intestate estate.

References: Section 3, Proposal #2

Advisory Committee Minutes
6/19/65, p. 5
8/13, 14/65, pp. 4 and 5

ORS 111.020 and 111.030.

Comment: This changes section 3 of proposal #2 in accordance with the suggestions of legislative counsel. The phrase "of the decedent, in addition to provision for support" is omitted in this section and in the following section because the definition of net estate excludes property used for the support of the surviving spouse.

Section 4. Share of surviving spouse when decedent leaves no issue. If the decedent leaves a surviving spouse and no issue, the surviving spouse shall have all of the net intestate estate.

References: Section 4, Proposal #2

Advisory Committee Minutes
8/13, 14/65, p. 5

ORS 111.020 and 111.030.

Comment: The changes in section 4 correspond to similar changes in section 3.

Section 5. Share of others than surviving spouse. The part of the net intestate estate not passing to a surviving spouse shall pass:

(1) To the issue of the decedent equally if they are in the same degree of kinship or, if in unequal degree, to the

issue of more remote degree by representation;

(2) If no issue survivies the decedent, to the surviving parents of the decedent;

(3) If no issue or parent survivies the decedent, to the issue of either parent by representation;

(4) If no issue, parent or issue of either parent survives the decedent, to the surviving grandparents of the decedent;

(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;

(6) If no issue, parent, issue of either parent, or grandparent survives the decedent, equally without representation to the issue of the deceased grandparents in the nearest degree of kinship to the decedent, to and including the fifth degree as provided in ORS _____.

(7) If no person takes under the preceding subsections, the net intestate estate shall escheat to the State of Oregon.

References: Section 5, Proposal #2

Advisory Committee Minutes
6/19/65 pp. 6 and 7
8/13,14/65 pp. 1, 2 and 5 to 10
9/18/65, p. 1

ORS 111.020 and 111.030

Comment: The only change in this draft from that of section 5 in proposal #2 is the addition of a provision in subsection 4 that surviving grandparents married to each other like surviving parents married to each other take real property as tenants by the entirety and personal property as joint owners with a right of survivorship.

Section 6. Representation defined. "Representation" means the method of determining distribution when the distributees are in unequal degrees of kinship to the decedent. It 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 in the nearest degree of kinship and the number of persons in the same degree of kinship who died before the decedent, and left issue surviving the intestate. Each share of a deceased person in the nearest degree of kinship is divided in the same manner among his surviving children and the issue of his children who have died leaving issue surviving the decedent. This division continues until each portion falls to a living person. All distributees except those in the nearest degree of kinship take by representation.

References: Section 6, Proposal #2

Advisory Committee Minutes
8/13, 14/65, p. 10
9/18/65, p. 1

ORS 111.010

Comment: This definition of representation is unchanged from section 6 of proposal #2. It is identical to both the uniform and the model probate code definitions.

Section 7. Degree of kinship. As used in section 5 the degree of kinship computed according to rules of the civil law is determined by counting upward from the decedent to the nearest common ancestor and then downward to the relative, the degree of kinship being the sum of the counts.

References: Section 7, Proposal #2

Advisory Committee Minutes
8/13, 14/65, p. 10

ORS 111.040

Comment: This section is unchanged from section 7 of proposal #2. The drafter sees no necessity to limit the section as suggested by legislative counsel nor does he find the section inappropriate in determining the degrees of kinship for purposes of other references as long as it is remembered that when any degree of kinship is computed, the person from whom the degrees are counted is assumed to be the "intestate" to which the civil rules refer.

Section 8. Time of determining relationships: After-born heirs: The relationships existing at the time of the death of the decedent govern the inheritance of his net intestate estate, but persons conceived before his death and born alive thereafter inherit as though they were alive at the time of his death.

References: Section 9, Proposal #2

Advisory Committee Minutes
8/13, 14/65, p. 11

ORS 111.010 (5)

Section 9. Persons of the half-blood. Persons of the half-blood inherit the same share that they would inherit if they were of the whole blood.

References: Section 10, Proposal #2

Advisory Committee Minutes
8/13, 14/65, p. 11

ORS 111.040

Comment: No change from section 10 of proposal #2.

Section 10. 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.

References: Section 11, Proposal #2

Advisory Committee Minutes
8/13/14/65, pp. 11 and 12

Model Probate Code Section 28.
1969 Uniform Probate Code Section 2-112.

Comment: This section should be retained if section 5 of the succession statute is revised to comply with the 1967 Uniform Code.

Proposed revised Oregon probate code
INTESTATE SUCCESSION
2nd draft
June 16, 1967

Prepared by
Stanton Allison

COMMENTS

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; 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.

This chapter deals throughout with the concept of the net intestate 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 varying 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 interest of the surviving spouse in the net estate.

Subsection 2 preserves existing Oregon law, see ORS 111.020(2) and (3).

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 within 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. 502. 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.

Subsection 5 provides that where a married couple inherits as parents or grandparents they take the real property by the entireties and the personal property jointly with rights of survivorship. This accords with the present rule that devises of real property to a husband and wife create them tenants by the entirety. (See C.J.S. Wills, Section 908). Your committee believes this accords with the usual desires of married couples that they take and hold property jointly.

Subsection 6 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, effective 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 though 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 remnants 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 of 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 Practive, 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 of 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 definited 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 8.

Section 8 is consistent with the rule of construction in existing Oregon law laid down by section 111.010(5).

10. Comment to Section 9.

Section 9 is consistent with present Oregon law in ORS 111.040.

Proposed revised Oregon probate code
INTESTATE SUCCESSION
2nd Draft
June 16, 1967

Prepared by

Stanton Allison

COMPARATIVE SECTION TABLE

Draft Sections	ORS Sections
1	111.010
2	111.020, 111.030
3	111.020, 111.030
4	111.020, 111.030
5	111.020, 111.030
6	111.010 (4)
7	111.040
8	111.010 (5)
9	111.040
10	111.020 (4)

Prepared by
Mr. Frohnmayer

Proposed revised Oregon probate code
INTESTATE SUCCESSION
1st Draft
April 27, 1967

This draft constitutes a final revision of committee proposal #2 and is formulated in light of the first draft of January 11, 1967, prepared by Legislative Counsel.

DESCENT AND DISTRIBUTION OF REAL AND PERSONAL PROPERTY

Section 1. Definitions and rules of construction. (Temporary Placement Only)

As used in this chapter, unless otherwise required by context, the following words and phrases shall be construed as follows:

1. Claims - include liabilities of the decedent which survive, whether arising in contract, in tort or otherwise, funeral expenses, the expense of a monument, expenses of administration and all estate and inheritance taxes.

2. Estate - the real and personal property of a decedent, as from time to time changed in form by sale, reinvestment or otherwise and augmented by any accretions or additions thereto and substitutions therefor or diminished by any decreases and distribution therefrom.

3. Issue - when used to refer to persons who take by intestate succession, includes all lawful lineal descendants, except those who are the lineal descendants of living lineal descendants of the intestate.

4. Net estate - 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 claims against the estate.

5. Personal property - includes interests in goods, money, choses in action, evidences of debt and chattels real.

6. Personal representative - includes executor, administrator and special administrator.

7. Property - includes both real and personal property.

8. Real property - includes all land, tenements and hereditaments and rights thereto and all interest therein, in fee simple or for the life of another.

9. Gender and number - the masculine gender includes the feminine and neuter; singular number includes the plural.

Comment: Section 1 of proposal #2 is only temporarily placed with the intestate succession provisions, and will ultimately be included in the definition section of chapter 111. All definitions are retained from proposal #2 except that legislative counsel's proposed change of "net estate" has been adopted. The committee must review its decisions on support rights, exempt property, family allowance and homestead property to determine if the new phraseology in describing the net estate includes adequately all of the property set apart. Legislative counsel's suggestions regarding the definition of "issue" are rejected; the previous definition was agreed by the committee and is consistent with the model and uniform probate codes.

Section 2. Net intestate estate. 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.

References: Section 8, Proposal #2

Advisory Committee Minutes
8/13,14/65, pp. 10 and 11

Comment: This new section changes section 2 of proposal #2 and adopts instead section 201 of the first tentative draft of the model's uniform probate code (July 10, 1966). This new section also makes it unnecessary to have a separate section 8 (as in proposal #2) on partial intestacy.

Section 3. Share of surviving spouse if decedent leaves issue. If the decedent dies intestate, leaving a surviving spouse and issue, the surviving spouse shall have an undivided one half interest in the net estate of the decedent, in addition to provision for support.

References: Section 3, Proposal #2

Advisory Committee Minutes
6/19/65, p. 5
8/13,14/65, pp. 4 and 5

ORS 111.020 and 111.030.

Comment: This changes section 3 of proposal #2 in accordance with the suggestions of legislative counsel. The phrase "provision for support" is substituted for "portion of the estate set apart to him for family allowances, homestead rights and exempt property."

Section 4. Share of surviving spouse when decedent leaves no issue. If the decedent dies intestate, leaving a

surviving spouse and no issue, the surviving spouse shall have all of the net estate of the decedent, in addition to provision for support.

References: Section 4, Proposal #2

Advisory Committee Minutes
8/13,14/65, p. 5

ORS 111.020 and 111.030.

Comment: The changes in section 4 correspond to similar changes in section 3.

Section 5. Share of others than surviving spouse. The part of the net estate not passing to a surviving spouse shall pass:

1. To the issue of the intestate equally if they are in the same degree of kinship, or if in unequal degree, those of more remote degree take by representation;

2. If no issue survives the intestate, to the surviving parents of the intestate; when both parents of the intestate survive him 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, to the issue of either parent by representation;

4. If no issue, parent or issue of either parent survives the intestate, to the surviving grandparents of the intestate; when grandparents of the intestate survive

him 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;

5. If no issue, parent, grandparent, or issue of either parent, survives the intestate, to the issue of deceased grandparents in the nearest degree computed according to the rules of the civil law, per capita without representation;

6. If no person takes under the preceding subsections, the net estate shall escheat to the state of Oregon.

References: Section 5, Proposal #2

Advisory Committee Minutes
6/19/65, pp. 6 and 7
8/13,14/65, pp. 1,2 and 5 to 10
9/18/65, p. 1

ORS 111.020 and 111.030

Comment: The only change in this draft from that of section 5 in proposal #2 is the addition of a provision in subsection 4 that surviving grandparents married to each other like surviving parents married to each other take real property as tenants by the entirety and personal property as joint owners with a right of survivorship.

Section 6. Representation defined. "Representation" refers to a method of determining distribution in which the takers are in unequal degrees of kinship with respect to the intestate and is accomplished as follows: After first determining who are in the nearest degree of kinship of those entitled to share in the estate, the 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, but who left issue surviving. Each share of a deceased person in the nearest degree shall in turn be divided in the same manner among his surviving children and the issue of his children who have died leaving issue who survive the intestate. This division shall continue until each portion falls to a living person. All distributees except those in the nearest degree take by representation.

References: Section 6, Proposal #2

Advisory Committee Minutes
8/13,14/65, p. 10
9/18/65, p. 1

ORS 111.010

Comment: This definition of representation is unchanged from section 6 of proposal #2. It is identical to both the uniform and the model probate code definitions.

Section 7. Civil rules defined. The degree of kinship computed according to rules of the civil law is determined by counting upward from the intestate to the nearest common ancestor and then downward to the relative, the degree of kinship being the sum of the counts.

References: Section 7, Proposal #2

Advisory Committee Minutes
8/13,14/65, p. 10

ORS 111.040.

Comment: This section is unchanged from section 7 of proposal #2. The drafter sees no necessity to limit the section as suggested by legislative counsel nor does he find the section inappropriate in determining the degrees of kinship for purposes of of other references as long as it is remembered that when any degree of kinship is computed, the person from whom the degrees are counted is assumed to be the "intestate" to which the civil rules refer.

Section 8. Partial intestacy. (This section is omitted)

Comment: Section 2 now deals with partial and total intestacy, making section 8 of proposal #2 now unnecessary.

Section 9. Time of determining relationships: After-born heirs: The relationships existing at the time of the death of the intestate govern the inheritance of the net estate of the intestate, but persons conceived before his death and born alive thereafter inherit as though they were alive at the time of the death of the intestate.

References: Section 9, Proposal #2

Advisory Committee Minutes
8/13,14/65, p. 11

ORS 111.010.

Comment: No change from section 9 proposal #2.

Section 10. Persons of the half blood. Persons of the half-blood inherit the same share that they would inherit if they were of the whole blood.

References: Section 10, Proposal #2

Advisory Committee Minutes
8/13,14/65, p. 11

ORS 111.040.

Comment: No change from section 10 of proposal #2.

Section 11. Person related through two lines. A person related to the intestate through more than one is entitled only to the share which is largest.

References: Section 11, Proposal #2

Advisory Committee Minutes
8/13,14/65, pp. 11 and 12

Comment: No change from section 11 of proposal #2.

Proposed revised Oregon probate code
PARTIAL DISTRIBUTION
2nd Draft
January 3, 1968

Prepared by

Stanton Allison

DISTRIBUTION BEFORE FINAL SETTLEMENT

Section 1. Petition and order for partial distribution. Upon petition by the personal representative or other interested person, and after such notice and hearing as the court may prescribe, the court may order the personal representative to distribute, prior to final settlement, property of the estate to the person or persons who would be entitled to the property under the will or under intestate succession on final distribution, if the court finds:

(1) All inheritance taxes payable to the State of Oregon have been paid or the State Treasurer has consented in writing to the distribution.

(2) After such partial distribution sufficient assets will remain to pay expenses of administration, unpaid claims, and all known unpaid creditors of the decedent or of the estate.

(3) The distribution may be made without loss to creditors or injury to the estate or to any person interested therein.

Section 2. Undertaking of distributee. The court may require a bond or other security for the protection of creditors and other interested persons who might suffer loss because of such distribution.

Section 3. Discharge of personal representative. The distribution of the assets in accordance with the order of the court shall be a full discharge of the personal representative with respect to all property embraced in such order.

Section 4. Petition and order for refund by distributee. If, after partial distribution, it appears that all or any part of the property distributed is required for the payment of claims and administration expenses, including determined and undetermined state and federal tax liability, the personal representative shall petition the court to order the return of such property. Notice of the hearing on the petition shall be given as provided in ORS_____. Upon the hearing the court may order the distributee to return the property distributed or any part thereof, or its value as of the time of distribution, and may specify the time within which such payment or return must be made. If the payment is not made or the property returned within the time ordered, the person so failing to pay the value or return the property may be adjudged in contempt of court and judgment may be entered against him and his sureties, if any.

Section 5. Repeal of existing statutes. ORS 117.350, 117.361, 117.370, 117.380 and 117.390 are repealed.

Proposed revised Oregon probate code
PARTIAL DISTRIBUTION
2nd Draft
January 26, 1968

Prepared by

Stanton W. Allison

COMMENTS

The proposed sections on the subject of partial distribution would replace and supersede ORS 117.350 to 117.390 inclusive. The content of the proposed sections is in general the same as that of the replaced sections. However, in individual comments which follow, the differences will be noted.

Section 1. Petition and order for partial distribution. The language of this section is based on Sections 353 and 354 of the 1963 Iowa Probate Code. The three subsections include the material of ORS 117.350 and 117.361. However, the court is given the right to prescribe the terms of the hearing and notice instead of the notice requirements in ORS 117.361. Furthermore, the personal representative or the interested parties do not have to wait until the semiannual account is filed and six months have elapsed since the publication of notice to creditors.

Section 2. Undertaking of distributee. The effect of this section is the same as subsection (3) of ORS 117.361.

Section 3. Discharge of personal representative. This section is subsection (5) of ORS 117.361 with editorial changes.

Section 4. Petition and order for refund by distributee. This section is a rewrite with editorial changes of ORS 117.380 to 117.390.

Proposed revised Oregon probate code
PARTIAL DISTRIBUTION
2nd Draft
January 26, 1968

Prepared by

Stanton W. Allison

COMPARATIVE SECTION TABLE

Draft Sections	ORS Sections
1	117.350, 117.361 (1) (2)
2	117.361 (3), 117.370
3	117.361 (4)
4	117.380, 117.390

Prepared by
Campbell Richardson

Proposed revised Oregon probate code
PARTIAL DISTRIBUTION
1st Draft
May 3, 1967

DISTRIBUTION BEFORE FINAL SETTLEMENT

Section 1. Upon application by the personal representative or any interested person, and after such notice to the personal representative and to such other persons, if any, as the court may prescribe, the court may enter an order authorizing the personal representative to surrender any of the property of the estate to the person or persons who, under the will or under the rules of intestate succession, would ultimately be entitled to such property if the court finds:

a. All inheritance taxes payable to the State of Oregon have been paid or the State Treasurer has consented in writing to the distribution.

b. After such distribution the personal representative will retain assets sufficient to pay all expenses of administration which have not been paid, all unpaid claims filed with the personal representative, and all known unpaid creditors of the decedent or of the estate.

c. The distribution may be made without loss to creditors or injury to the estate or to any person interested therein.

Section 2. The court may require a bond or other

security conditioned as it may determine in connection with the delivery of such property.

Section 3. The surrender of possession and delivery of the assets in accordance with the order of the court shall be a full discharge of the personal representative with respect to all property embraced in such order.

Section 4. If, after any surrender of possession in accordance with the order of the court it becomes necessary to require the payment of all or any part of the property distributed to satisfy in whole or in part any claim against the estate, including determined and undetermined state and federal tax liability, the personal representative 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 10 days before the application is made. Upon hearing of the application, the court may decree a return of the property or its value as of the time of distribution, and may specify the time within which such payment or return must be made. If the payment is not made or the property is not returned 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.

References: Advisory Committee Minutes
4/18,19/66

ORS 117.350, 117.361, 117.370,
117.380 and 117.390

Proposed revised Oregon probate code
RENUNCIATION OF INTESTATE SUCCESSION OR DEVISE
Amended 2nd Draft
January 4, 1968

Prepared by

Stanton Allison

Section 1. Renunciation of Intestate Succession or Devise. A person may renounce intestate succession or a devise of property by filing a signed declaration of such renunciation with the probate court and serving a copy on the personal representative within four months after the appointment of the personal representative. No interest in the property so renounced is deemed to have vested in the heir or devisee and the renunciation is not deemed a transfer by gift of the property renounced, but the property passes as if the heir or devisee had failed to survive the decedent. Creditors of the renouncing heir or devisee, including judgment creditors, attachment and execution creditors and tax lien claimants, have no interest in the property renounced.

Proposed revised Oregon probate code
RENUNCIATION OF INTESTATE
SUCCESSION OR DEVISE
Amended 2nd Draft
January 4, 1968

Prepared by

Stanton Allison

COMMENTS

The proposed section would constitute a new statutory provision not represented by the present ORS Probate Code. 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 settle the question as to the right of a devisee or legatee to renounce a provision made for his benefit. For comparable legislation see Section 853.21 Assembly Bill 280, Wisconsin Probate Code, 1967 Uniform Probate Code Section 2-801, and Section 58, 1946 Model Probate Code. See also Section 552, Volume II, Jaureguy and Love Oregon Probate Law and Practice.

The language of the proposed section is taken primarily from the 1967 Uniform Probate Code. However, the period for renunciation is changed from six months after death to four months after the appointment of the personal representative. This latter time period would conform to the period of the non-claim statute and the proposed period for election against the will and for contest of will. The section spells out affirmative action required by the person renouncing by filing a written renunciation and service on the personal representative. It provides that a renunciation is not deemed a transfer by the party renouncing or a gift by the heir or devisee who renounces the inheritance or the devise.

Proposed revised Oregon probate code
WILLS
2nd Draft
July 26, 1967

Prepared by
Stanton W. Allison

Section 18. Renunciation of intestate succession or devise. A person may renounce intestate succession or a devise of property, wholly or partially, if he has not accepted possession as heir or devisee, by filing a signed declaration of such renunciation with the probate court and serving a copy on the personal representative within four months after the appointment of the personal representative. No interest in the property so renounced is deemed to have vested in the heir or devisee but the property passes as if he had failed to survive the decedent. Creditors of the renounced heir or devisee have no interest in the property renounced, whether their claims are based on contract, tort, tax obligations or otherwise.

References: Advisory Committee Minutes:
6/17,18/67, Appendix A, pp. 14 and 15
7/14,15/67, p.11
Riddlesbarger draft of Chapter on Wills
Wisconsin Section 853.21 (Assembly Bill 280)
Uniform Probate Code, Sec. 2-801 (1967)
Jaureguy and Love, Sec. 552
Model Probate Code, Sec. 58.

Proposed revised Oregon probate code
RENUNCIATION OF INTESTATE SUCCESSION OR DEVISE
2nd Draft
September 8, 1967

Prepared by
Stanton W. Allison

COMMENTS

The proposed section would constitute a new statutory provision not represented by the present ORS Probate Code. 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 settle the question as to the right of a devisee or legatee to renounce a provision made for his benefit. For comparable legislation see Section 853.21 Assembly Bill 280, Wisconsin Probate Code, 1967 Uniform Probate Code Section 2-801, and Section 58, 1946 Model Probate Code. See also Section 552 to Jaureguy and Love Oregon Probate Law and Practice.

The language of the proposed section is taken primarily from the 1967 Uniform Probate Code. However, the period for renunciation is changed from six months after death to four months after the appointment of the personal representative. This latter time period would conform to the period of the non-claim statute and the proposed period for election against the will and for contest of will. The proposed section spells out affirmative action required by the person renouncing by filing a written renunciation and service on the personal representative.

(Draftsman's Note: Your draftsman had serious doubts as to the advisability of including in the language of a proposed section on renunciation

the specific right to make a partial renunciation. I quote the following from Section 1566 Am. Jur. Wills: "Although the right to renounce a testamentary gift in toto is fully recognized, many cases enunciate the limitation that a donee may not accept the benefits of a gift and at the same time reject its burdens. Every bequest is but a bounty and a bounty must be taken as it is given."

I also quote the language from an annotation in 91 ALR beginning at page 608:

"In general, it may be said that the question whether a beneficiary may reject one or more of the devises or bequests under a will and accept others depends upon the apparent intent of the testator to make the gifts separately and independently or as a single, aggregate gift. Where two or more separate and independent gifts are made by a will to a beneficiary, he is, as a general rule, entitled to accept one or more and disclaim others, unless a contrary intention on the part of the testator appears from other provisions of the will. Supporting this proposition, either by their holdings or the language of the court, are the following authorities: (citing authorities).

"If, however, the bequests or devises in the will are not separate and distinct, but constitute a single or aggregate gift, so that to permit the beneficiary to accept part only would defeat the apparent intention of the testator, the beneficiary must take all or reject all. This proposition is supported by the holding, or at least by the language, of the courts in various cases."

I recall some of the doubts expressed in our consideration of this question whether it was advisable to permit an heir or devisee to accept benefits under the will or inheritance and reject other portions that he might

deem burdensome. As indicated in the note quoted above, there has apparently been a tremendous amount of litigation arising from this question of partial renunciation. I believe consideration should be given to eliminating the language "wholly or partially" from the above suggestion, and leaving the statutory question open on this point. The language in the Wisconsin statute "or any part of such property unless the will expressly prohibits partial renunciation" does not seem very helpful in solving this difficult problem. I also feel that consideration should be given the thought that perhaps the question of the gift tax might be more clearly resolved if the statute did not expressly authorize a partial renunciation.)

Section 6. Appointment of probate commissioner. The court may appoint the clerk of the circuit court or some other suitable person at the county seat to act as probate commissioner. If the clerk of the circuit court is appointed probate commissioner, his deputy has the power to perform any act as probate commissioner that his principal has, and his principal is responsible for his conduct.

Section 7. Powers of probate commissioner. (1) The probate commissioner may act upon uncontested petitions for appointment of special administrators, for probate of wills and for appointment of personal representatives, guardians and conservators, to the extent authorized by rule of court. Pursuant thereto he may make and enter orders on behalf of the court admitting wills to probate, appointing special administrators and personal representatives, guardians and conservators, and setting the amount of the bond as prescribed in ORS _____ and _____, subject to his orders being set aside or modified by the judge.

(2) Any matter presented to the probate commissioner may be referred by him to the judge.

(3) Unless set aside or modified by the judge, the orders of the probate commissioner shall have the same effect as if made by the judge.

Section 8. ORS 3.101 is amended to read:

3.101. District court judge acting as circuit court

Proof of the giving of notice must be made on or before the hearing and filed in the proceeding. Proof shall 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 11. Waiver of notice. A guardian, a guardian ad litem, a conservator, or a person who is not incompetent or a minor 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 12. Filing objections to petition. Any interested person, on or before the day set for a hearing, may file written objections to a petition previously filed.

Section 13. Proof of documents; certification. (1) Proof of documents pursuant to this code may be made as follows:

(a) Of a will, by a certified copy thereof.

(b) That a will has been probated or established in a foreign jurisdiction, by a certified copy of the order admitting the will to probate or evidencing its establishment.

(c) Of letters, by a certified copy thereof. The certification shall include a statement that the letters have not been revoked.

(2) A document or order filed or entered in a foreign jurisdiction may be proved by a copy thereof, certified by a

clerk of the court in which such document or order was filed or entered, or by such other official as shall have legal custody of the original document.

Section 14. Translations. If a document or part thereof is not in the English language, a translation certified by the translator to be accurate may be attached thereto and shall be regarded as sufficient evidence of the contents of the document, unless objection is made thereto. In the absence of objection, if any person relies in good faith on the accuracy of the translation he shall not be prejudiced thereafter because of its inaccuracy or because of proceedings to set aside or modify the probate on the ground of its inaccuracy.

Section 15. Stenographic record. The judge may of his own motion, or on the request of an interested person, direct the reporter of his court to attend any hearing and make a stenographic record of the same.

Section 16. ORS 3.130 is amended to read:

3.130. Transfer of judicial jurisdiction of certain county courts to circuit courts. (1) All judicial jurisdiction,

[circuit court and the] Supreme Court[, or either, as directed].

Section 23. Repeal of existing statutes. ORS 3.140, 3.180, 3.340, 5.040, 5.050, 5.070, 5.100, 109.345, 109.370, 116.535, 117.510, 117.520, 117.530, 117.540, 117.550, 117.560 and 118.500 are repealed.

in the county, in the absence or disability of the circuit court judge.

Section 9. Pleadings and mode of procedure. Section 9 is identical with ORS 115.010 with minor editorial changes. The only change in substance from the ORS section is that the proposed section provides for a verification by the attorney for a petitioner or by the agent of a corporation.

Section 10. Notice; method and time of giving. This useful informative section is taken verbatim from Section 1-205 of the 1967 draft Uniform Probate Code. No comparable provision appears in our present probate code.

Section 11. Waiver of notice. This is taken from Section 1-206 of the 1967 Draft Uniform Probate Code.

Section 12. Filing objections to petition. This is from Section 1-208 of the 1967 draft Uniform Probate Code.

Section 13. Proof of documents; certification. (1) This section is based on Section 7 of the Uniform Probate of Foreign Wills Act. For comparable legislation see ORS 43.110 and 115.160. Paragraph (1)(b) should be read with reference to Section 5 of the chapter on Initiation of Probate or Administration relating to establishing foreign wills.

The Uniform Probate of Foreign Wills Act differs from the present code in that it dispenses with the requirement that, in addition to the certification by the clerk, there must also be furnished "a certificate of the chief judge or presiding

magistrate that the certificate is in due form and made by the clerk or other person having the legal custody of the record." This double certification has caused problems in procuring copies of documents from other jurisdictions where the certifying clerk was not familiar with our requirements. It seemed to your committees that a simple certification is all that need be required.

Paragraph (1)(c) follows ORS 86.130 in requiring a statement in the certified copy of letters that the letters have not been revoked.

Section 14. Translations. This section is based on Section 7 of the Uniform Probate of Foreign Wills Act. There is no comparable provision in the present Oregon Revised Statutes, although the utility of such a provision seems obvious. The principal effect of the section, other than providing a guideline for the certification, is to provide protection to a person who relies upon the translation in good faith when no objection has been made to it.

Section 15. Stenographic record. This section merely codifies present practices.

Sections 16 through 22 amend existing sections of the Oregon Revised Statutes to implement the transfer of probate jurisdiction to the circuit court.

determination of title to and rights in property claimed by or against personal representatives, guardians and conservators; administration, settlement and distribution of estates of decedents; construction of wills, whether incident to the administration or distribution of an estate or as a separate proceeding; guardianships and conservatorships, including the appointment and qualification of guardians and conservators, and the administration, settlement and closing of guardianships and conservatorships and supervision and disciplining of personal representatives, guardians and conservators.

Section 5. Powers of probate court. The circuit court's general legal and equitable powers are applicable to effectuate its probate jurisdiction, punish contempts, and carry out its determinations, 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 determinations, 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. The court sitting in probate shall have full, legal and equitable powers to make declaratory judgments, as provided in ORS 28.010 to 28.160, in all matters involved in the administration of the estate, including those pertaining to the title of real estate, the determination of heirship, and the distribution of the estate. No issue determined in a probate court shall be tried again on appeal or otherwise

reexamined in a manner other than those appropriate to issues determined by a court of record with general jurisdiction in law and equity. Appeals shall be to the Supreme Court as in other cases.

POWERS AND JURISDICTION OF
PROBATE COURT
Amended 2nd Draft
January 18, 1968

Prepared by

Stanton Allison

AMENDED COMMENTS

Introduction

The proposed chapter would accomplish the following: First, it would vest all jurisdiction of probate matters in the Circuit Court. Second, it would broaden the powers of the district judge to act as circuit court judge in the absence of the circuit judge in all probate matters, and would appoint court commissioners to act on behalf of the circuit court judge in ex parte initiation of probate proceedings and probate of wills; thirdly, it would spell out the general jurisdiction and powers of the probate court and the mode of procedure to be followed in probate matters; and, fourthly, it would include amendments or repeals of existing statutes to transfer all probate matters to the circuit court and provide for pending matters.

We quote a memorandum by Mr. Robert W. Lundy, Legislative Counsel, outlining the present situation in Oregon.

> "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 9 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

***

"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#, 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.)"

The proposed chapter was presented to the two committees by a subcommittee consisting of the Honorable John C. Warden, Coquille, the Honorable Joseph J. Thalhofer, Bend, Mr. John M. Copenhaver, Redmond, Mr. R. Thomas Gooding, LaGrande, and Mr. Duncan L. McKay, Bend. It was felt that this subcommittee

would be familiar with the problems covered by this chapter. Detailed comments follow:

Section 1. Transfer of probate jurisdiction to circuit court. This is the general section transferring present jurisdiction from county and district courts to the circuit court.

Section 2. Transfer of pending proceedings: appeals. In addition for providing for transfer of pending matters from the lower courts to the circuit court, this makes it clear that pending appeals in the circuit court under the sections cited shall be conducted under the provisions of law existing prior to the effective date of the new code.

Section 3. Probate jurisdiction vested in the circuit court. As noted above, we have over past legislative sessions achieved a partial and piecemeal transfer of probate jurisdiction from many of the county courts. The problem has been not one of theory, in that there has been agreement among attorneys and legislators that jurisdiction in probate matters should not be vested in a county court which does not require the county judge to have legal training or background. The problem has been one of practical application. Your committees agreed that the appointment of probate commissioners in those counties where they are needed to institute noncontested probate proceedings, plus giving full probate jurisdiction to district judges in the absence of the circuit court judge, would meet the present objections to vesting all probate jurisdiction in

the circuit court.

Section 4. Probate jurisdiction. It seemed advantageous that a section outlining the general areas of probate jurisdiction be included in the probate code, rather than be placed in piecemeal fashion in a large number of separate chapters, as in the present Oregon Revised Statutes. An examination of the present code sections, particularly ORS 3.140, will indicate that the enumerated jurisdiction is that presently granted to and exercised by our probate circuit courts. The general language is taken from Section 1-201 of the 1967 draft of the Uniform Probate Code.

Section 5. Powers of probate court. The general language of this section is from Section 1-201 of the 1967 draft Uniform Probate Code, but the reference to the power to make declaratory judgments is taken from Section 10 of the 1963 Iowa Probate Code. Although it is not believed that the section alters, restricts or increases the present powers of our circuit probate court, it seems proper that these powers be enumerated.

The chapter would repeal ORS 117.510 to 117.560 entitled "Determination of Heirship". This chapter was originally enacted as chapter 331, Session Laws of 1913. Many years later, in 1927, the Uniform Declaratory Judgments Act, ORS 28.010 to 28.160, was enacted. The present chapter on

Determination of Heirship and the Uniform Declaratory Judgments Act are discussed in Sections 864 and 865, Oregon Probate Law and Practice, Jaureguy and Love. The work mentions the ambiguities in the Determination of Heirship chapter and suggests that the Uniform Act gives broader powers, particularly in regard to rights to real property. Since under the Uniform Act a declaratory judgment proceeding may now be brought in the probate court it seemed advisable to your committees that the present jurisdiction of the probate court to operate under this Act should be preserved, and that the more limited chapter on Determination of Heirship be repealed. The inclusion in the proposed chapter of the power of the probate court to operate under the Uniform Act seems advisable in view of the proposed repeal of the present chapter on Determination of Heirship.

Section 6. Appointment of probate commissioner. The necessity and utility of this provision to meet the problems of temporary absence of the circuit judge in many of our counties has been commented upon already. It is more and more the pattern in the new probate codes to have purely formal matters handled by a registrar or a court commissioner, or the clerk

of the court. For a comparable section see section 22 of the 1963 Iowa Probate Code.

Section 7. Powers of probate commissioner. It will be noted that the powers of the probate commissioner are limited to ex parte proceedings for initiation of probate, including the appointment and qualification of personal representatives and the probate of wills. Any order of the probate commissioner may be set aside or modified by the judge. The probate commissioner is given a right to refer a matter upon which he may have doubt or uncertainty to the circuit judge.

Your committees felt that problems caused by temporary unavailability of the circuit court judge or the district court judge were primarily those of delaying the institution of the probate proceeding. Matters which must be set for hearing, approval of accounts and orders for partial and final distribution may well await the availability and convenience of the circuit court judge. With the broad powers given to the personal representative under the present code it is felt that there will be no material delay or inconvenience in the few matters which would have to be considered and heard by the circuit court judge.

Section 8 would amend present ORS 3.101 to provide that the district court judge can exercise the powers and duties of the circuit court judge in any matter in probate pending in

in the county, in the absence or disability of the circuit court judge.

Section 9. Pleadings and mode of procedure. Section 9 is identical with ORS 115.010 with minor editorial changes. The only change in substance from the ORS section is that the proposed section provides for a verification by the attorney for a petitioner or by the agent of a corporation.

Section 10. Notice; method and time of giving. This useful informative section is taken verbatim from Section 1-208 of the 1967 Uniform Probate Code. No comparable provision now appears in our present probate code.

Section 11. Waiver of notice. This is taken from Section 1-209 of the 1967 Uniform Probate Code.

Section 12. Filing objections to petition. This is from Section 1-211 of the Uniform Probate Code.

Section 13. Stenographic record. This section is found in Section 1-212 of the 1967 Uniform Probate Code.

The following sections 14 through 20 inclusive amend existing sections of the Oregon Revised Statutes to carry out the transfer of the probate jurisdiction to the circuit court.

Proposed revised Oregon probate code
POWERS AND JURISDICTION OF PROBATE COURT
Amended 2nd Draft
February 2, 1968

Prepared by

Stanton W. Allison

Amended Comparative Section Table

Draft Sections	ORS Sections
1	3.180, 5.040, 5.070, 5.100, 109.345, 109.370, 116.535
2	5.050, 109.370, 116.535, 118.500, 118.700, 179.650
3	
4	3.140, 3.340
5	3.340, 117.510, 117.520, 117.530, 117.540, 117.550, 117.560
6	
7	
8	3.101
9	115.010
10	
11	
12	
13	
14	3.130
15	5.080
16	7.230
17	21.313
18	46.092
19	179.650
20	179.670
21	Repealer

Proposed revised Oregon probate code
POWERS AND JURISDICTION OF PROBATE COURT
2nd Draft
November 9, 1967

Prepared by

Stanton Allison

POWERS AND JURISDICTION OF PROBATE COURT

Section 1. Transfer of probate jurisdiction to circuit court. All probate jurisdiction, authority, powers, functions and duties of the county courts and the judges thereof and the district courts and the judges thereof in all counties are transferred to the circuit courts and the judges thereof.

Section 2. Transfer of pending proceedings; appeals. (1) All matters, causes and proceedings relating to probate jurisdiction, authority, powers, functions and duties pending in a county court or in a district court on the effective date of this Act are transferred to the circuit court for the county.

(2) Appeals pending in a circuit court under ORS 109.370, 116,535, 118.500, subsection (3) of 118.700 or subsection (1) of ORS 179.650 on the effective date of this Act shall be conducted and completed pursuant to the provisions of law in effect immediately before that date.

Section 3. Probate jurisdiction vested in the Circuit Court. Jurisdiction of all probate matters shall be vested in the circuit court.

Section 4. Probate jurisdiction. Probate jurisdiction of the circuit court shall include, but not be limited to, appointment and qualification of personal representatives; probate and contest of wills; determination of heirship;

determination of title to and rights in property claimed by or against personal representatives, guardians and conservators; administration, settlement and distribution of estates of decedents; construction of wills, whether incident to the administration or distribution of an estate or as a separate proceeding; guardianships and conservatorships, including the appointment and qualification of guardians and conservators, and the administration, settlement and closing of guardianships and conservatorships and supervision and disciplining of personal representatives, guardians and conservators.

Section 5. Powers of probate court. The circuit court's general legal and equitable powers are applicable to effectuate its probate jurisdiction, punish contempts, and carry out its determinations, 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 determinations, 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 reexamined in a manner other than those appropriate to issues determined by a court of record with general jurisdiction in law and equity. Appeals shall be to the Supreme Court as in other cases.

Section 6. Appointment of probate commissioner. The court may appoint the clerk of the circuit court or some other suitable person at the county seat to act as probate commissioner. If the clerk of the circuit court is appointed probate commissioner, his deputy has the power to perform any act as probate commissioner that his principal has, and his principal is responsible for his conduct.

Section 7. Powers of probate commissioner. (1) The probate commissioner may act upon uncontested petitions for appointment of special administrators, for probate of wills and for appointment of personal representatives, to the extent authorized by rule of court. Pursuant thereto 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.

(2) Any matter presented to the probate commissioner may be referred by him to the judge.

(3) Unless set aside or modified by the judge, the orders of the probate commissioner shall have the same effect as if made by the judge.

Section 8. ORS 3.101 is amended to read:

3.101. District court judge acting as circuit court

judge in certain cases; orders; effect. (1) Whenever by reason of absence, illness or injury there is not within a county in which a district court organized under ORS 46.025 is located, a judge of the circuit court able to preside over and conduct the business of the circuit court, any judge of the district court for the county may, within the county, exercise the powers and duties of judge of the circuit court for the county in so far as they pertain to:

(a) The commencement, trial and disposition of juvenile court matters and proceedings.

(b) Sanity inquests and the commitment of mentally diseased persons.

(c) The appointment of guardians ad litem for infants and others under legal disability.

(d) The granting of orders to make service of summons by publication.

(e) The granting of preliminary injunctions.

(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) If the district court judge is not a party to, or directly interested in, the suit, action or proceeding, and if the question or matter passed upon by him has not been presented to, or passed upon by, any circuit court judge, any decree, judgment or order given and made by a district court judge pursuant to his powers and duties under this section, when filed and entered in the suit, action or proceeding, has the same effect as though given and made by a circuit court judge.

Section 9. Pleadings and mode of procedure. No particular pleadings or forms thereof are required in the exercise of jurisdiction of probate courts. The mode of procedure in the exercise of jurisdiction is in the nature of a suit in equity except as otherwise provided by statute. The proceedings shall be in writing and upon the petition of a party in interest or the order of the court. All petitions, reports and accounts shall be verified by at least one of the persons making them or by his attorney, or in case of a corporation by its agent. The court exercises its powers by means of:

(1) A petition of a party in interest.

(2) A notice to a party.

(3) A subpena to a witness.

(4) Orders and decrees.

(5) An execution or warrant to enforce its orders and decrees.

Section 10. 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 or other matter upon which an order is sought, the petitioner or other person filing the same shall cause notice of the time and place of hearing thereof to be given to all persons 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 them at their post-office address given in their request for notice or at their offices or places of residence, if known;

(2) By delivering a copy thereof to them personally or to their 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.

Upon good cause shown the court may change the requirements as to the method or time of giving notice for any hearing.

Proof of the giving of notice must be made on or before the hearing and filed in the proceeding. Proof shall 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 employes.

Section 11. Waiver of notice. A guardian, a guardian ad litem, a conservator, or a person who is not incompetent or a minor 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 12. Filing objections to petition. Any interested person may file written objections to a petition for probate of a will or appointment of a personal representative at any time before the court admits the will to probate or makes an appointment pursuant to the petition. Any interested person, on or before the day set for a hearing may file written objections to a petition previously filed.

Section 13. Stenographic record. The judge may of his own motion, or on the request of an interested person, direct the reporter of his court to attend any hearing and make a stenographic record of the same.

Section 14. ORS 3.130 is amended to read:

3.130. Transfer of judicial jurisdiction of certain county courts to circuit courts. (1) All judicial jurisdiction,

authority, powers, functions and duties of the county courts and the judges thereof, except the jurisdiction, authority, powers, functions and duties exercisable in the transaction of county business, are transferred to the circuit courts and the judges thereof:

(a) In Clackamas, Columbia, Douglas, Jackson, Josephine, Klamath, Lake, Lane, Marion and Tillamook Counties.

(b) In any county for which a county charter providing for such transfer is adopted under ORS 203.710 to 203.790, to the extent that the judicial jurisdiction, authority, powers, functions and duties were not previously transferred as provided by law.

(2) All judicial jurisdiction, authority, powers, functions and duties of the county court and the judge thereof, except [probate jurisdiction, authorty, powers, functions and duties and] the jurisdiction, authority, powers, functions and duties exercisable in the transaction of county business, are transferred to the circuit court and the judges thereof in Coos County.

(3) All matters, causes and proceedings relating to judicial jurisdiction, authority, powers, functions and duties transferred to the circuit courts and the judges thereof under this section, and pending in a county court on the effective date of the transfer, are transferred to the circuit court for the county.

Section 15. 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, it] shall be proceeded with in this circuit court as upon appeal from the county court to the circuit court.

Section 16. ORS 7.230 is amended to read:

7.230. Probate and juvenile court records to be kept separate. In so far as may be practicable and convenient the records and proceedings pertaining to probate and juvenile matters shall be kept separate from the other records and proceedings of the circuit courts [described in ORS 3.130].

Section 17. ORS 21.313 is amended to read:

21.313. Probate contest filing fees. There shall be collected by the county clerk of each county, at the time of filing of the initial papers in any will contest proceedings in the [probate department of those] circuit courts [having probate jurisdiction], a fee of $6, in addition to all other fees; and from each defendant appearing separately in any such will contest proceeding, a fee of $3 in addition to all other fees.

On the first working day of each month, the clerk shall forward all money so collected during the preceding month to the State Treasurer, with a detailed statement showing the purposes for which the fees were paid. The money shall be deposited in the General Fund and become available for general governmental expenses.

Section 18. ORS 46.092 is amended to read:

46.092. Transfer of certain judicial jurisdiction of certain county courts to district courts. [(1)] All judicial jurisdiction, authority, powers, functions and duties of the county courts and the judges thereof, except juvenile court jurisdiction, authority, powers, functions and duties and the jurisdiction, authority, powers, functions and duties exercisable in the transaction of county business, are transferred to the district courts and the judges thereof:

(a) In Benton, Clatsop, Curry, Deschutes, Hood River, Lincoln, Linn, Polk, Umatilla, Wasco, Washington and Yamhill Counties.

(b) In any county for which a county charter providing for such transfer is adopted under ORS 203.710 to 203.790, to the extent that the judicial jurisdiction, authority, powers, functions and duties were not previously transferred as provided by law.

[(2) All probate jurisdiction, authority, powers, functions and duties of the county court and the judge thereof are transferred to the district court and the judge thereof in Coos County.]

Section 19. ORS 179.650 is amended to read:

179.650. Appeal from order declaring financial ability; order effective until modified. (1) An appeal may be taken from the determination of the court under ORS 179.640, [to the circuit court within 30 days in the ordinary manner for taking appeals from orders of the probate court and,] within 30 days from the entry of the order of the [circuit] court, to the Supreme Court.

(2) An order declaring the financial ability of the person at the state institution, his estate or his responsible relatives to pay for care and maintenance of such person under ORS 179.640 shall remain in full force and effect, unless modified by subsequent court or board orders.

Section 20. ORS 179.670 is amended to read:

179.670. District attorney's duties in proceedings under ORS 179.640. (1) The district attorney, on request of the Board of Control or on request of the probate court, shall appear in the probate court proceedings under ORS 179.640 and present evidence with respect to the ability of the person at the state institution or his estate or responsible relatives to pay the cost of his care and maintenance in the state institution.

(2) If the Board of Control feels aggrieved by the order of the probate court under ORS 179.640, the district attorney on request of the board shall appeal such cause to the

[circuit court and the] Supreme Court [, or either, as directed].

Section 21. ORS 3.140, 3.180, 3.340, 5.040, 5.050, 5.070, 5.100, 109.345, 109.370, 116.535 and 118.500 are repealed.

POWERS AND JURISDICTION OF PROBATE COURT
2nd Draft
November 24, 1967

Prepared by

Stanton Allison

COMMENTS

Introduction

The proposed chapter would accomplish the following: First, it would vest all jurisdiction of probate matters in the Circuit Court. Second, it would broaden the powers of the district judge to act as circuit court judge in the absence of the circuit judge in all probate matters, and would appoint court commissioners to act on behalf of the circuit court judge in ex parte initiation of probate proceedings and probate of wills; thirdly, it would spell out the general jurisdiction and powers of the probate court and the mode of procedure to be followed in probate matters; and, fourthly, it would include amendments or repeals of existing statutes to transfer all probate matters to the circuit court and provide for pending matters.

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"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.

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"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.)"

The proposed chapter was presented to the two committees by a subcommittee consisting of the Honorable John C. Warden,

Coquille, the Honorable Joseph J. Thalhofer, Bend, Mr. John M. Copenhaver, Redmond, Mr. R. Thomas Gooding, LaGrande, and Mr. Duncan L. McKay, Bend. It was felt that this subcommittee would be familiar with the problems covered by this chapter. Detailed comments follow:

Section 1. Probate jurisdiction vested in the Circuit Court. As noted above, we have over many legislative sessions achieved a partial and piecemeal transfer of probate jurisdiction from some of the county courts. The problem has been not one of theory, in that there has been agreement among attorneys and legislators that jurisdiction in probate matters should not be vested in a county court which does not require any legal training or background in the county judge. The problem has been one of practical application. Your committees agree that the appointment of probate commissioners in those counties where they are needed to institute non-contested probate proceedings plus giving full probate jurisdiction to district judges in the absence of the circuit court judge would meet the practical objections to vesting all probate jurisdiction in the circuit court.

Section 2. Probate jurisdiction. It seemed advantageous that a section outlining the general areas of probate jurisdiction should be included as a part of the probate code, rather than be included in piecemeal fashion in a large number of separate chapters, as in the present Oregon Revised

Statutes. An examination of the present code, particularly ORS 3.140, will make clear that the enumerated powers are those now authorized and exercised by our probate circuit courts. The general language is taken from Section 1-201 of the 1967 draft of the Uniform Probate Code.

Section 6. Powers of probate court. The comments under section 2 are generally applicable to this section, which has no specific counterpart in our present code. The language is taken from Section 1-201 of the 1967 Uniform Probate Code. It is not believed that the section alters, restricts or increases the present powers of our circuit probate courts. It seems desirable that these specific powers be spelled out in the probate code.

Section 7. Appointment of probate commissioner. The necessity and utility of this provision to meet the problems of temporary absence of the circuit judge in many of our present counties has been commented upon already. It should be noted that it is more and more the pattern in the new probate codes to have purely formal matters handled by a registrar or a court commissioner, or the clerk of the court. For a comparable section see section 22 of the 1963 Iowa Probate Code.

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Section 9. would amend present ORS 3.101 to provide that the district court judge exercising the powers and duties of the circuit court judge can operate in any matter in probate pending in the county, in the absence or disability of the circuit court judge.

Section 10. Pleadings and mode of procedure. Section 10 is identical with ORS 115.010 with minor editorial changes. The only change in substance from the ORS section is that the proposed section provides for a verification by the attorney for a petitioner or by the agent of a corporation.

Section 11. Notice; method and time of giving. This useful and informative section is taken verbatim from Section 1-208 of the 1967 Uniform Probate Code. No comparable provision now appears in our present probate code.

Section 12. Waiver of notice. This is taken from Section 1-209 of the 1967 Uniform Probate Code.

Section 13. Filing objections to petition. This is from Section 1-211 of the Uniform Probate Code.

Section 14. Stenographic record. This section is found in Section 1-212 of the 1967 Uniform Probate Code.

The following sections 15 through 24 inclusive amend existing sections of the Oregon Revised Statutes to carry out the transfer of the probate jurisdiction to the circuit court.

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
POWERS OF COURT IN PROBATE - CIRCUIT COURT
1st Draft
May 3, 1967

This draft is not intended to be a final draft, and there will be other sections of the code, outside of the probate chapters, that will have to be amended. This draft is intended to serve as a point of departure by the committees.

PROBATE COURT

Section 1. The circuit court shall have exclusive jurisdiction in the first instance, pertaining to a court of probate, including jurisdiction of:

(1) Estates of decedents and absentees, and:

(a) The probate and contest of wills;

(b) The appointment of personal representatives;

(c) The granting of letters testamentary and of administration; and

(d) The administration, settlement and distribution of estates of decedents and absentees.

(2) The construction of will and trust instruments during the administration of the estate or trust, whether the construction is incident to the administration or a separate proceeding.

(3) Conservatorships and guardianships, and:

(a) The appointment of conservators and guardians;

(b) The granting of letters of conservatorship or guardianship; and

(c) The administration, settlement and closing of conservatorships and guardianships.

(4) Trusts and trustees, and:

(a) The appointment of trustees;

(b) The granting of letters of trusteeship;

(c) The administration of testamentary trusts;

(d) The administration of express trusts where jurisdiction is specifically conferred on the court by the trust instrument;

(e) The administration of express trusts where the administration of the court is invoked by the trustee, beneficiary or any interested party;

(f) The administration of trusts which are established by a decree of court and result in the administration thereof by the court; and

(g) The settlement and closing of all trusts provided in this subsection.

Section 2. (1) All probate jurisdiction, authority, powers, functions and duties of the county courts and the judges thereof and the district courts and the judges thereof in all counties are transferred to the circuit courts and the judges thereof.

(2) 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 subsection (1) of this section, in so far as they are applicable, as though the circuit courts and the judges thereof were originally referred to in the existing laws.

Section 3. (1) All matters, causes and proceedings relating to probate jurisdiction, authority, powers, functions and duties transferred to the circuit courts and the judges thereof under section 1 of this Act, and pending in a county court or a district court on the effective date of this Act, are transferred to the circuit court for the county.

(2) Appeals pending in a circuit court under ORS 109.370, [116.535,] 118.500, subsection (3) of ORS 118.700 or subsection (1) of ORS 179.650 immediately before the effective date of this Act shall be conducted and completed pursuant to the provisions of law in effect immediately before that date, except that the circuit court shall be considered the court appealed from.

Section 3. Circuit courts are always open for the transaction of the business pertaining to a court of probate whenever the particular business may be transacted without the presence of or notice to another.

Section 4. 3.130 is amended to read:

3.130. Transfer of judicial jurisdiction of certain county courts to circuit courts. (1) All judicial jurisdiction, authority, powers, functions and duties of the county courts and the judges thereof, except the jurisdiction, authority, powers, functions and duties exercisable in the transaction of county business, are transferred to the circuit courts and the judges thereof:

(a) In Clackamas, Douglas, Jackson, Josephine, Klamath, Lake, Lane and Marion Counties.

(b) In any county for which a county charter providing for such transfer is adopted under ORS 203.710 to 203.790, to the extent that the judicial jurisdiction, authority, powers, functions and duties were not previously transferred as provided by law.

(2) All judicial jurisdiction, authority, powers, functions and duties of the county court and the judge thereof, except [probate jurisdiction, authority, powers, functions and duties and] the jurisdiction, authority, powers, functions and duties exercisable in the transaction of county business, are transferred to the circuit court and the judges thereof in Coos County.

(3) All juvenile court jurisdiction, authority, powers, functions and duties and the jurisdiction, authority, powers, functions and duties set forth in ORS chapters 418, 419, 420 and 444 relating to the welfare and health of juveniles and of delinquent and dependent children of the county courts and the judges thereof are transferred to the circuit courts and the judges thereof in Columbia, Curry, Lincoln, Polk, Tillamook, Umatilla, Washington and Yamhill Counties.

(4) All matters, causes and proceedings relating to judicial jurisdiction, authority, powers, functions and duties transferred to the circuit courts and the judges

thereof under this section, and pending in a county court on the effective date of the transfer, are transferred to the circuit court for the county.

Section 5. 3.140 is amended to read:

3.140. Application of laws governing county courts to circuit courts exercising judicial jurisdiction formerly vested in county courts; power to make rules. (1) The circuit courts and the judges thereof are governed by the existing laws relating to the exercise of the judicial jurisdiction, authority, powers, functions and duties transferred under ORS 3.130, in so far as they are applicable, as though the circuit courts and the judges thereof were originally referred to in the existing laws [; except that, in those counties in which probate jurisdiction, authority, powers, functions and duties are transferred under ORS 3.130, the circuit courts and the judges thereof shall have in the first instance exclusive jurisdiction in equity in all matters pertaining to probate, including the construction and declaration of rights under wills and the determination of questions of title to real, personal or mixed property thereunder, and in a probate proceeding in which a claim is rejected by the executor or administrator, the claimant may present the claim to the circuit court for allowance as provided in ORS 116.525 and 116.530, or he may, and if the executor or

administrator demands it in writing, he shall, in the first instance bring a separate plenary action or suit against the executor or administrator on the claim].

(2) The judges of the circuit courts may make all rules and regulations, not inconsistent with law, to facilitate the transaction of business and render effectual the provisions of ORS 3.130, 3.140 and 7.230.

Section 6. 5.070 is amended to read:

5.070. When court open to probate business. The [county] court is always open for the transaction of the business pertaining to a court of probate, whenever the particular proceeding or transaction is authorized to be had or done without the presence of, or notice to, another.

Section 7. 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, it shall be proceeded with in this circuit court as upon appeal from the county court to the circuit court.]

Section 8. 5.100 is amended to read:

5.100. Order of docketing and disposal of business; records of proceedings. (1) The business of the county court at each term shall be docketed and disposed of [in the following order:]

[(a) The business pertaining to a court of probate as specified in ORS 5.040.]

[(b)] by first considering county business.

(2) The proceedings and records of the court pertaining to the respective classifications of business specified in this section shall be kept in separate books.

Section 9. ORS 7.230 is amended to read:

7.230. In so far as may be practicable and convenient the records and proceedings pertaining to probate and juvenile matters shall be kept separate from the other records and proceedings of the circuit courts [described in ORS 3.130].

Section 10. ORS 21.313 is amended to read:

21.313. There shall be collected by the county clerk of each county, at the time of filing of the initial papers in any will contest proceedings in the probate department of those circuit courts [having probate jurisdiction], a fee of $6, in addition to all other fees; and from each defendant appearing separately in any such will contest proceeding, a fee of $3 in addition to all other fees. On the first working day of each month, the clerk

shall forward all money so collected during the preceding month to the State Treasurer, with a detailed statement showing the purposes for which the fees were paid. The money shall be placed to the credit of the General Fund of the state, and is appropriated as provided in ORS 3.060.

Section 11. ORS 46.092 is amended to read:

46.092. (1) All judicial jurisdiction, authority, powers, functions and duties of the county courts and the judges thereof, except the jurisdiction, authority, powers, functions and duties exercisable in the transaction of county business, are transferred to the district courts and the judges thereof in Clatsop and Hood River Counties.

(2) All judicial jurisdiction, authority, powers, functions and duties of the county courts and the judges thereof, except juvenile court jurisdiction, authority, powers, functions and duties, the jurisdiction, authority, powers, functions and duties set forth in ORS chapters 418, 419, 420 and 444 relating to the welfare and health of juveniles and of delinquent and dependent children and the jurisdiction, authority, powers, functions and duties exercisable in the transaction of county business, are transferred to the district courts and the judges thereof:

(a) In Benton, Curry, Deschutes, Lincoln, Linn, Polk, Umatilla, Wasco, Washington and Yamhill Counties.

(b) In any county for which a county charter providing for such transfer is adopted under ORS 203.710 to 203.790, to the extent that the judicial jurisdiction, authority, powers, functions and duties were not previously transferred as provided by law.

[(3) All probate jurisdiction, authority, powers, functions and duties of the county court and the judge thereof in Coos County.]

Section 12. ORS 179.650 is amended to read:

179.650. (1) An appeal may be taken from the determination of the court under ORS 179.640, [to the circuit court within 30 days in the ordinary manner for taking appeals from orders of the probate court and,] within 30 days from the entry of the order of the [circuit] court, to the Supreme Court.

(2) An order declaring the financial ability of the person at the state institution, his estate or his responsible relatives to pay for care and maintenance of such person under ORS 179.640 shall remain in full force and effect, unless modified or appealed.

(3) Any order or modified order and appeal shall only be altered upon a new hearing upon citation to all persons interested. Where there has been a change in the ability of the persons to pay as specified in the order, and, upon a change of ability to pay, the order shall be modified accordingly.

Section 13. ORS 179.670 is amended to read:

179.670. (1) The district attorney, on request of the Board of Control or on request of the probate court, shall appear in the probate court proceedings under ORS 179.640 and present evidence with respect to the ability of the person at the state institution or his estate or responsible relatives to pay the cost of his care and maintenance in the state institution.

(2) If the Board of Control feels aggrieved by the order of the probate court under ORS 179.640, the district attorney on request of the board shall appeal such cause to the [circuit court and the] Supreme Court [, or either, as directed].

Section 14. ORS 3.340, 5.040, 5.050, 5.070, 109.345, 109.370, 116.535 and 118.500 are repealed.

Section 15. This Act takes effect on January 1, 1970.

Section 9. Small estates; setting apart whole estate; termination of administration. If it appears that necessary and reasonable provision for support requires that the whole of the estate, after payment of claims against the estate, taxes and expenses of administration, be set apart for such support, the court shall so order. There shall be no further proceeding in the administration of the estate unless further property is discovered.

Section 10. 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 11. Repeal of existing statutes. ORS 113.070, 116.005, 116.010, 116.015, 116.020, 116.025, 116.590 and 116.595 are repealed.

Section 8. Priority; support treated as administration expense. This section provides priority of support payments over claims against the estate and administration expenses. It spells out that the support is an expense of administration and is not to be charged against the distributive share of the spouse or child receiving the support.

Section 9. Small estates; setting apart whole estate; termination of administration. This section is a rewritten version of ORS 116.020. The changes are that the net value of the estate to be set over is not limited to $1,000, and the provision is not limited to intestate estates. There is no separate chapter in the proposed code for "small estates". The proposed code gives the court full discretion to set apart property and money necessary for support, after full disclosure of probate and nonprobate assets available for this purpose, and after due notice to interested parties and hearing. If the entire net estate is required for such support, the court may so order, without an arbitrary dollar limit being imposed.

Proposed revised Oregon probate code
SUPPORT OF SPOUSE AND CHILDREN
Amended 2nd Draft
March 15, 1968

Prepared by

Stanton W. Allison

COMPARATIVE SECTION TABLE

Draft Sections	ORS Sections
1	113.070, 116.005
2	116.015
3	
4	116.005
5	
6	116.010, 116.020
7	
8	116.590, 116.595
9	116.020
10	23.260

Proposed revised Oregon probate code
SUPPORT OF SPOUSE AND CHILDREN
2nd Draft
November 2, 1967

Prepared by
Stanton W. Allison

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 and 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 that it was exempt when the decedent was living.

Section 2. Support of spouse and children. 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:

(1) Petition therefor by the spouse or by the guardian of the estate of any minor or incompetent child.

(2) Service of the petition and notice of hearing thereon to the personal representative, unless the petitioner is the personal representative.

(3) Citation to persons whose distributive share of the estate may be diminished by the granting of the petition, unless the court by order shall direct otherwise.

(4) Hearing.

Section 3. Petition and answer. (1) The petition for support shall include a description of property other than property of the estate available for the support of the spouse and children, 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.

(2) 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.

Section 4. Temporary support. Pending hearing upon the petition temporary support may be allowed by order of the court in an amount and of a 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 5. Modification or termination of support. Provision for support ordered by the court may be modified or terminated by the court by further order.

Section 6. Nature of support. (1) Provision for support ordered by the court may consist of any one or more of the following:

(a) Transfer of title to personal property.

(b) Transfer of title to real property.

(c) Periodic payment of moneys during administration of the estate, but the payments may not continue for 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.

Section 7. Limitations. If it appears to the court that after provision for support is made the estate will be insolvent, the 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 not continue for more than one year after the date of death of the decedent.

Section 8. Priority; support treated as administration expense. Provision for support ordered by the court has priority over claims against the estate and other expenses of administration.

Section 9. 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 10. Repeal of existing statutes. ORS 113.070, 116.005, 116.010, 116.015, 116.020, 116.025, 116.590 and 116.595 are repealed.

Proposed revised Oregon probate code
SUPPORT OF SPOUSE AND CHILDREN
2nd Draft
November 7, 1967

Prepared by
Stanton Allison

COMMENTS

In considering a simplified approach to the problem of support of the widow or widower and children of the deceased, and the provisions granting a broader discretion to the court in this area, it should be realized that the inheritance rights of the surviving spouse are much enlarged by the proposed code. The surviving spouse, if there are children, would be given not only an undivided half of the personal property as now provided, but also an undivided one-half in fee of the real property, in lieu of the present dower and curtesy interests which will be abolished. In addition, the election against the will by the surviving spouse would include an undivided one-quarter interest in the real property as well as in the personal property as now provided.

Your committees were cognizant of the problems which have arisen from the confusing and in some cases contradictory provisions of the present ORS. After extended discussion and consideration, your committees decided to eliminate any reference to homestead rights or exempt property, upon which our present support statutes are determined, for the reason that the provisions for homestead and exemptions from execution are subject to frequent change by the legislature. It seemed unwise to base provisions for support of the surviving spouse and children on artificial legislative definitions and restrictions on homestead and exemptions enacted with reference

to sales on execution and judgment liens. Your committees therefore decided that the court should be given full discretion and authority to order support purely on the basis of need, rather than have the authority curtailed or complicated by legislation referable to other problem areas. Thus, the so-called "probate homestead" provisions and the setting aside of property exempt from execution are eliminated in favor of broad powers of the court to provide support as needed.

Section 1. Occupancy of family abode by spouse and children. This section would supersede ORS 113.070 which grants the widow the right to remain in the dwelling house of her husband one year after his death, and ORS 116.005 which grants the surviving spouse and minor children of the deceased the right to remain in possession of the homestead until administration is granted and the inventory filed. The proposed section would grant the right of occupancy for one year to the widow and the widower and the minor or incompetent children. It provides the right where there is a leasehold estate or an estate for the life of another. However, the section provides that the occupants shall not commit waste nor permit the attachment of liens, and requires that the premises be insured against fire and other hazards. It requires payment of taxes and currently payable improvement liens. It provides that the exemption from execution possessed by the decedent shall extend to the occupancy by the surviving spouse and children.

The requirements during the occupancy by the spouse and children of the deceased for upkeep and protection of the property are not spelled out in the present code, but their utility for the protection of the property is obvious. The provision for the exemption from execution complies with the philosophy of ORS 116.590 and 116.595.

Section 2. Support of spouse and children. As noted in the introduction, this section would eliminate any restriction to the exempt homestead or to other exempt property in granting the court full power to make necessary and reasonable provision for the support of the spouse and of the minor or incompetent children. It would replace the present ORS 116.015. There is an important difference, however, from the present probate code, in that this section would require not only a proper showing to the court of the need and circumstances, (including non probate property), but would require due notice to the personal representative, citation to interested persons, and a hearing. This is obviously a greater protection to the interested parties than our present procedure which is usually on an ex parte basis.

Section 3. Petition and answer. This section would require that full information be available to the court before it makes its order for support. Unlike our present code the section requires that property other than estate property which may be available for the support of the spouse and children be shown in the petition.

Section 4. Temporary support. This section would replace ORS 116.005 to provide temporary support pending the hearing on the petition. It should be noted that the order for support does not have to be postponed until the inventory is filed, as now provided in ORS 116.015.

Section 5. Modification or termination of support. This section, providing for modification or termination of the support by court order, is not spelled out in the present code, but is a useful provision.

Section 6. Nature of support. Broad power is given to the court to transfer to the surviving spouse such real and personal property as may be necessary for support. This broad provision would replace the present probate homestead. It should be noted that under this section payments may be continuted for two years after the death, whereas ORS 116.015 prescribes a period of one year after the filing of the inventory. The section also provides that the court shall take into consideration the property outside of the estate which may be available for the support of the surviving family.

Section 7. Limitations. This section provides that in an insolvent estate the awarded support may not exceed one-half the estimated value of the estate and limits the payments in that case to one year after the date of death. ORS 116.015 provides that no order for further support shall be made if the estate is insolvent.

Section 8. Priority; support treated as administration expense. This section provides priority of support payments over claims against the estate and administration expenses. It spells out that the support is an expense of administration and is not to be charged against the distributive share of the spouse or child receiving the support.

SUPPORT OF SPOUSE AND CHILDREN

COMPARATIVE SECTION TABLE

Draft Section	ORS Section
1	113.070, 116.005
2	116.015
3	
4	116.005
5	
6	116.010, 116.020
7	
8	116.590, 116.595
9	23.260

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
SUPPORT OF SURVIVING SPOUSE AND CHILDREN
1st Draft
January 25, 1967

This draft is based primarily on a draft prepared by Mr. Gilley and Mr. Krause and approved by the advisory and bar committees.

Section 1. Occupancy of family abode by surviving spouse and children. The surviving spouse and any minor or incompetent child of a decedent may continue for one year after the date of death of the decedent to occupy the abode owned by the decedent that they occupied on the date of death. During that occupancy:

(1) The occupants shall not commit or permit waste to the abode.

(2) The occupants shall keep improvements to the abode insured against fire.

(3) The occupants shall pay taxes 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 surviving 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 surviving spouse and any minor or incompetent child of the decedent upon:

(a) Petition therefor by the surviving spouse or the guardian of the estate for any minor or incompetent child;

(b) Citation to the personal representative and interested persons; and

(c) Hearing on the petition.

(2) The petition for support shall include a description of any property available for the support of the surviving spouse and children other than property of the estate and an estimate of the expenses anticipated for their support.

(3) The personal representative shall answer the petition for support. The answer shall include, so far as known, a description 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.

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 expenses 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 116.010 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?

his death, to his children or heirs, vests an estate or interest for life only in the devisee and remainder in the children or heirs.

Section 15. Devise passes all interest of testator. 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 devise a lesser interest.

Section 16. Property acquired after making will. Any property acquired by the testator after the making of his will shall pass thereby, and in like manner as if title thereto were vested in him at the time of making the will, unless the intent is clear and explicit to the contrary.

Section 17. Effect of direction to pay debts, charges, taxes or administration expenses. A mere testamentary direction to pay debts, charges, taxes or expenses of administration shall not be deemed a direction for exoneration from encumbrances or against apportionment of estate taxes.

Section 18. Non-ademption of specific devises in certain cases. In the situations and under the circumstances provided in and governed by this section, specific devises will not fail or be extinguished by the sale, destruction, damage, condemnation or change in form of the property specifically devised. This section is inapplicable if the intent that the gift fail under the particular circumstances appears in the will, or if the testator during his lifetime gives property to the specific

Proposed revised Oregon probate code
WILLS
Amended 2nd Draft
December 22, 1967

Prepared by
Stanton W. Allison

Section 1. Definition of will. The term "will" as used in this chapter includes codicil; it also includes a testamentary instrument that merely appoints an executor, and a testamentary instrument that merely revokes or revives another will.

Section 2. 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 make a will.

Section 3. Execution of a will. A will shall be in writing and shall be executed with the following formalities:

(1) The testator, in the presence of each of the witnesses, shall:

(a) Sign the will; or

(b) 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 thereon and write on the will that he signed the name of the testator at the direction of the testator; or

(c) Acknowledge the signature previously made on the will by him or at his direction.

(2) At least two witnesses shall each:

(6) If securities are specifically willed to a devisee, 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 devise is deemed to include such additional or substituted securities. "Securities" has the same meaning as in ORS 59.030(3).

(7) Throughout this section the amount the specific devisee 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.

Section 18. When estate passes to issue of devisee or legatee, anti-lapse. When property is devised 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 by representation the property the devisee would have taken if he had survived the testator.

Section 19. Children born or adopted after execution of will (pretermitted children). (1) If a testator is survived by a child born or adopted after the execution of his will 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 is entitled to share in the estate as follows:

(A) The portion of the estate in which the after-born or after-adopted child may share is limited to the portion passing to the living children under the will.

(B) The after-born or after-adopted child shall receive such share of the estate, as limited by subparagraph (A) of this paragraph, as 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 given an equal share of the estate to each such child.

(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.

(4) The after-born or after-adopted child may recover the share of the estate to which he is entitled, 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 portions 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 so far as possible. However, persons to whom the will gives only 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 20. 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 the court having jurisdiction of the estate of the testator or to an executor named in the will.

(2) If is appears to the 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.

Section 21. Disposition of wills deposited with county clerk. So far as he is able, the county clerk of each county shall deliver to the testator, or to the person to whom the will is to be delivered after the death of the testator, each will deposited in his office for safekeeping pursuant to ORS 114.410. Any will he has been unable to so deliver before January 1, 2010, may be destroyed by the county clerk.

Section 22. 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.

Section 23. 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.

Proposed revised Oregon probate code
WILLS
2nd Draft
July 26, 1967

Prepared by
Stanton W. Allison

Section 1. Definition of will. The term "will" as used in this chapter includes codicil; it also includes a testamentary instrument that merely appoints an executor, and a testamentary instrument that merely revokes or revives another will.

Reference: ORS 114.010

Section 2. 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 make a will.

References: Advisory Committee Minutes:
11/19,20/65 p. 5
4/15, 16/66 p. 2

ORS 114.020

Section 3. Execution of a will. A will shall be in writing and shall be executed with the following formalities:

(1) The testator, in the presence of each of the witnesses, shall:

(a) Sign the will; or

(b) Direct 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 thereon and write on the will that he signed the name of the testator at the direction of the testator; or

(c) Acknowledge the signature previously made on the will by him or at his direction.

(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; and

(c) Having been informed that the instrument is the will of the testator, attest it by subscribing his name to the will in the presence of the testator and at his request.

References: Advisory Committee Minutes:
11/19, 20/65 p. 5; and Appendix
3/18, 19/66 pp. 10 to 12; and Appendix (Report March 16, 1966)
4/15, 16/65 p. 2

Section 4. Witness as beneficiary. An interested witness is one to whom is devised a personal and beneficial interest in the estate. 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 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.

References: Advisory Committee Minutes:
12/17, 18/65 p. 19; and Appendix
11/19, 20/65 pp. 5 and 6; and Appendix
3/18, 19/66 pp. 10 to 12; and Appendix (Report March 16, 1966)

Section 5. Law governing 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; 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.

References: Advisory Committee Minutes:
12/17, 18/65 Appendix A
3/18, 19/66 pp. 10, 12 and 13; and Appendix (Report dated March 16, 1966)

Section 6. Testamentary additions to trusts. (1) A devise 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; and

(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 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:

(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, and, if the testator's will so provides, including any amendments to the trust made after the death of the testator.

(5) A revocation or termination of the trust before the death of the testator shall cause the devise to lapse.

(6) This section shall not be construed as providing an exclusive method for making devises to the trustee or trustees of a trust established otherwise than by the will of the testator making the devise.

(7) This section shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact the same or similar provisions.

References: Advisory Committee Minutes:
12/17, 18/65 pp. 4 to 6; and Appendix A
3/18, 19/66 pp. 6 and 7

Section 7. Manner of revocation or alteration exclusive. A will may be revoked or altered only as provided in sections 7 to 11 of this Act.

Section 8. 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.

Section 9. Revival of revoked or invalid will. If a will or a part thereof has been revoked or is invalid, it can be revived only by a re-execution of the will or by the execution of another will or codicil in which the revoked or invalid will or part thereof is incorporated by reference.

Section 10. Revocation by marriage. A will is revoked by the subsequent marriage of the testator if the testator is survived by his spouse, unless:

(1) The will indicates an intent that it not be revoked by the subsequent marriage or was drafted under circumstances indicating that it was in contemplation of the marriage.

(2) Testator and spouse have entered into a contract before marriage which either makes provision for the spouse or provides that the spouse is to have no rights in the estate of the testator.

Section 11. 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.

References: Advisory Committee Minutes:
11/19, 20/66 pp. 6 to 8
12/17, 18/66 Appendix A

Section 12. Contract of sale of property devised not a revocation. An executory contract of sale made by a testator to convey property devised in a 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, if the property had descended to them.

Reference: Advisory Committee Minutes:
12/17, 18/65

ORS 115.140

Section 13. 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 interest therein which is subject to the disposal of the testator at the time of his death.

References: Advisory Committee Minutes:
12/17, 18/65 p. 10; and Appendix

ORS 114.230

Section 14. Devise of life estate. A devise 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 and remainder in the children or heirs.

References: Advisory Committee Minutes:
12/17, 18/65 pp. 7 to 9; and Appendix

ORS 114.220

Section 15. Devise passes all interest of testator. 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 devise a lesser interest.

References: Advisory Committee Minutes:
12/17, 18/65 pp. 10 and 11; and Appendix

ORS 114.230

Section 16. Property acquired after making will. Any property acquired by the testator after the making of his will shall pass thereby, and in like manner as if title thereto were vested in him at the time of making the will, unless the intent is clear and explicit to the contrary.

References: Advisory Committee Minutes:
12/17, 18/65 p. 10 and Appendix

Section 17. Non-ademption of specific devises in certain cases. In the situations and under the circumstances provided in and governed by this section, specific devises will not fail or be extinguished by the sale, destruction, damage, condemnation or change in form of the property specifically devised. This section is inapplicable if the intent that the gift fail under the particular circumstances appears in the will, or if the testator during his lifetime gives property to the specific

beneficiary with the invent of satisfying the specific gift.

(1) Whenever the subject of a specific devise is property only part of which is destroyed, damaged, sold or condemned, the specific devise 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 ademed under the common law by the destruction, damage, sale or condemnation.

(2) If insured property which is the subject of a specific devise is destroyed or damaged, the specific beneficiary has the right to receive (reduced by any amount expended or incurred by the testator in restoration or repair of the property):

(a) Any insurance proceeds paid to the personal representative after death of the testator with the incidents of the specific devise; and

(b) A general pecuniary legacy equivalent to any insurance proceeds paid to the testator within six months before his death.

(3) If property which is the subject of a specific devise is sold by the testator, the specific devisee 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 devise; and

(b) A general pecuniary legacy equivalent to the amount of the purchase price paid to the testator within six months before 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. 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) If property which is the subject of a specific devise is taken by condemnation prior to the testator's death, the specific devisee has the right to:

(a) Any amount of the condemnation award unpaid at the time of death, with the incidents of the specific devise; and

(b) A general pecuniary legacy equivalent to the amount of an award paid to the testator within six months before his death. In the event of an appeal in a condemnation proceeding, the award is for purposes of this section limited to the amount established on such appeal.

(5) If property which is the subject of a specific devise 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 devisee has the right to a general pecuniary legacy equivalent to the proceeds of the sale, or the condemnation award, or the insurance proceeds (reduced by any amount expended or incurred in restoration or repair 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 six months.

(6) If securities are specifically willed to a devisee, 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 devise is deemed to include such additional or substituted securities. "Securities" has the same meaning as in ORS 59.030 (3).

(7) Throughout this section the amount the specific devisee 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.

(Draftsman's note: Section 18 will be redrafted following further committee consideration.)

Section 19. When estate passes to issue of devisee or legatee, anti-lapse. When property is devised 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 by representation the property the devisee would have taken if he had survived the testator.

References: Advisory Committee Minutes:
12/17, 18/65 pp. 11 and 12.

Section 20. Children born or adopted after execution of will (pretermitted children). (1) If a testator is survived by a child born or adopted after the execution of his will 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 is entitled to share in the estate as follows:

(A) The portion of the estate in which the after-born or after-adopted child may share is limited to the portion passing to the living children under the will.

(B) The after-born or after-adopted child shall receive such share of the estate, as limited by subparagraph (A) of this paragraph, as 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 given an equal share of the estate to each such child.

(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.

(4) The after-born or after-adopted child may recover the share of the estate to which he is entitled, 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 portions 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 so far as possible.

References: Advisory Committee Minutes:
3/18, 19/66 p. 15; and Appendix
1966 New York Revision, "Estates, Powers - Trusts Law" Sec. 5-3.2

ORS 114.250

Section 21. 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 the court having jurisdiction of the estate of the testator or to an executor named in the will.

(2) If it appears to the 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.

References: Advisory Committee Minutes:
3/18,19/66 pp. 9 and 10; and Appendix

ORS 115.110, 115.130 and 115.990

Section 22. Disposition of wills deposited with county clerk. So far as he is able, the county clerk of each county shall deliver to the testator, or to the person to whom the will is to be delivered after the death of the testator, each will deposited in his office for safekeeping pursuant to ORS 114.410. Any will he has been unable to so deliver before January 1, 2010, may be destroyed by the county clerk.

References: Advisory Committee Minutes:
1/14/66, p. 11

ORS 114.410, 114.420, 114.430, 114.440.

(Draftsman note: This section was drafted by Legislative Counsel)

Section 23. 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.

Section 24. 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.

Proposed revised Oregon probate code
WILLS
2nd Draft
August 16, 1967

Prepared by:
Stanton Allison

COMMENTS

Section 1. Definition of will. This definition of will is taken from the 1963 Iowa Probate Code, Sec. 3, Subsection 35. It broadens the definition in ORS 114.010, which this would replace, to include testamentary instruments appointing an executor or merely revoking or reviving another will. The broader definition would make clear that the following requirements as to execution and proof would apply not only to the usual will, but also to the documents included in this definition. Although the present plan is to group all the definitions in the beginning of the new probate code, which will contain this definition, since our present chapter begins with a definition it would seem sensible that this broader definition be also included as the first section.

Section 2. Who may make a will. This section changes ORS 114.020 to reduce the age for unmarried persons who may make a will from 21 to 18. ORS 109.520 provides that all persons shall be deemed to have arrived at the age of majority upon their being married according to law. ORS 106.010 provides that marriage may be entered into by males at least 18 years of age and females at least 15 years of age. Thus, under our present statute, married persons of these ages can make will. Your committee felt that it was

advisable to keep the present rule as to married people but remove the present discrimination against unmarried people by making males and females 18 years of age, even if not married, able to make wills.

I quote a portion of the comment on Section 853.01 of the proposed Wisconsin Probate Code, explaining lowering the age of testamentary capacity to 18 years:

> Minors today are increasingly owners of substantial amounts of property. In an era when accumulation of wealth was the major means of acquiring an estate, few, if any, men acquired an estate before they reached 21. Today the tax advantages of inter vivos gifts have induced parents and grandparents to make transfers, outright or in trust, for minors.
>
> Marriage of minors is increasingly frequent. Patterns of marriage and raising a family have changed drastically. There is more need for a minor to be able to make a will to provide for a changing family situation.
>
> Minors can avoid existing limitations by resorting to legal devises which bypass probate: insurance, joint bank accounts, government bonds with beneficiary designations, etc.
>
> With modern public education, a young person of 18 ought to have sufficient judgment to make a testamentary disposition.
>
> Eighteen states have already recognized these changed conditions and set the age of 18 as the minimum age requirement. This also is the age adopted in the Model Probate Code.

Section 3. Execution of a will. This section incorporates and replaces ORS 114.030, 114.040, and 114.050. The format of the proposed new section follows in general Section 47 of the Model Probate Code. However, the new section has not changed the present ORS requirements that the will shall be in writing, signed by the testator, or by

some other person under his direction in his presence, and shall be attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator. The present proposal does, however, spell out a situation where the will has been already signed by the testator or by another person at his direction at the time the witnesses are asked to subscribe their names.

There has been, however, added a further statutory requirement that the subscribing witnesses be informed that the instrument they are asked to subscribe is the will of the testator.

The additional requirement may be summarized as requiring that the subscribing witnesses attest the will of the testator, and not merely the signature of the testator. This is in line with the requirement of the Model Probate Code, Section 47, Section 279 of the 1963 Iowa Probate Code, Section 50 of the Probate Code of California, West's California Codes, Section 14-303, Idaho Probate Code, and Section 21 Decedent Estate Law, McKinney's Consolidated Laws of New York, to cite a few examples.

Your committees believe that this publication requirement is in line with the usual practice in this state.

Section 4. Witness as beneficiary. This section covers the interested witness. It replaces ORS 114.310, 114.320, 114.330, and 114.340. The general wording of the revised section follows Section 281 of the 1963 Iowa Probate Code. The definition of an interested witness is generally taken

from the proposed Wisconsin Probate Code, Section 853.07. In essence, your committee believes that the proposed revision incorporates the present statutory provisions in that the validity of the will is established in any case, and that only in case there are not two or more disinterested witnesses does the rule apply that the interested witness may, on the basis of intestacy, receive an amount not to exceed the provision in the will. The inclusion of the definition makes clear that the section does not apply to one who was merely appointed a personal representative of the estate, or would merely derive some benefit therefrom, other than being a devisee.

Section 5. Law governing validity of a will. The proposed Section 5, governing the validity of a will, represents a broadening of the present ORS 114.060. The present statute makes a distinction between a devise of real property and a bequest of personalty. As to real property, the will must be executed in accordance with the laws of Oregon, but a bequest of personalty may be made by a will which is valid in the state where the will was executed. Thus, a will executed in California which contained provisions for both real and personal property, if a holographic will, would be good as to the personalty, but not as to the realty. The proposed section removes the difference between real and personal property and provides that the will would be good as to both realty and personalty if executed pursuant to

Oregon Law or if executed according to the law of the domicile, either at the time of execution, or at the time of death, or the law of the place of execution at the time of execution.

Your committees were of the strong opinion that the strong interests of the testators and the beneficiaries would be preserved and protected if wills which were valid at the time and place of execution be admitted to probate in this state. For reference, see Section 3-205 of the 1967 Draft Uniform Probate Code, Section 50 of the Model Code, and Section 283 of the 1963 Iowa Code.

It should be especially noted, however, that the proposed section requires that in all cases the will must be in writing and signed by the testator and otherwise executed according to the law of the particular jurisdiction, as noted. Thus, this section would not only replace ORS 114.060, but would repaal ORS 114.050 and would require the amendment of ORS 41.520, since soldiers' and sailors' nuncupative wills would not be legal.

It was the considered decision of your committees that the so-called "Soldiers' and Sailors' Wills" are great rarities in Oregon practice. Actually, with the literacy requirement of the armed services where all of their members are able to read and write, the immediate availability of service officers, the provisions which were originally enacted in 1849 seem no longer necessary as a part of our Probate Code.

Section 6. Testamentary additions to trusts. This section embodies in the proposed code the uniform testamentary additions to trusts act. This section is of course new, but it was the unanimous feeling of our committees that the adoption of the uniform act would provide for a uniformity of construction in many situations which Oregon practitioners will recognize have in the past caused many problems and uncertainties in the trust field. It is felt that the adoption of this act will not only provide uniformity of construction, but will spell out many of the problems and uncertainties now existing in this area.

Section 7 to 11 on Manner of Revocation and Alteration replace and recodify the present ORS sections 114.110 and 114.150 inclusive.

Section 8. Express revocation or alteration. This section is practically identical in wording with the present ORS 114.110. The only changes from the ORS section are editorial.

Section 9. Revival of revoked or invalid will. This section would replace and supersede ORS 114.120. The language of the proposed section was taken from Section 284 of the 1963 Iowa Probate Code which in turn was adopted from Section 55 of the Model Probate Code. The comment under the Iowa section states in part that "the last sentence is taken directly from Section 55 of the Model Probate Code to prevent the inadvertent revival of a will which the

testator did not actually desire." The present ORS section is discussed and to some extent criticized in Sections 279 and 380, Jaureguy and Love Probate Law and Practice.

(1) It is believed that the proposed section conforms to the general purpose and intent of the present ORS section, but avoids the difficulties and ambiguities criticized by the above authors. For discussion see Minutes of November 16, 17, 1965 at pages 6 and 7. For comparable provisions see Section 2-508 of the proposed 1967 draft Uniform Probate Code, which language appears similar to the language of Section 853.11 (6) of the 1967 proposed Wisconsin Probate Code. Your draftsman prefers the approach of the Model Code and the Iowa Code to the last two mentioned references which, in his opinion, would involve many more problems than the simple language proposed above.

Section 10. Revocation by Marriage. This section covering revocation by marriage, and section 11, covering revocation by divorce by annulment, cover and replace ORS 114.130. The language of the proposed section 10 is taken from Section 853.11 of the Proposed Wisconsin Probate Code.

Prior to 1965, ORS 114.130 provided that a will made by any person is deemed revoked by his or her subsequent marriage or divorce. This section is discussed in Section 376, Jaureguy and Love, Oregon Probate Law and Practice, and the cases cited there make it clear that prior to the 1965 amendment the statute operated automatically to revoke a

will upon the subsequent marriage of the testator, regardless of the intent of the testator. By Chapter 506, 1965 Session Laws, ORS 114.130 was amended by striking the word or between marriage and divorce and inserting "or annulment of marriage, unless the will expressly declares the intention of the testator that the will shall not be revoked by such action."

The proposed statute, copied from the Wisconsin proposed code, goes further than the 1965 amendment in attempting to give effect to the actual intention of the testator. In several of the cases cited in the section from Jaureguy and Love, and in the 1964 pocket part, the fairly restrictive language of the 1965 amendment would not have prevented a revocation of the will even though the intent of the testator was clear that the provision for the second wife was in his mind and she was provided for, although the will, in these cases, did not expressly declare that intention. It seems only right that where a subsequent marriage settlement upon the marriage of the testator makes provision for the wife and evidences the intent that the will not be revoked, the statute give full effect to the intention of the testator and prevent an automatic revocation of the will.

Thus, there seems every reason for adopting the proposed language, which would preserve the will and prevent a revocation if in fact that was the intent and desire of the testator.

There is one very important change in the proposed

section on revocation by marriage in that the proposed section makes the revocation dependent upon the testator being survived by his spouse. Our present statute does not have this provision and therefore, although the sole purpose of the revocation by subsequent marriage statute is to protect the spouse, actually under the Oregon statute the will is revoked even though the spouse predeceases the testator. This is obviously an unjust and unnecessary provision in these cases and the proposed statute makes the revocation only effective if in fact the spouse survives the testator.

Section 11. Revocation by divorce or annulment. The wording of this section is in general the same as Senate Bill 197, introduced in the 1963 Legislature as an Oregon State Bar Bill by the Probate Law and Procedure Committee. The bill failed to pass the 1963 Legislature and was introduced as Senate Bill 305 in the 1965 Legislature where it passed without amendment by the Senate, but was amended in the House as indicated in the comment on Section 10.

Your committees have adopted the wording to cover the situation of revocation by divorce and annulment substantially as outlined in the original Oregon State Bar Committee Bill. The amendment by the 1965 legislature which in effect would provide for an automatic revocation in the case of a subsequent divorce or annulment unless the will expressly declares the intention otherwise of the testator, is not realistic. It is difficult to visualize a situation where a testator would provide in his will that the will not be

revoked by his divorce or annulment of his marriage. Actually, this would not express the usual intention of the testator. The intention of the testator in such case would be that, after having made provision for his wife and appointed her executrix of his will in addition to numerous bequests and provisions for his children and friends and relatives, the will itself, the bequests to his children and to his friends and relatives and perhaps to charities should not be affected by the divorce of his wife, but that all of the provisions in the will providing for his former spouse would be revoked. Thus, your committees feel that the present proposed section which would revoke all provisions in the will for the divorced spouse but preserve the remainder of the will would carry out the actual intention of the testator in these cases.

Section 12. Contract of sale of property devised not a revocation. This section is identical with ORS 114.140 with purely editorial changes. A similar provision is found in the 1965 Washington Code, Section 11.12.060. The section is discussed in Section 377, Jaureguy and Love. The discussion there makes clear that, but for the statute referred to, ORS 114.140, under the doctrine of equitable conversion the proceeds of the sale of devised property sold on contract would go to those entitled to the testator's personal property and not to his devisee. The section is necessary to provide that in these cases the proceeds of the contract go

to the devisee of the real property.

Section 13. Encumbrance or disposition of property after making will. Section 13 covers ORS 114.230 (3) and ORS 114.150. These sections are also considered in Section 377, Jaureguy and Love, Oregon Probate Law and Practice.

Section 14. Devise of life estate. This section is identical in content with ORS 114.220, with merely editorial changes.

Section 15. Devise passes all interest of testator. Section 15 is identical in content with ORS 114.230 (1), with purely editorial changes.

Section 16. Property acquired after making will. This section embodies ORS 114.230 (2). Your committee, however, felt that the language of the proposed section, which is taken from Section 269 of the 1963 Iowa Probate Code, is preferable to the present ORS section. The Iowa section is adopted from Section 56 of the Model Probate Code.

Section 17. Non-ademption of specific devises in certain cases. This section is taken from Section 853.35 of the Proposed Wisconsin Probate Code. We quote the editorial comment on this section as contained in the Proposed Wisconsin Probate Code, which we consider is equally applicable to the situation in this state:

> This section is new and changes the law. At common law, if real or personal property were specifically given by will to a named person, and the property were destroyed or sold between the time of execution of the

will and the testator's death, the devise or bequest failed; the reason was that there was no property in the estate to satisfy the specific gift. This doctrine, known as ademption by extinction, worked without regard to the testator's intent. It was ameliorated to some extent by various judicial approaches. Thus if testator devised "my residence" to his wife, and sold the residence he owned at the time the will was drafted and subsequently purchased another residence, the court would apply the time-of-death construction; by relating the phrase "my residence" to the residence testator owned at death, ademption was avoided. But if testator sold one residence and died pending negotiations to purchase another residence, the wife was out of luck. If the testator sold on a land contract, our Supreme Court has held that the devisee is entitled to the unpaid balance on the land contract. Estate of Atkinson 19 Wis. 2d 272, 120 N.W. 2d 109 (1963). Apparently the result would be different if the testator had sold and taken a mortgage back, however. The same kind of problem arises if the house burns down before the testator's death. Is the devisee entitled to the fire insurance proceeds? In a somewhat analogous case our Supreme Court again prevented hardship by giving the insurance proceeds to the surviving joint tenant. Rock County Savings & Trust Co. v. London Assurance Co., 17 Wis. 2d 618, 117 N.W. 2d 676 (1962). The existing law not only involves uncertainty but requires costly litigation to reach a decision in each new case. This section is intended to settle the law.

The Committee decided that specific kinds of situations should be covered by the statute, rather than a broad statute abolishing the doctrine entirely. The resulting statute is only partly drawn from legislation in other states. The need for an anti-ademption statute was considered as great as the need for the anti-lapse statute which has been on the books for many years. The statute is intended to carry out the normal intent of the testator.

Section 19. <u>When estate passes to issue of devise or legatee anti-lapse</u>. The proposed section 19 is identical in content with ORS 114.240, except for purely editorial changes. The proposed section does, however, include relatives by adoption, which presumably would be understood by the present ORS section, and provides that the descendants

of the deceased devisee would take by representation, which also seems inherent in the present section. For comparative legislation, see Section 11.12.110 of the 1965 Washington Code and Sections 273 and 274 of the 1963 Iowa Probate Code.

Section 20. Children born or adopted after execution of will (pretermitted children). This section would replace ORS 114.250. The proposed section is taken from Section 5-3.2, 1966 New York Revision "Estates, Powers and Trusts Law."

The committees were in agreement that they did not wish to perpetuate the problems and the palpable injustices inherent in the present ORS statute. A cursory examination of the litigation involved in this provision would be sufficient reason for adopting a different approach. It may be said that from this starting point probably no other one of the proposed sections in the code resulted in more extended discussion than this problem of pretermitted children. The committees were agreed that such a provision should, so far as possible, try to carry out the desires of a testator. Obviously, a present situation where a testator makes a $10,000 bequest to a living child named in his will, makes no provision for after-born children, and a posthumous child would take one-half of a $200,000 estate, does not carry out what would seem the obvious desires of the testator.

Attention is called to the changes in the proposed section. The section spells out that the same provisions apply to an after-adopted child as would apply to an after-born child. If the will makes no provision for a child

living at the time of the execution of the will, the after-born child does not take a share of the estate. This provision is contrary to the present ORS statute which provides for children living at the time of execution of the will if they are not provided for by the will. Your committees believe that the proposed provision would carry out the intention of the testator. In other words, if he purposely made no provision for living children who obviously were known to him when he made his will, the ordinary implication would be that he purposely did not provide in his will for these children. Similarly, if he did not provide for the children he knew of, he may be assumed to not desire to make provision for after-born children. Your committees feel that the present ORS provision, where the testator had knowledge of his living children and did not provide for them, would enforce a provision directly contrary to the obvious desires of the testator.

On the other hand, if the will does provide for the children living at the time of the execution of the will, the after-born child is provided for from the provision made to the living children. The share of the after-born child is arrived at by taking the amount of the will provision for the children and dividing it by the number of children provided for and the number of after-born children so that the after-born child would take an equal share of the total

provision. For example, if provision is made in the will to child A with a legacy of $10,000, child B with a legacy of $20,000, and after-born child C is not provided for, child C would take one-third of the total provision of $30,000, or $10,000, and the legacies to children A and B would be reduced proportionately by one-third.

If the testator had no child living when he made his will, the after-born or after-adopted child would take by intestate succession.

It should be explained that contrary to the present ORS section, if the testator has three living children when he made his will and makes provision for two children, but none for the third, the proposed statute would not make any provision for the omitted child. Your committees feel that this approach is actually in accord with what would seem the obvious intention of the testator in failing to provide for a child of which he had knowledge.

The comment by the New York Temporary State Commission on Estates attached to the bill as submitted to the 1966 Session of the New York Legislature is as follows:

> Comments: This section substantially revises DEL Sec. 26 to eliminate a serious defect in the policy underpinning of that statute by which an after-born child who qualifies for an elective share of his parent's estate will receive a substantial portion of such estate although the parent has made no provision for other children living at the time the will was executed. The new section undertakes to correct this distortion of the reasonably presumable intention of the normal parent.

No change has been effected in the principle underlying DEL Sec. 26, embodied in paragraph (a) of the new section, which disqualifies an after-born child from taking an elective share where the testator has given some concrete evidence that the after-born child was not inadvertently or unintentionally disinherited (see, McLean v. McLean, 207 N.Y. 365).

Section 21. Delivery of will by custodian, liability. This section embodies the provisions of ORS 115.110 and 115.130.

The civil liability to persons injured by failure to deliver the will is preserved as now provided in ORS 115.110. ORS 115.990, providing a criminal penalty for such failure, is repealed by the proposed new code. In the opinion of the committee, apparently the criminal penalty is never invoked. The committees agreed that the civil liability gives sufficient protection.

Section 22. Disposition of wills deposited with county clerk. This section would replace and supersede ORS 114.410, 114.420, 114.430, and 114.440, covering deposit of wills with county clerk. As will be noted, this proposed section would terminate the provisions for depositing wills with the county clerk and would provide that, so far as possible, all wills now in the possession of the county clerks under the present provisions, would be returned to the testator or to the persons to whom the will is to be delivered following the death of the testator. It would provide for eventual destruction of all wills which the county clerk had been

unable to dispose of 40 years after the effective date of the new code.

When this matter was being studied by the two committees, data was submitted to the committees by the committee members on the number of wills deposited and the procedures followed in the following counties: Multnomah County, Union County, Lane County, Jackson County, and Clackamas County. Following the detailed reports on these counties and general suggestions from members from a number of additional counties, the consensus can perhaps be best summed up by quoting from one of the reports as follows: "I believe all of this matter should be repealed. The clerk states that it is a nuisance, the courthouse is full, and her office is understaffed and quite busy with other matters. Moreover, the state should not perform this rather non-important service. It isn't used, and a will being ambulatory, it is likely that many of them will have been revoked."

It was apparent from the discussion, participated in of course by members representing a substantial number of counties in central, eastern, and southern Oregon, that no attempt was made by the county clerk's office to check on whether the persons depositing the wills were living or were in fact deceased. Apparently, there is no widespread practice of the county clerks in checking as to whether intestate proceedings have been instituted forparties for whom wills

were on deposit. As an example of the problem, since 1945, when this present act became effective, in Multnomah County 1339 wills had been deposited, 430 of these had been withdrawn, and 909 were on deposit as of January 14, 1966, when the most recent deposit was made. Your committees were strongly of the opinion that there is much greater probability of a will being found after a decease of the testator if the will is in the safe deposit box. It is felt that the present statute had its tendency in many cases to provide a depository for wills and no factual provisions for notification of such deposit to the executor named therein following the death of the testator. It was felt strongly, also, that this service is not a proper function of the county clerks and from the reports received it obviously is one which for many practical reasons has not resulted in proper notification, following the death of the testator in every case.

It should be noted also that the present provision of ORS 115.110 for delivery of will by a custodian is preserved in the preceding Section 21.

Section 23. Evidence to prove a will. It was necessary to amend ORS 41.520 to eliminate the exception of soldiers' and sailors' wills, pursuant to ORS 114.050, since under the proposed code, ORS 114.050 would be repealed, and no provision would be made for oral or holographic wills of mariners at sea or soldiers in the military service.

CORRESPONDING SECTIONS - CHAPTER ON WILLS AND ORS CHAPTER ON WILLS

SECTION	ORS SECTIONS
1	114.010
2	114.020
3	114.030, 114.040, 114.050
4	114.310, 114.320, 114.330, 114.340
5	114.060
6	114.070
7	
8	114.110
9	114.120
10	114.130
11	114.130
12	114.140
13	114.150, 114.230(3)
14	114.220
15	114.230(1)
16	114.230(2)
17	
18	
19	114.240
20	114.250
21	115.110, 115.130, 115.990
22	114.410, 114.420, 114.430, 114.440

Prepared by
Legislative Counsel

Proposed revised Oregon probate code
WILLS
1st Draft
January 30, 1967

This draft is based primarily on a draft distributed by Mr. Mapp and Mr. Riddlesbarger at the November 1965 meeting, and the action taken by the committees at the meetings in November 1965, December 1965, January 1966 and March 1966. See also the appendix to the November and December 1965 minutes.

EXECUTION

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 will.

References: Advisory Committee Minutes:
11/19,20/65 p. 5
4/15,16/66 p. 2

ORS 114.020

Comment: The present plan is to define a will, either at the beginning of the probate code, or in the section on wills, or in both. The definition will be that a will includes a codicil or other instrument executed with the same formalities as a will.

ORS 114.010 is repealed by the repealing section at the end of these sections.

Section 2. Execution of 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:

(1) The testator, in the presence of each of the witnesses shall:

(a) Sign the will;

(b) Acknowledge his signature previously made on the will; or

(c) At the direction of the testator and in his presence have another person sign thereon the name of the testator. Any witness 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.

References: Advisory Committee Minutes:
11/19,20/65 p. 5; and Appendix
3/18,19/66 pp. 10 to 12; and Appendix (Report March 16, 1966)
4/15,16/65 p. 2

Comment: The draftsman changed the word "subscribe" to "sign" in section 2. Should section 2 provide that any person otherwise qualified to be a witness in court may be a witness to a will?

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 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 a personal and beneficial interest in the estate of the testator is bequeathed or devised to him by the will.

References: Advisory Committee Minutes:
12/17,18/65 p. 19; and Appendix
11/19,20/65 pp. 5 and 6; and Appendix
3/18,19/66 pp. 10 to 12; and Appendix (Report March 16, 1966)

ORS 114.310, 114.320, 114.330 and 114.340

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.

References: Advisory Committee Minutes:
12/17,18/65 Appendix A
3/18,19/66 pp. 10 pp. 12 and 13; and Appendix (Report dated March 16, 1966)

ORS 114.050 and 114.060

Comment: The draftsman changed "legally executed" to "lawfully executed."

Could this section be drafted to provide "A will that is not executed as provided in section 2 shall be admitted to probate provided: etc."?

TESTAMENTARY ADDITIONS TO TRUSTS

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, and, if the testator's will so provides, including any amendments to the trust made after the 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 or bequest.

(7) This section shall have no effect upon any devise or bequest made by a will executed prior to the effective date of this section.

(8) This section shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact the same or similar provisions.

(9) This section may be cited as the Uniform Testamentary Additions to Trusts Act.

References: Advisory Committee Minutes:
12/17,18/65 pp. 4 to 6; and Appendix A
3/18,19/66 pp. 6 and 7

ORS 114.070

Comment: These sections of the draft were combined by the draftsman into one section.

REVOCATION AND ALTERATION

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.

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.

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.

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.

Section 10. Revocation 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.

References: Advisory Committee Minutes:
11/19,20/66 pp. 6 to 8
12/17,18/66 Appendix A

ORS 114.110, 114.120, 114.130, 114.140 and 114.150

Comment: The section concerning exoneration will be in a later draft.

DEVISES AND LEGACIES

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.

References: Advisory Committee Minutes:
12/17,18/65 pp. 7 to 9; and Appendix

ORS 114.220

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.

References: Advisory Committee Minutes:
12/17, 18/65 pp. 10 and 11; and Appendix

ORS 114.230

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 lessor estate or interest.

References: Advisory Committee Minutes:
12/17,18/65 p. 18; and Appendix

ORS 114.230

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.

References: Advisory Committee Minutes:
12/17,18/65 p. 10; and Appendix

ORS 114.230

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.

References: Advisory Committee Minutes:
12/17,18/65 pp. 11 and 12

ORS 114.240

PRETERMITTED CHILDREN

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.

References: Advisory Committee Minutes:
3/18,19/66 p. 18; and Appendix

ORS 114.250

CUSTODIANS

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.

References: Advisory Committee Minutes:
3/18,19/66 pp. 9 and 10; and Appendix

ORS 115.110, 115.130 and 115.190

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.

References: This was drafted by the Legislative Counsel.

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.

Section 20. ORS 107.110 is amended to read:

107.110 Annulment or divorce decree ends marriage; when effective; appeal; content of decree. (1) A decree declaring a marriage void or dissolved at the suit or claim of either party shall give the court jurisdiction to award, to be

effective immediately, the relief provided by ORS 107.100. The decree shall revoke any will pursuant to the provisions of [ORS 114.130] section 9 of this Act, but the decree shall not be effective in so far as it affects the marital status of the parties until the expiration of 60 days from the date of the decree or, if an appeal is taken, until the suit is determined on appeal, whichever is later. However, the right of one party to cohabit with the other shall cease on the date of the decree.

(2) In case either party dies within the 60-day period specified in subsection (1) of this section, the decree shall be considered to have entirely terminated the marriage relationship immediately before such death, unless an appeal is pending.

(3) (a) The Supreme Court shall continue to have jurisdiction of such an appeal pending at the time of death of either party, the estate of the decedent being the nominal party therefor. The attorney of record on the appeal, for the deceased party, may be allowed a reasonable attorney fee, to be paid from the decedent's estate. However, costs on appeal may not be awarded to either party.

(b) The Supreme Court shall have the power to determine finally all matters presented on such appeal. Before making final disposition, the Supreme Court may refer the proceeding back to the trial court for such additional findings of fact as are required.

(4) The marriage relationship is terminated in all respects at the expiration of the 60-day period specified in subsection (1) of this section or, if an appeal is taken, when the suit is determined on appeal, whichever is later, without any further action by either party. However, at any time within the 60-day period or while an appeal is pending, the court may set aside the decree upon the motion of both parties.

(5) A decree declaring a marriage void or dissolved shall include the substance of subsections (1) to (4) of this section and shall specify the date on which the decree becomes finally effective to terminate the marital status of the parties.

Section 21. Act not to effect wills made prior to Act. This Act does not apply to wills made prior to the effective date of this Act as provided by ORS Chapter 114.

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.

Note: Mr. Riddlesbarger had a note made in the minutes that he would like to discuss ORS 114.270 again when the committees considered the first drafts.