December 6, 1968

To: Law Improvement Committee

From: Advisory Committee on Probate Law Revision

Subject: Changes in Preliminary Draft of Proposed Oregon Probate Code

Copies of the Preliminary draft of the Proposed Oregon Probate Code, prepared by the Advisory Committee on Probate Law Revision with the assistance of the Oregon State Bar Committee on Probate Law and Procedure, were distributed to all active members of the Oregon State Bar in Oregon and others in September 1968. Following this distribution, a series of some 18 meetings throughout the state was arranged and held for the purpose of explaining to members of the Bar in attendance the provisions of the preliminary draft and obtaining from those in attendance their comments, suggestions and criticisms on the preliminary draft. These meetings, and the preliminary draft itself, were widely publicized. The meetings were well attended.

The meetings were conducted by designated members of the advisory and Bar committees, who explained in general the content of the preliminary draft and described some of the specific changes in the present probate code proposed thereby. Lawyers in attendance then were invited to submit oral questions, suggestions and criticisms. The chairman of each meeting prepared and forwarded to the chairman of the advisory committee a resume of the questions, suggestions and criticisms submitted. Lawyers also were asked to submit written suggestions or criticisms to the chairman of the advisory committee. A considerable number of suggestions and criticisms on the preliminary draft were so obtained.

The advisory and Bar committees met on November 15 and 16, 1968, to review proposed changes in the preliminary draft in the light of comments, suggestions and criticisms received, and approved certain of those proposed changes. Pursuant to authorization given by the two committees at that meeting, subcommittees met on November 22 and December 2 and 5, 1968, to consider those and other changes and to finalize the content of the preliminary draft for presentation to the Law Improvement Committee. The changes approved by the two committees and their subcommittees were drafted by Mr. Stanton W. Allison, and subsequently reviewed, and in a few instances modified in form, by the Legislative Counsel's office.

This set of green sheets sets forth the advisory committee changes in the preliminary draft. The sheets are designed for insertion at appropriate places in the preliminary draft.

The format of the advisory committee changes set forth on the green sheets generally is as follows:

1. Deletion of a complete section, subsection or paragraph is indicated by a simple direction to delete.

2. Redesignation of a subsection or paragraph is also indicated by a simple direction to this effect.

3. Change in the substance of a proposed new section is indicated by [bracketing] material to be deleted and underscoring material to be inserted.

4. Change in the substance of a proposed amendment of an existing statute section is indicated by [[double bracketing]] material to be deleted and double underscoring material to be inserted.

In addition to deletions, insertions and redesignation of subsections and paragraphs, a rearrangement of sections in certain areas of the preliminary draft is contemplated. By reason of this rearrangement, the deletion of whole sections and the insertion of whole new sections, a substantial renumbering of sections of the preliminary draft, with advisory committee changes, will be necessary. This rearrangement and renumbering of sections is reflected, tentatively, in the revised Outline included in this set of green sheets. Renumbering of sections will require changes in references in certain sections of the preliminary draft to other sections of that draft; this has not yet been done.

The preliminary draft, with advisory committee changes, constitutes the final draft of the proposed code submitted by the Advisory Committee on Probate Law Revision to the Law Improvement Committee, with the recommendation that the Law Improvement Committee, after appropriate consideration, in turn submit that draft, in the form of proposed legislation, to the Oregon Legislative Assembly at the 1969 regular session thereof.

Following Law Improvement Committee consideration of and action on the preliminary draft, with advisory committee changes, the Legislative Counsel's office will proceed to prepare the appropriate proposed legislation for submission to the 1969 Oregon legislature. The proposed legislation will reflect any changes in substance approved by the Law Improvement Committee and any technical drafting changes determined to be necessary.

Preliminary Draft

Proposed

OREGON PROBATE CODE

Prepared by

Advisory Committee on
Probate Law Revision

August 1968
Salem, Oregon

THE ADVISORY COMMITTEE ON

PROBATE LAW REVISION

Judge William L. Dickson, Chairman
Circuit Court, 4th Judicial District
244 Multnomah County Courthouse
Portland 97204

Clifford E. Zollinger, Vice Chairman
527 Pacific Building
Portland 97204

Stanton W. Allison
2444 S. W. Broadway Drive
Portland 97201

Herbert E. Butler
P. O. Box 3168
Portland 97208

Wallace P. Carson
Pioneer Trust Building
Salem 97301

Otto J. Frohnmayer
200 Cooley Theatre Building
Medford 97501

R. Thomas Gooding
P. O. Box 1025
La Grande 97850

Senator Donald R. Husband
72 W. Broadway
Eugene 97401

Nicholas Jaureguy
1408 Standard Plaza
Portland 97204

Patricia A. Lisbakken
710 S. W. 3rd Avenue
Portland 97204

Professor Thomas W. Mapp
School of Law
University of Oregon
Eugene 97403

William P. Riddlesbarger
1170 Pearl Street
Eugene 97401

THE COMMITTEES ON PROBATE LAW AND PROCEDURE

OF THE OREGON STATE BAR

(1964-65 through 1967-68)

Robert C. Anderson
Astoria

Wade P. Bettis
Canby

Paul R. Biggs
Oregon City

Sen. Harry D. Boivin
Klamath Falls

Patricia Braun
Portland

Ernest J. Buhlinger
Portland

Herbert E. Butler
Portland

John M. Copenhaver
Redmond

Shirley A. Field
Portland

Robert W. Gilley
Portland

Donald E. Heisler
The Dalles

Gregory T. Hornecker
Medford

William M. Keller
Portland

Kenneth Kraemer
Portland

Donald G. Krause
Portland

Charles M. Lovett
Portland

George Luoma
Roseburg

F. D. Mayer
Lebanon

Duncan L. McKay
Bend

C. Laird McKenna
Portland

Lillian Meyers
Portland

John D. Mosser
Portland

Walter H. Pendergrass
Portland

A. E. Piazza
Medford

J. Ray Rhoten
Salem

Campbell Richardson
Portland

Louis Schnitzer
Portland

Kenneth E. Shetterly
Dallas

David C. Silven
Baker

Herman F. Smith
Klamath Falls

Herbert Swift
Newberg

William E. Tassock
Portland

Judge Joseph J. Thalhofer
Bend

William R. Thomas
Lebanon

Judge John C. Warden
Coquille

CONSULTANTS

Walter L. Barrie
Salem

David B. Frohnmayer
San Francisco, California

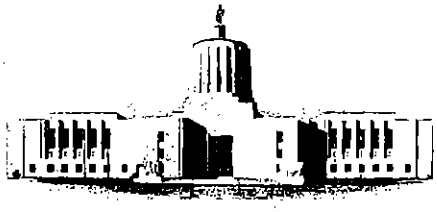
Donald J. Georgeson
Portland

William C. Martin
Portland

Charles J. McMurchie
Portland

Peter A. Schwabe
Portland

Denny Z. Zikes
Portland



STATE OF OREGON
LAW IMPROVEMENT COMMITTEE

COMMITTEE OFFICE
410 STATE CAPITOL
SALEM, OREGON 97310
TEL. 364-2171, EXT. 1207

ROBERT W. LUNDY, SECRETARY

August 9, 1968

Mr. Allan G. Carson, Chairman
Law Improvement Committee
410 State Capitol
Salem, Oregon

Dear Mr. Carson:

The Law Improvement Committee's Advisory Committee on Probate Law Revision herewith submits its preliminary draft of a proposed Oregon probate code.

Pursuant to the plan previously discussed and approved by the Law Improvement Committee and Advisory Committee, copies of this preliminary draft will be distributed to all active members of the Oregon State Bar in Oregon and to other interested persons. The aims of this distribution are to inform and to stimulate and invite comments, suggestions and criticisms on the preliminary draft.

Following a sufficient exposure of the preliminary draft, the Advisory Committee intends to review the draft, particularly in regard to comments, suggestions and criticisms received. Upon conclusion of this review the Advisory Committee will submit to the Law Improvement Committee its final draft of the proposed code, with the recommendation that the Law Improvement Committee, after appropriate consideration, in turn submit that draft, in the form of proposed legislation, to the Oregon Legislative Assembly at the 1969 regular session thereof.

Very truly yours,

William L. Dickson

WILLIAM L. DICKSON
Chairman
Advisory Committee on
Probate Law Revision

WLD-mw

TABLE OF CONTENTS

FOREWORD

Initiation of Probate Revision Project

Nationwide interest in probate law and practice recently has been stimulated by the publication and brisk sale of Mr. Dacey's controversial book, How To Avoid Probate, by a Reader's Digest article "The Mess in Our Probate Courts" and by numerous newspaper and magazine articles on the subject. Whatever else one may say about this publicity, it seems to be accomplishing one worthy purpose -- a growing, and probably long overdue, recognition of a need to examine the present law and practice throughout the country with a view to improvement thereof.

Revision of Oregon's probate law was the first project initiated by the Law Improvement Committee after it organized in December 1963. The committee was well aware of the criticism directed from time to time against the existing law on this subject and of the need for revision thereof expressed by individuals and groups, including the Committee on Probate Law and Procedure of the Oregon State Bar.

Recognizing that revision of the probate law was an undertaking of considerable magnitude and that expert assistance would be required in the prosecution of the project, the Law Improvement Committee authorized appointment of the Advisory Committee on Probate Law Revision to engage in the detailed work of formulating recommendations and proposed legislation designed to improve this law. A list of the members of the Advisory Committee appears on page iii of this publication.

Present Oregon Probate Law and Need for Revision

Probate law appears to have played a part in the early history of Oregon. In 1841 Ewing Young, reputedly one of the wealthiest American citizens in the Oregon territory, died leaving no known will or heirs. At that time both England and the United States laid claim to jurisdiction over the territory. American settlers refused to be governed by laws made applicable to English subjects in the territory, and therefore there was no law for determining disposition of Young's estate. Following Young's funeral a number of the mourners met together and a discussion of the proper disposition of the estate of the deceased led to the broader question of organizing a civil government. Formation of a provisional government followed in 1843, and the first laws adopted by this government included some on wills, administration of decedents' estates and establishment of probate courts.

Later, in 1853, the first territorial legislature enacted a code of laws, which included those on probate. Those probate laws still exist today, many substantially changed, but some virtually the same as originally enacted in 1853.

Despite piecemeal improvement of our probate laws over the years, many who are concerned with these laws and their application share the view that there is room for improvement. Complaints that these laws are too complex and difficult to understand are fairly common. It is often contended that present procedures required by these laws are unnecessarily complicated and time-consuming, especially in the handling of small estates. It has been the aim of the Advisory Committee to formulate a revision that will remove much of the cause of these complaints, and at the same time continue to reflect the basic idea of probate to provide an orderly procedure for collecting and distributing the assets of a decedent as speedily as possible, consistent with steps recognized as proper and with due regard to the rights and interests of all persons concerned in an estate.

Previous Probate Revision in Oregon

There have been at least two previous efforts at wholesale revision of Oregon's probate law, both by committees of the Oregon State Bar. In 1919 the President of the Oregon Bar Association appointed a three-member committee, pursuant to a resolution adopted at the 1918 annual meeting of the association, to prepare and recommend to the legislature a new probate code. That committee prepared such a code, consisting of 201 new statute sections replacing then existing statutes equivalent in substance to that of ORS chapters 115, 116, 117, 118, 121 and 126, and embodied it in a report distributed to all members of the association. This report was considered at the association meeting in 1922, and thereafter a revised version of the new code was prepared. The revised version was introduced at the 1923 session of the Oregon legislature, but was indefinitely postponed, apparently because of technical defect in form. At its 1923 meeting, the Bar Association resolved that an effort be made to have the new code reintroduced at the 1925 session of the legislature, but this was not done.

In 1938 Allan G. Carson, then President of the Oregon State Bar, called to the attention of the Bar the need for a new probate code in Oregon. The Bar Committee on Probate Law and Procedure, under the chairmanship of Mr. Lowell Mundorff (later Judge of the Circuit Court for Multnomah County), undertook to consider the probate code with a view to its revision. The committee reported its progress to the 1940 annual meeting of the Bar, and recommended that a new probate code be prepared. The 1940 annual meeting approved this recommendation and directed the committee to proceed. By the time of the 1941 annual meeting the committee was involved

in a consideration and refinement of a preliminary draft. The committee's report to the 1942 annual meeting contained a draft of a proposed new probate code, consisting of 220 new statute sections replacing then existing statutes equivalent in substance to ORS chapters 115, 116, 117, 118, 121 and 126. The 1942 annual meeting directed that the question of approval of the committee's draft be submitted to the members of the Bar before any recommendation was made to the legislature. The December 1942 issue of the Bar Bulletin contained pro and con arguments on the question and a referendum ballot to be marked and returned. The result of the referendum was 210 negative and 157 affirmative votes, and this effort on the part of the organized bar to accomplish revision of the probate code was abandoned.

Despite the failure of the organized bar to gain approval and enactment of an overall revision of a large portion of Oregon's probate law, it appears that many of the reforms proposed by the two revisions described above have been accomplished through separate proposals over the years enacted into law, many of which have been recommended by the Bar Committee on Probate Law and Procedure.

Previous Guardianship Revision in Oregon

In the past 20 years two revisions of the Oregon guardianship statutes have been accomplished through enactments by the legislature in 1947 and 1961. The most recent of these revisions was the product of a substantive law revision project initiated by the Legislative Counsel Committee early in 1960 and carried out by an advisory committee composed of members of the bench and bar experienced and knowledgeable in the subject. That revision, consisting of 96 new statute sections replacing 68 then existing sections and amendment of 11 then existing sections, was enacted as chapter 344, Oregon Laws 1961. Members of the advisory committee were: Judge William L. Dickson, Chairman, Portland; Nicholas Jaureguy, Vice Chairman, Portland; Allan G. Carson, Salem; Senator Donald R. Husband, Eugene; Representative George H. Layman, Newberg; Senator (later Circuit Court Judge) Jean L. Lewis; Judge Robert D. Maclean, Newport; and Cliffored E. Zollinger, Portland. The 1961 revision has been well received and, with minor changes, is perpetuated by the preliminary draft of a proposed Oregon probate code set forth herein.

Probate Revision Elsewhere

In the three decades prior to 1960 revised probate codes were enacted in 15 states. The 1930's saw such enactment in California, Florida, Illinois, Kansas, Michigan, Minnesota and Ohio. In the 1940's probate law revision was accomplished in Arkansas, Nevada and Pennsylvania; and in the 1950's, in

Indiana, Missouri, New Jersey, North Carolina and Texas. Thus far in the 1960's revised probate codes have been adopted in four states (Iowa, Louisiana, New York and Washington) and the District of Columbia. Work on revision projects is underway in Alabama, Maryland, Michigan, South Carolina, Wisconsin and, quite likely, a number of other states.

In 1946 work begun in 1940 culminated in the publication of a Model Probate Code. This Model Code was prepared for the Probate Law Division, Section of Real Property, Probate and Trust Law of the American Bar Association by the division's Model Probate Code Committee in cooperation with the Research Staff of the University of Michigan Law School. Impetus for this undertaking was supplied by a series of articles on probate courts and procedure published in the Journal of the American Judicature Society in 1939 and 1940, and by the new probate codes adopted in at least eight states in the 1930's and early 1940's. A stated objective of the Model Code was improvement of probate procedure wherever revision was sought, rather than attainment of uniformity among states. It was said to be intended as a reservoir of ideas and of acceptable legislative formulations of those ideas, from which draftsmen and policy-makers might draw in the preparation of new probate codes.

In 1962, 16 years after publication of the Model Probate Code, it was agreed jointly by representatives of the National Conference of Commissioners on Uniform State Laws and a special subcommitee of the Real Property, Probate and Trust Law Section of the American Bar Association that an effort should be made to update and revise the Model Code. By 1964 a committee of Reporters for this project had been assembled. Preliminary drafts of portions of a new Model or Uniform Probate Code were submitted to the National Conference at its annual meetings in 1964, 1965 and 1966. A working draft of a complete Uniform Probate Code was prepared by the Reporters at a continuous five-week meeting at Boulder, Colorado, in June and July 1967, which was attended by Professor Thomas W. Mapp, a member of the Advisory Committee, as an observer. That draft was considered by the National Conference at its annual meeting in 1967, and a revised draft at the annual meeting in July 1968. The Uniform Code is scheduled for final changes and approval by the National Conference at its 1969 annual meeting. Much of the Uniforn Probate Code is reflected in the preliminary draft of a Oregon probate code.

1964-68 Oregon Probate Revision Procedure

Following its appointment early in 1964 the Advisory Committee on Probate Law Revision undertook a comprehensive and systematic review of the 11 chapters of Oregon Revised Statutes (i.e., ORS chapters 111 through 121) that constitute

the bulk of the present Oregon statutory law on probate and of related statutes. The principal area of our present probate law consists of over 300 statute sections, and there may be at least 600 other statute sections that are related to probate in some degree.

Since January 1965, the Advisory Committee has met jointly with and had the benefit of invaluable assistance from the Bar Committee on Probate Law and Procedure. Members of the Bar Committee undertook the preparation of many research reports and drafts of proposed legislation. The period of participation in the probate law revision project by the Bar Committee has spanned four such committees. A list of the members of these committees appears on page v of this publication.

Other individual members of the Bar have assisted in the prosecution of the probate law revision project as consultants. A list of these consultants appears on page vii of this publication.

During the period April 1964 through April 1968, the Advisory Committee held 46 meetings, including 28 two-day meetings. Thirty-seven meeting were held jointly with the Bar Committee. Meeting hours during this period totaled over 330, and if the hours spent in attendance at meetings by each member of both committees were aggregated, the total during this period would be near 5,250. Probably a greater number of hours have been spent by members of both committees in research and preparation of reports and drafts of proposed legislation outside of meetings. Their time in attendance at meetings and in outside research was donated by members of the committees, who also assumed their own expenses.

The Advisory Committee, soon after it organized in April 1964, solicited suggestions from interested persons and groups, including probate judges, probate court clerks, local bar associations, law schools, banks, trust companies, title insurance companies and state and federal tax agencies. News releases have been sent to the Oregon State Bar for publication in its Bulletin, and most of these have appeared in issues of this organ of the Bar. News releases have also been sent from time to time to major newspapers and wire service representatives in Oregon, and a few of these have found their way into print.

The mode of procedure adopted by the Advisory Committee and generally followed included assignment of particular segments of the present law to subcommittees or individual members for study and recommendation for revision to the committee. These subcommittees and individual members prepared many research reports and drafts of proposed legislation for consideration and action by the committee. Research and drafting services also were provided during this stage by the Legislative Counsel's office.

Following committee action on substantially all segments of the present law, the Legislative Counsel's office, early in 1967, proceeded to incorporate the approved recommendations in first drafts of proposed legislation. These first drafts were considered in detail by the committee over a period of almost a year. Upon completion of consideration and action on each first draft, the draft was turned over to Mr. Stanton W. Allison, a member of the Advisory Committee, for revision thereof in conformity with committee action and for preparation of appropriate comments indicating the source and explaining the background of each proposed statute section. Mr. Allison's contribution to the preparation of the preliminary draft set forth herein, spanning the period June 1967 through April 1968, was indispensable. Final editorial work on the preliminary draft was performed by the Legislative Counsel's office.

Organization of Preliminary Draft

Immediately preceding the preliminary draft itself is an outline thereof by article, part and section, from which one may obtain a general overall view of the arrangement of material in the draft. An effort has been made to arrange the material in the draft in a way that improves upon the arrangement of material in the present Oregon probate code.

The preliminary draft is divided into 10 articles. The first seven articles constitute what may be considered the proposed probate code proper, equivalent in substance to ORS chapters 111 to 117, 120 and 121. Article VIII contains certain proposed procedural adjustments of the inheritance tax statutes (ORS chapter 118). Article IX contains proposed changes in the guardianship and conservatorship statutes (ORS chapter 126). Article X consists largely of proposed amendments of present statute sections outside the probate code, made for the purpose of conformity with changes in the probate code itself, but the article also contains a provision on the application of the draft, a repeal of a long list of existing statute sections and an effective date provision.

Style of Amendments

Following the customary style of legislative bills in Oregon, in present statute sections amended by the preliminary draft, matter underscored is new, and matter [bracketed] is existing law to be omitted.

Comments in Draft

In the preliminary draft, comments appear at the beginning of some articles and parts, and follow many of the

proposed statute sections. These comments include references to sources of proposed new provisions of law and reasons for proposed changes in or elimination of present law. Certain references to source materials in these comments are shortened in the interest of brevity. A fuller description of these materials is as follows:

References to "Oregon Probate Law and Practice" are to the two-volume work of that title, authored by Nicholas Jaureguy and William E. Love of the Oregon Bar, and published by West Publishing Company.

References to "Model Probate Code" are to the Model Probate Code prepared for the Probate Law Division of the Section of Real Property, Probate and Trust Law of the American Bar Association by the division's Model Probate Code Committee, in cooperation with the Research Staff of the University of Michigan Law School, and published in 1946, together with related monographs and appendix notes, by Callaghan and Company.

References to "Uniform Probate Code" are to the proposed Uniform Probate Code under consideration by the National Conference of Commissioners on Uniform State Laws, in the form of a pamphlet entitled "Third Working Draft, Uniform Probate Code, With Comments" and dated November 1967. As mentioned previously, the Third Working Draft was prepared for consideration by the National Conference at its 1967 meeting.

References to "Iowa Probate Code" are to the revised probate code of Iowa, enacted by the legislature of that state in 1963, and effective January 1, 1964. The revised code was prepared, over a five-year period, by the Special Probate Committee of the Iowa State Bar Association. It was available in the form of a pamphlet entitled "1963 Iowa Probate Code," embodying the enactment by the Iowa legislature (Acts 1963 (60 G.A.) S. F. No. 165), and published by West Publishing Company. See Iowa Code Annotated, chapter 633.

References to "Washington Probate Code" are to the revised probate code of Washington, enacted by the legislature of that state in 1965, effective July 1, 1967. The revised code was prepared over a period of almost five years by the Committee on Real Property, Probate and Trusts of the Washington State Bar Association. It was available in the form of a bill (Senate Bill No. 6, State of Washington, 39th Regular Session), with amendments, which was enacted as Laws 1965, chapter 145. See Washington Revised Code Annotated, title 11.

References to "Wisconsin Probate Code" are to a proposed revised probate code of Wisconsin. The proposed revised code was prepared by two committees of the State Bar of Wisconsin, their work beginning in 1963, as part of a larger project to study revision of the basic property statutes of the state.

It was introduced as Assembly Bill 280 at the 1967 session of the Wisconsin legislature, but was not enacted at that session. It was available in the form of a pamphlet entitled "Proposed Wisconsin Probate Code, Study Draft," published in 1966 by West Publishing Company, and also the bill introduced at the 1967 session of the Wisconsin legislature, with amendments.

Comparative Section Tables

Following the preliminary draft are two tables. The first of these tables shows, for each section of Oregon Revised Statutes included within or repealed by the draft, whether the section is amended, repealed or not affected, the section of the draft that accomplishes an amendment and the section or sections, if any, of the draft that contain subject matter comparable to that found in a repealed ORS section. The second table shows, for each section of the draft, whether the section is new, an amendment of an existing ORS section or an existing ORS section not affected, the existing ORS section or sections, if any, containing subject matter comparable to the draft section and the ORS section amended by the draft section.

Purpose of Distribution

The draft of a proposed Oregon probate code set forth herein is labeled "preliminary" because some changes therein are certain before the Advisory Committee submits its finally approved product to the Law Improvement Committee. Indeed, the principal purpose of publication of the preliminary draft and of the wide distribution of copies thereof to all active members of the Oregon State Bar in the state and other interested persons is to stimulate comments, suggestions and criticisms on the draft -- an invitation to change if the reasons therefor are persuasive.

The substantive content of the preliminary draft, as previously indicated, has been worked out, discussed, revised and re-revised over a period of many months by the Advisory Committee and Bar Committee on Probate Law and Procedure. In general, the substantive content has the tentative approval of both committees. However, the committees have not reviewed the draft as a whole, nor, in some instances, passed upon particular wording or arrangement of material.

It is the desire of the committees, concurred in by the Law Improvement Committee, that the preliminary draft be subjected to the scrutiny of members of the Bar and of as many other interested persons as possible, in order that the committees may have the benefit of comments, suggestions and criticisms to better enable them to prepare a final draft for submission to the Law Improvement Committee and for

subsequent presentation to the 1969 Oregon legislature. In addition to committee evaluation of the substantive content of the preliminary draft in the light of comments, suggestions and criticisms received, the execution of this content, in terms of clarity and consistency in wording and in appropriate and most convenient arrangement of material, will undergo the necessary refinement and polishing.

OUTLINE OF PRELIMINARY DRAFT
(Revised)

(Note: If the number of a section in this outline differs from the number of the same section in the original preliminary draft, as changed, that original section number appears in [brackets] following the section number in this outline.)

OUTLINE OF PRELIMINARY DRAFT

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 1 (page 1)

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

(7) "Claims" includes liabilities of a 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].

(9) "Decedent" means a person who has died leaving property that is subject to administration [, and includes any person whose life was taken by a slayer].

PRELIMINARY DRAFT

ARTICLE I. GENERAL PROVISIONS

Part 1. Definitions

Section 1. (Definitions) As used in sections 1 to 208 of this Act, unless the context requires otherwise:

(1) "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" includes suits and legal proceedings.

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

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

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

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

(7) "Claims" includes liabilities of a 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.

(8) "Court" means the circuit court.

(9) "Decedent" means a person who has died leaving

property that is subject to administration, and includes any person whose life was taken by a slayer.

(10) "Devise," when used as a noun, means property disposed of by a will, and includes "legacy" and "bequest."

(11) "Devise," when used as a verb, means to dispose of property by a will, and includes "bequeath."

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

(13) "Distributee" means a person entitled to any property of a decedent under his will or under intestate succession.

(14) "Domicile" means the place of abode of a person, where he intends to remain and to which, if absent, he intends to return.

(15) "Estate" means 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.

(16) "Funeral" includes burial or other disposition of the remains of a decedent, including the plot or tomb and other necessary incidents to the disposition of the remains.

(17) "General devise" means a devise chargeable generally on the estate of a testator and not distinguishable from other parts thereof or not so given as to amount to a bequest of a specific part of the personal property of the testator.

(18) "Heirs" means those persons, including the surviving spouse, who are entitled under intestate succession to the

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 1 (page 2)

(17) "General devise" means a devise chargeable generally on the estate of a testator and not distinguishable from other parts thereof or not so given as to amount to a [bequest of a specific part of the personal property of the testator] specific devise.

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 1 (page 3)

(20) "Intestate" means one who dies without [having made] leaving a valid will or the circumstance of dying without [having made] leaving a valid will effectively disposing of all his estate.

(22) "Issue [,]" includes adopted children and, 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].

(23) "Net estate" means 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] funeral expenses, expenses of administration, claims and taxes.

Delete all of subsection (25).

Renumber subsection (26) as subsection (25).

property of a decedent who died wholly or partially intestate.

(19) "Interested person" includes heirs, devisees, children, spouses, creditors and any others having a property right or claim against the estate of a decedent which may be affected by the proceeding. It also includes fiduciaries representing interested persons.

(20) "Intestate" means one who dies without having made a valid will or the circumstance of dying without having made a valid will.

(21) "Intestate succession" means succession to property of a decedent who dies intestate or partially intestate.

(22) "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.

(23) "Net estate" means 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.

(24) "Net intestate estate" means any part of the net estate of a decedent not effectively disposed of by his will.

(25) "Obligations" includes liabilities of a 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.

(26) "Personal property" includes all property other than real property.

(27) "Personal representative" includes executor, administrator, administrator with will annexed and administrator de bonis non, but does not include special administrator.

(28) "Property" includes both real and personal property.

(29) "Real property" includes all legal and equitable interests in land, in fee and for life.

(30) "Settlement" includes, as to the estate of a decedent, the full process of administration, distribution and closing.

(31) "Specific devise" means a devise of a specific thing or specified part of the estate of a testator that is so described as to be capable of identification from all others of the same fund. It is a gift of a part of the estate identified and differentiated from all other parts.

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

Advisory Committee Comment

The use of statutory definitions in legislative Acts promotes clearness in the meaning of the text of laws dealing with technical matters. The proposed code would follow the pattern of Iowa, Washington, Wisconsin and the Model and Uniform Probate Codes in placing a comprehensive definitions section at the beginning of the code. The sources of some of the less obvious definitions in section 1 are as follows:

(3) Administration. This definition is adapted from section 851.01, Wisconsin Probate Code.

(4) Advancement. This definition is adapted from 26 C.J.S. Descent and Distribution §91.

(5) All purposes of intestate succession. This definition is taken from section 2-110, Uniform Probate Code.

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 1 (page 4)

Renumber subsections (27) through (32) as subsections (26) through (31), respectively.

(14) Domicile. This definition is taken from State v. Atti, 127 N.J.L. 39, 21 A.2d 603 (1941).

(24) Net intestate estate. This definition is adapted from section 2-101, Uniform Probate Code.

The definitions of (17) "general devise" and (31) "specific devise" are taken from In re Preston's Estate, 157 Or. 631, 73 P.2d 369 (1937), and In re Boice's Estate, 209 Or. 521, 307 P.2d 324 (1957).

The definitions of (7) "claims," (15) "estate," (18) "heirs," (19) "interested person," (22) "issue," (23) "net estate," (25) "obligations," (30) "settlement" and (32) "will" are taken or adapted from definitions in the Uniform Probate Code.

Part 2. Probate Jurisdiction and Procedures

Advisory Committee Comment

This part of the proposed code would accomplish the following: First, it would vest all jurisdiction of probate matters in the circuit court. Second, it would authorize the circuit court to appoint a probate commissioner to act on behalf of the circuit court judge in ex parte initiation of estate proceedings and probate of wills. Note also that the amendment of ORS 3.101 by section 257 of this draft would broaden the powers of the district court judge to act as circuit court judge in the absence of the latter in all probate matters. Third, this part would spell out the general jurisdiction and powers of the probate court and the mode of procedure to be followed in probate matters. This draft includes amendments and repeals of present statutes to transfer all probate matters to the circuit court and provide for pending matters.

The following, quoted from a staff memorandum submitted to the committee, outlines the present situation in Oregon as to courts having probate jurisdiction:

> "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#, 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.)"

This part and related amendments and repeals of present statutes were presented to the committee 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 involved.

Section 2. (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.

Advisory Committee Comment

Section 2 is the general section transferring present probate jurisdiction from county and district courts to the circuit court.

Section 3. (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, subsection (1) of 179.650 or ORS 427.085 on the effective date of this Act shall be conducted and completed pursuant to the provisions of law in effect immediately before that date.

Advisory Committee Comment

In addition for providing for transfer of pending matters from the other courts to the circuit court, section 3 makes it clear that pending appeals in the circuit court under the statute sections cited shall be conducted under the provisions of law existing prior to the effective date of the proposed code.

Section 4. (Probate jurisdiction vested in circuit court) Jurisdiction of all probate matters is vested in the circuit court.

Advisory Committee Comment

As noted above, action by past legislative sessions has achieved a partial and piecemeal transfer of probate jurisdiction from many of the county courts in Oregon. The problem has not been 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, with a judge not required to have legal training or background. The problem has been one of practical application. The committee agreed that the appointment of probate commissioners in those counties where they are needed to handle noncontested probate proceedings, plus giving full probate jurisdiction to district court judges in the absence of the circuit court judge, would meet the present objections to vesting all probate jurisdiction in the circuit court.

Section 5. (Probate jurisdiction described) The probate jurisdiction of the circuit court includes, but is not limited to:

(1) Appointment and qualification of personal representatives.

(2) Probate and contest of wills.

(3) Determination of heirship.

(4) Determination of title to and rights in property claimed by or against personal representatives, guardians and conservators.

(5) Administration, settlement and distribution of estates of decedents.

(6) Construction of wills, whether incident to the administration or distribution of an estate or as a separate proceeding.

(7) Guardianships and conservatorships, including the appointment and qualification of guardians and conservators and the administration, settlement and closing of guardianships and conservatorships.

(8) Supervision and disciplining of personal representatives, guardians and conservators.

Advisory Committee Comment

It seemed advantageous that a section outlining the general areas of probate jurisdiction be included in the proposed code, rather than be placed in piecemeal fashion in a large number of separate chapters, as in the present Oregon statutes. An examination of present statute sections, particularly ORS 3.140, will indicate that the enumerated jurisdiction in section 5 is that presently granted to and exercised by our probate circuit courts. The general wording of section 5 is taken from section 1-201, Uniform Probate Code.

Section 6. (Powers of probate court; appeals) (1) The general legal and equitable powers of the circuit court 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.

(2) The circuit court sitting in probate has 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 an estate, including those pertaining to the title of real property, the determination of heirship and the distribution of the estate.

(3) 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.

Advisory Committee Comment

The general wording of section 6 is from section 1-201, Uniform Probate Code, but the reference to the power to make declaratory judgments is taken from section 10, 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.

This draft would repeal ORS 117.510 to 117.560, relating to determination of heirship. Those statute sections were originally enacted as chapter 331, General Laws of Oregon 1913. Many years later, in 1927, the Uniform Declaratory Judgments Act (ORS 28.010 to 28.160) was enacted. The present statute sections on determination of heirship and the Uniform Declaratory Judgments Act are discussed in Oregon Probate Law and Practice §§ 864 and 865. The work mentions the ambiguities in the determination of heirship statutes 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 the committee that the present jurisdiction of the probate court to operate under the Uniform Act should be preserved, and that the more limited statutes on determination of heirship be repealed.

Section 7. (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 the clerk has, and the clerk is responsible for conduct of the deputy so acting.

Advisory Committee Comment

The necessity and utility of section 7 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, a court commissioner or the clerk of the court. For a comparable provision, see section 22, Iowa Probate Code.

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

New section 6a (page 10)

Section 6a. (District court judge acting as probate court judge) (1) In Benton, Clatsop, Coos, Curry, Deschutes, Hood River, Lincoln, Wasco and Washington Counties, a judge of the district court for the county may exercise the powers and duties of judge of the circuit court for the county in any matter, cause or proceeding in probate pending in the county. In any other county, a judge of the district court for the county may exercise any power or duty of judge of the circuit court in any matter, cause or proceeding in probate pending in the judicial district in which the district court is located, which is assigned to him by a judge of the circuit court of the judicial district.

(2) Whenever by reason of absence, illness or injury there is not within a county a judge of the circuit court able to preside over and conduct the business of the circuit court, any judge of a district court located in the judicial district may exercise the powers and duties of judge of the circuit court for the county 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 matter, cause 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 matter, cause or proceeding, has the same effect as though given and made by a circuit court judge.

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 7 (page 10)

Section 7. (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 within the county. If the clerk of the circuit court is appointed probate commissioner, his deputy has the power to perform any act as probate commissioner that the clerk has, and the clerk is responsible for conduct of the deputy so acting.

Section 8 (page 11)

Section 8. (Powers of probate commissioner) (1) A 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 the court. Pursuant thereto he may make and enter orders on behalf of the court admitting wills to probate and appointing and setting the amount of the bonds of special administrators, personal representatives, guardians and conservators, subject to his orders being set aside or modified by the judge of the court within 30 days after the date an order is entered.

Section 8. (Powers of probate commissioner) (1) A 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 the court. Pursuant thereto he may make and enter orders on behalf of the court admitting wills to probate and appointing and setting the amount of the bonds of special administrators, personal representatives, guardians and conservators, subject to his orders being set aside or modified by the judge of the court.

(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 have the same effect as if made by the judge.

Advisory Committee Comment

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.

The committee 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 proposed 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 257 of this draft would amend ORS 3.101 to

provide that the district court judge may exercise the powers and duties of the circuit court judge in any matter in probate pending in the county, in the absence or disability of the 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.

Advisory Committee Comment

Section 9 is almost identical with ORS 115.010, with minor editorial changes. The only change in substance from the ORS section is that section 9 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) (1) Except as otherwise specifically provided in sections 1 to 208 of this Act, 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

Section 10 (page 13)

(1)(a) By mailing a copy thereof, [at least 14 days before the date 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, at least 14 days before the date set for the hearing.

(1)(c) 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 consecutive weeks, the last publication of which shall be at least 10 days before the date set for the hearing.

shall cause notice of the date, 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:

(a) By mailing a copy thereof at least 14 days before the date 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.

(b) By delivering a copy thereof to them personally or to their attorney at least five days before the date set for the hearing.

(c) 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 shall be at least 10 days before the date set for the hearing.

(2) Upon good cause shown the court may change the requirements as to the method or time of giving notice for any hearing.

(3) Proof of the giving of notice must be made at 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.

Advisory Committee Comment

Section 10, which is taken almost verbatim from section 1-205, Uniform Probate Code, is a useful provision. No comparable provision appears in the present probate code.

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.

Advisory Committee Comment

Section 11 is taken from section 1-206, Uniform Probate Code.

Section 12. (Filing objections to petition) Any interested person, on or before the date set for a hearing, may file written objections to a petition previously filed.

Advisory Committee Comment

Section 12 is taken from section 1-208, Uniform Probate Code.

Section 13. (Proof of documents; certification) (1) Proof of documents pursuant to sections 1 to 208 of this Act may be made as follows:

(a) Of a will, by a certified copy thereof.

(b) That a will has been probated or established 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

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 11 (page 14)

Section 11. (Waiver of notice) A guardian, a guardian ad litem, a conservator or a person who is [not] neither incompetent [or] nor 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 13 (page 14)

(1)(c) Of letters testamentary or of administration, by a certified copy thereof. The certification [shall] may include a statement that the letters have not been revoked.

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 13 (page 15)

(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] the document or order was filed or entered or by [such] any other official having legal custody of the original document or order.

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 having legal custody of the original document or order.

Advisory Committee Comment

Section 13 is based on section 7, Uniform Probate of Foreign Wills Act. For comparable present statutes, see ORS 43.110 and 115.160. Paragraph (1)(b) should be read with reference to section 85 of the proposed code, relating to establishing foreign wills.

The Uniform Probate of Foreign Wills Act differs from ORS 115.160 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 present double certification requirement has caused problems in procuring copies of documents from other jurisdictions where the certifying clerk was not familiar with our requirements. It seemed to the committee 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. (Translation of documents) 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.

Advisory Committee Comment

Section 14 is based on section 7, Uniform Probate of Foreign Wills Act. There is no comparable provision in the present Oregon 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) The judge of the court may, on 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.

Advisory Committee Comment

Section 15 merely codified present practice.

ARTICLE II. INTESTATE SUCCESSION AND WILLS

Part 1. Intestate Succession

Advisory Committee Comment

This part of the proposed code constitutes a major revision of the present Oregon law of intestate succession. In the drafting of this part, 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 terminology throughout where necessary to eliminate ambiguities and inconsistencies; and fifth, to eliminate some of the more archaic provisions of the law.

This part 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:

1. All property is treated indentically 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 law, no difference in the shares of real and personal property receivable by the intestate heirs.

2. Any system of intestate succession is to a certain extent arbitrary. The shares under any system may alter radically upon the contingency of some person in a closer degree of kindred having predeceased the intestate.

This part 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 this situation is not likely to change greatly. Hence, the intestate succession statute -- 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 the 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 present Oregon 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 of the proper pattern of descent than do present statutes.

3. Present Oregon law treats real property differently than personal property. This distinction is a product 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 this distinction, and the modern trend, embodied in this part, is toward a single system of inheritance (intestate succession), with the 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.

The proposed code would repeal ORS 111.070, relating to the right of a nonresident alien to take property by succession or testamentary disposition. This statute was held unconstitutional by Zschernig v. Miller, 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683, decided January 15, 1968. The following is from the comment on the Zschernig decision by Mr. Rowland L. Young, appearing in his "Review of Recent Supreme Court Decisions" in the March 1968 issue of the 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 . . ."

Section 16. (Net intestate estate) Any part of the net estate of a decedent not effectively disposed of by his will shall pass as provided in sections 17 to 20 of this Act.

Advisory Committee Comment

Section 16 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 part on intestate succession.

Section 17. (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.

Advisory Committee Comment

Section 17 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 the 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 18. (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.

Advisory Committee Comment

Section 18 preserves present Oregon statutory law regarding the share of the surviving spouse when the decedent leaves no issue. See ORS 111.020(2) and 111.030(4).

Section 19. (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 the issue are all of 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 of the decedent and the issue of any deceased brother or sister of the decedent 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 of the decedent and the issue of any deceased grandparent of the decedent by representation. If there is no surviving grandparent, the issue of grandparents 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.

(5) If, at the time of taking, surviving parents or grandparents of the decedent 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.

Advisory Committee Comment

Section 19 is taken from section 2-103, Uniform Probate 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. It describes the scheme of distribution both in the case where the decedent has left a surviving spouse and issue and in the situation where there is no surviving spouse, but issue or other kindred of the decedent survive.

Subsection (1) retains the priority given under present Oregon law to the issue of the intestate. It also codifies, with the definition of "representation" in section 21 of the proposed code, present Oregon law. Under present Oregon law the rights of lineal descendants, where the 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 section 17 of the proposed code, 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 present Oregon law. See ORS 111.020(2) and 111.030(3).

Subsection (3) is consistent with present Oregon law, ORS 111.020(3), in that it provides for the brothers and sisters of the intestate. It differs from present law, however, in providing for succession to the issue of the parents of the intestate, even when no brothers or sisters are living. Under present law the issue of deceased brothers or sisters of the decedent may take only by right of representation. In the event that all brothers and sisters have predeceased the decedent, their descendants, if any, do not presently take by right of representation but only as next of kin. See Oregon Probate Law and Practice § 12. Bones v. Lollis, 192 Or. 376, 234 P.2d 788 (1951); Andrews v. First Nat. Bank of Eugene, 192 Or. 230, 234 P.2d 791 (1951); and Ops. Att'y Gen. 1934-36, 602, have held that if the decedent left nieces and nephews and also grandnieces and grandnephews, the latter would take nothing even though their parents predeceased the intestate. Under subsection (3) the latter would be able to take by right of representation.

Subsection (4) represents a change from present law. Under 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 under present 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.

Subsection (4) limits inheritance to relatives claiming through the grandparents of the intestate 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 legislation effective September 1, 1963, adopted new rules of descent and distribution which eliminate collaterals in lines more remote than that of the grandparent. Also, see section 852.01(2), Wisconsin Probate Code. Limitations on inheritance by collateral kindred were proposed in the Model Probate Code and adopted in a slightly different form in Pennsylvania in 1947 and in Indiana in 1953.

These limitations on inheritance were proposed for the following reasons:

1. 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.

2. 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 the 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.

3. With the 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.

4. 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.

5. 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.

Two other archaic doctrines are eliminated by the proposed code. First, such remnants of the doctrine of ancestral estates as exist in ORS 111.020(5), which are discussed in Cordon v. Gregg, 164 Or. 306, 97 P.2d 732, 101 P.2d 414 (1940), discussed in Oregon Probate Law and Practice § 15, and criticized and noted in 20 Or. L. Rev. 164 (1940), are deleted. Section 19 also makes no such distinction as exists in 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 code, 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 as tenants by the entirety 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 96 C.J.S. Wills §908. The committee believes this accords with the usual desire of married couples that they take and hold property jointly.

Section 20. (Escheat) If no person takes under sections 17 to 19 of this Act, the net intestate estate shall escheat to the State of Oregon.

Advisory Committee Comment

Section 20 is taken from ORS 111.020(6) and 111.030(5).

Section 21. (Representation defined) "Representation" means the method of determining the passing of the net intestate estate when the distributees are of 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 of the nearest degree of kinship and deceased persons of the same degree who left issue who survive the decedent, each surviving heir of the nearest degree receiving one share and the share of each deceased person of the same degree being divided among his issue in the same manner.

Advisory Committee Comment

Section 21 defines "representation" in more detail than ORS 111.010(4) and is consistent with present Oregon law. See Oregon Probate Law and Practice §§ 9, 10. This definition makes it clear that the pattern of stirpital distribution is to be determined at the level of the nearest lineal descendant of the intestate, rather than at the level of the decedent's children, regardless of whether or not they predeceased the decedent. The definition is taken from section 2-106, Uniform Probate Code, and prevents the anomalous result of such cases as Maud v. Catherwood, 67 Cal.App.2d 636, 155 P.2d 111 (1945), noted in 33 Calif. L. Rev. 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 22. (Time of determining relationships; afterborn heirs) The relationships existing at the time of the death of the decedent govern the passing 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.

Advisory Committee Comment

Section 22 is consistent with the rule of construction in present Oregon law laid down by ORS 111.010(5).

Section 23. (Heir to survive decedent for five days) Any person who fails to survive the decedent by five days is considered to have predeceased the decedent for all purposes of intestate succession, and the heirs of the decedent are determined accordingly.

Advisory Committee Comment

Section 23 is taken from section 2-104, Uniform Probate Code. For a similar provision, see section 852.01(4), Wisconsin Probate Code.

The comment on the Uniform Probate Code section, appearing in an earlier draft, 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 24. (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.

Advisory Committee Comment

Section 24 is consistent with present Oregon law in ORS 111.040.

Section 25. (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.

Advisory Committee Comment

Section 25 would replace ORS 111.231. Unlike ORS 111.231, section 25 requires that the paternity of the child be determined during the child's lifetime. The section would answer the criticism of ORS 111.231 in Oregon Probate Law and Practice § 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 section 1 of the proposed code to mean succession by, through or from a person, both lineal and collateral. This definition is taken from section 2-110, Uniform Probate Code.

Section 25, in the committee's 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, Oregon Laws 1957, which substantially rewrote the former law respecting inheritance rights and other legal relationships of illegitimate children. For this reason section 25 refers to and incorporates ORS 109.070, which prescribes how paternity shall be established. The reference terminology is the same as that used in 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 wording is taken from section 2-111, Uniform Probate Code. For similar provisions, see sections 221 and 222, Iowa Probate Code; section 11.04.081, Washington Probate Code, and section 852.05, Wisconsin Probate Code. The committee 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 probate 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. Section 25 makes it clear that it would not be operative if the child had been adopted.

Section 26. (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.

Advisory Committee Comment

Section 26 is taken from section 2-112, 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.

Part 2. Advancements

Section 27. (When gift is an advancement) If a person dies intestate as to all his estate, property which he gave in his lifetime to an heir shall be treated as an advancement against the heir's share of the estate if declared in writing by the decedent or acknowledged in writing by the heir

to be an advancement. For this purpose the property advanced shall be valued as of the time the heir came into possession or enjoyment of the property or as of the time of death of the decedent, whichever occurs first.

Advisory Committee Comment

Section 27 is taken from section 2-113, Uniform Probate Code.

Section 27 changes present Oregon law in ORS 111.110 by expanding the doctrine of advancements to any person taking by intestate succession, as opposed to the present limitation to the issue of the intestate. It also restricts the provisions to those cases where the decedent dies intestate as to his entire estate.

Since the intestate share of real and personal property will be the same for all takers under the proposed code, there is no need to distinguish between the real and personal property, as is done in ORS 111.150.

Unlike the Iowa Probate Code, Washington Probate Code and Model Probate Code, section 27 does not specify that the person to whom the advancement was made must have been entitled to inherit a part of the estate had the intestate died at the time of making the advancement. It would expand the doctrine of advancements to apply to persons who would not have been heirs had the intestate died at the time of the advancement, but who subsequently became heirs prior to the death of the intestate.

Section 27 specifies that the doctrine of advancements applies only to intestacy and only to persons sharing in the estate of one who has died intestate as to his entire estate. This limitation would not, however, seem to affect the holding of Clark v. Clark, 125 Or. 333, at 342, 267 P. 534, at 537 (1928), that a will might direct that a previous gift be considered an advancement in the determination of the shares into which an estate is to be divided.

Section 27 follows the approach of section 852.11(1), Wisconsin Probate Code. The Iowa Probate Code (section 224), Washington Probate Code (section 11.04041) and Model Probate Code (section 29) provide that the presumption of a gift is rebuttable. However, the Wisconsin Probate Code section is in accord with the more limited application of the statute of frauds already existing in Oregon law, ORS 111.120. Since the Wisconsin Probate Code section represents the latest thinking and since section 27 does not substantially change present Oregon law, it would seem to be the preferred approach.

Section 28 (page 29)

Section 28. (Effect of advancement on distribution) (1) If the value of the advancement exceeds the heir's share of the estate, he shall be excluded from any further share of the estate, but he shall not be required to refund any part of the advancement. If the value of the advancement is less than his share, the heir shall be entitled upon distribution of the estate to such additional amount as will give him his share of the estate.

(2) The property advanced is not a part of the estate, but for purposes of determining the shares of the heirs the advancement shall be added to the estate, the sum then divided among the heirs and the advancement then deducted from the share of the heir to whom the advancement was made.

The early case of Seed v. Jennings, 47 Or. 464, 83 P. 872 (1905), is in conflict with both the present Oregon statute and section 27. That case suggested the common law presumption that the voluntary conveyance of property by a parent to a child is presumed to be an advancement, unless it is proved to be a gift. This dictum was contrary to the statute in force at the time and would, in any event, be overruled by section 27, which reverses the presumption and makes it rebuttable only by evidence in writing.

Section 27 also changes present Oregon law (ORS 111.160) which provides for valuation by the donor or donee in any one of three different writings or its estimated value when granted. Present Oregon law thus makes possible inconsistent valuations arising from each of the authorized writings. In Oregon Probate Law and Practice §§ 41 to 46, this problem is noted. No such possibility of different and inconsistent valuations is contained in section 27.

Section 28. (Effect of advancement on distribution) If the value of the advancement exceeds the heir's share of the estate, he shall be excluded from any further share of the estate, but he shall not be required to refund any part of the advancement. If the value of the advancement is less than his share, the heir shall be entitled upon distribution of the estate to such additional amount as will give him his share of the estate.

Advisory Committee Comment

Section 28 is a substitute for ORS 111.140 and substantially reenacts that ORS section.

Section 29. (Death of advancee before decedent) If the recipient of the property fails to survive the decedent, the amount of the advancement shall be taken into account in computing the share of the recipient's issue, whether or not the issue take by representation.

Advisory Committee Comment

Section 29 is a substitute for ORS 111.170 and is consistent therewith. It is virtually identical to section 226, Iowa Probate Code; section 11.04.041, Washington Probate Code, and section 29(c), Model Probate Code. The person to whom an advancement is made is charged for it whether he takes per capita or by representation. For a contrary approach, see section 2-113, Uniform Probate Code, which provides that if the advancee dies before the intestate, the advancement shall not be taken into account in determining descent and distribution of the net intestate estate.

Part 3. Status of Adopted Persons for Inheritance, Wills and Class Gifts

Advisory Committee Comment

For a proposed amendment of ORS 109.041, pertaining to the effect of a decree of adoption on the relationship between the adopted child and his natural and adoptive parents, see section 279 of this draft.

Section 30. (Adopted child treated as natural child) For all purposes of intestate succession, an adopted child shall be treated as a natural child of his adopting parents, and he shall cease to be treated as a child of his natural parents, except:

(1) If a natural parent marries or remarries and the child is adopted by the stepfather or stepmother, the child shall continue to be treated as the child of the natural parent who is the spouse of the adopting parent.

(2) If a natural parent of a legitimate child dies, the other natural parent remarries and the child is adopted by the stepfather or stepmother, the child shall continue to be treated as the child of the deceased natural parent for all purposes of intestate succession through the deceased natural parent.

Advisory Committee Comment

Section 30 would replace ORS 111.210 and 111.212. The wording of the section is taken from section 2-109, Uniform Probate Code.

Section 30 broadens the coverage of rights of inheritance, although following the basic rule of the present Oregon statute that inheritance rights are derived from the adoptive parents rather than the natural parents. It should be noted that the section uses the wording "for all purposes of intestate succession." This phrase is defined in section 1 of the proposed code to mean succession by, through or from a person, both lineal and collateral. This wording thus gives the adopted person a status for purposes of inheritance from his adoptive relatives and his adoptive relatives a status for purposes of inheritance from the adopted person, and is broad enough to cover inheritance rights of those claiming through the adopted child.

There are, as noted, two exceptions to the general rule outlined in section 30. First, subsection (1) preserves the relationship to the natural parent in the limited situation where a natural parent marries or remarries and the child is adopted by the stepparent. This exception is consistent with the result reached by the Oregon Supreme Court in Hood v. Hatfield, 235 Or. 38, 383 P.2d 1021 (1963), commented upon in 43 Or. L. Rev. 88 (1963). The second exception, in subsection (2), meets the situation which arose in In re Estate of Topel, 32 Wis.2d 223, 145 NW2d 162 (1966). In that case the decedent had died intestate, survived by three children of his deceased son. Their mother had remarried and her husband had adopted the children. It was held that the former Wisconsin statute precluded inheritance by the children. The wording of subsection (2) is adopted from section 851.51(2)(b), Wisconsin Probate Code.

Section 31. (Effect of more than one adoption) For all purposes of intestate succession, a child who has been adopted more than once shall be treated as a child of the parents who have most recently adopted him and shall cease to be treated as a child of his previous adoptive parents. He shall be treated as the child of his natural parents only to the extent provided in section 30 of this Act.

Advisory Committee Comment

The wording of section 31 is taken from section 2-109(b), Uniform Probate Code. This situation is not specifically covered by present Oregon statutes and clarifies the rights of the adopted child under the latest adoption.

Section 32. (Gifts in wills, deeds and trusts to accord with law of intestate succession) Unless a contrary intent is indicated by the instrument, a gift by will, deed or other instrument to an individual or member of a class described generically in relation to a particular person as child, children, lawful issue, grandchildren, descendants, heirs, heirs of the body, next of kin, distributees, relatives, nieces, nephews or the like shall include any person who would be treated as so related for purposes of intestate succession, except that for purposes of construction of an instrument, an adopted person must have been adopted as a minor or after having been a member of the household of the adopting parent while a minor.

Advisory Committee Comment

The present Oregon statutes contain no provision equivalent to section 32. However, a reading of the section reveals the obvious utility of spelling out the rights of adopted children in class gifts. The wording is taken from section 851.51(3), Wisconsin Probate Code.

The Wisconsin Probate Code comment, applicable to the exception contained in the last sentence of section 32, states that the exception "prevents a deliberate adoption of an adult to qualify the latter as a member of a class. In some states it has been possible to adopt one's own wife in order to make the latter a child within a class gift; the statute avoids such an absurd result."

Part 4. Escheat

Advisory Committee Comment

The involved and difficult ORS chapter 120 of the present Oregon probate code provides three forms of procedure for the state to assert its right to escheated property. ORS 120.030 and related sections provide for administration by the probate court. ORS 120.050 provides that the state may maintain "any action, suit or proceeding necessary to recover the possession of any such property." ORS 120.060 provides for bringing an information on behalf of the state.

With reference to the proceeding by information, Oregon Probate Law and Practice § 204 states:

> "In view of this section, it seems that the special provision for an information of escheat is entirely unnecessary. While procedure by information is the traditional common law form of complaint by the state, in either civil or criminal proceedings, it seems that by providing that the state may maintain any proceeding to protect its rights that a private person could it was unnecessary duplication to provide that the state could proceed by the traditional method of information."

Oregon Probate Law and Practice § 203 states:

> "The recent trend has been toward the trial of escheat proceedings in the probate court rather than by information . . .Under the present statute governing procedure, the great majority of escheats are conducted in connection with administration proceedings."

The committee is convinced that the confusion incident to the three procedures now authorized should be eliminated by limiting the state to an administration proceeding.

Section 20 of the proposed code provides: "If no person takes under sections 17 to 19 of this Act, the net intestate estate shall escheat to the State of Oregon." Under the proposed code probate jurisdiction is vested in the circuit court, which is given full power to make declaratory judgments pertaining to the title of real estate, determination of heirship and distribution of the estate.

Subsection (3) of section 120 of the proposed code provides: "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 deliver or send by ordinary mail to the

Director of the Division of State Lands a copy of the petition and the information required by subsection (1) of this section." Thus, the information given to the Director of the Division of State Lands is the same as that given to heirs in an intestate estate or to devisees in a testate estate. Upon the filing of the final account and petition for distribution the same notice is given the Director of the Division of State Lands as is given the heirs or devisees.

The proposed code conforms to present Oregon law in vesting both real and personal property, in the absence of known heirs, in the State of Oregon.

The action of the committee has been to recommend repeal of all of ORS chapter 120, except those portions which provide for the recovery of escheated property and except some technical amendments to the sections covering property of persons confined in state institutions. However, one important change in the procedure for recovery of escheated property should be noted. The proposed amendment of ORS 120.130 provides that instead of processing the claim in the court "in which the escheat proceedings were held," the claim should be processed pursuant to the Administrative Procedure Act in the same manner as other claims against state agencies.

The committee felt there was every advantage in having the escheat administered under the proposed code as an estate proceeding. In an escheat situation the State of Oregon has legally the status of an heir at law. The proposed code provides the same notice and the same procedures as where there are known heirs. Rights of creditors are protected. The required time for filing claims gives an opportunity to unknown heirs to come forward. The broad power given by the proposed code to the personal representative to sell real and personal property of the estate for distribution purposes provides a simple procedure for liquidating estate assets and turning them into cash which can be turned over to the Division of State Lands. Under the proposed code the circuit court in probate is given full power to make proper determination of heirship and enter final decrees escheating the real and personal property of the estate to the State of Oregon.

Section 33. ORS 120.130 is amended to read:

120.130. (Recovery of escheated property) (1) Within 10 years after [judgment in any proceeding in the circuit court escheating real property to the state, or after the order of the court having probate jurisdiction directing the conveyance of escheated real property to the state, and in

all other cases within 10 years after payment of the proceeds of escheated personal property to the State Land Board,] entry of a decree of distribution designating title to the estate available for distribution in the Division of State Lands, a claim may be made for the property escheated, or the proceeds thereof, by or on behalf of a person not [a party or privy to such proceeding, nor] having actual knowledge of the making of such [judgment or order or of such payment to the State Land Board.] decree.

(2) The claim shall be made by a petition filed [in the court in which the escheat proceedings were held.] with the Director of the Division of State Lands. The claim shall be considered a contested case as provided in ORS 183.310 and there shall be the right of judicial review as provided in ORS 183.480. The petition shall be verified in the same manner as a complaint and shall state:

(a) The age and place of residence of the claimant by whom or on whose behalf the petition is filed;

(b) That the claimant lawfully is entitled to such property or proceeds, briefly describing the same;

(c) That at the time the property escheated to the state the claimant had no knowledge or notice thereof;

(d) That the claimant claims the property or proceeds as an heir [or next of kin,] or as [executor, administrator, guardian or conservator of either,] personal representative of an heir, setting forth the relationship of the decedent, who at the time of his death was the owner of same;

(e) That 10 years have not elapsed since the [making of the judgment or order] entry of the decree escheating the property to the state [, or since the payment of the proceeds of the escheated estate by the administrator thereof to the State Land Board pursuant to the order of the court having probate jurisdiction]; and

(f) If the petition is not filed by the claimant himself, the status of the petitioner [, whether executor, administrator, conservator or guardian].

[(3) The State Land Board shall be made a defendant in the proceeding, and a copy of the petition must be served upon the clerk of the board at least 20 days before the hearing of the petition. The court must try the issue, as issues are tried in civil actions, with the aid of a jury, if requested by either party.]

[(4)] (3) If it is determined that the claimant is entitled to [such] the property or the proceeds thereof, [the court must order the same to be delivered] the Director of the Division of State Lands shall deliver the property to the petitioner, subject to and charged with the inheritance tax thereon, if any, and the costs and expenses of the state in connection therewith. [The order for delivery shall be an order upon the State Land Board to draw its warrant on the State Treasurer for the payment of the same, but without interest or cost to the state, a certified copy of which order shall be sufficient voucher for drawing such warrants.]

[(5)] (4) If the person whose property or funds escheated or reverted to the state was at any time an inmate of

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

New section 33a (page 37)

Section 33a. ORS 120.210, 120.220 and 120.230 are added to and made a part of ORS chapter 179.

a state institution in Oregon for the [insane or feeble-minded] mentally ill, the reasonable unpaid cost, as determined by the State Board of Control, of the care and maintenance of the person while a ward of such institution, regardless of when the cost was incurred, may be deducted from, or, if necessary, be offset in full against, the amount of the escheated property or funds. [, and, for the purpose of collecting the charge, the State Board of Control shall have the right to intervene and file an account in any proceeding, whether in the circuit court or before the State Land Board for the recovery of such property or funds.]

Section 34. ORS 120.210 is amended to read:

120.210. (Escheat of money or property deposited with institution on death, escape or parole of inmate; notice and publication) All money, certificates of deposit, securities, assets or other personal property which have been or shall be taken charge of by the officials of the state institutions listed in ORS 179.321, belonging to patients or inmates committed to any of such institutions and who die inmates thereof or escape or who are paroled therefrom, and which is not claimed by such person, or by the heirs or personal representative of such person within one year after such death, escape or parole, escheats to the state [for the benefit of the Common School Fund], and without other or further proceeding shall be paid or turned over by the officials of the above institutions to the [State Land Board, who] Division of State Lands, which shall issue therefor receipts in duplicate. One of the receipts shall be filed in the office of the Secretary of State.

However, if such escheated money, certificates of deposit, securities or other personal property exceeds the sum of $50, a notice of such escheated property shall be published under direction of the [State Land Board] Division of State Lands in a newspaper of general circulation within the county in which such institution paying or turning over the same is situated, and also in a newspaper in the county from which the inmate was committed, once each week for not less than three consecutive weeks. The expense of such publication shall be paid out of the proceeds of the escheated property.

Section 35. ORS 120.220 is amended to read:

120.220. (Collection and disposition by Division of State Lands) The money, certificates of deposit, securities or other personal property mentioned in ORS 120.210 shall be collected or liquidated by the [State Land Board] Division of State Lands, and the [board] division may sell, indorse and collect all such money, certificates of deposit, securities or other personal property and place the proceeds thereof in the State Treasury [to the credit of the Common School Fund].

Section 36. (Owners' and representatives' rights to reclaim property; limitation) (ORS 120.230) The money or the proceeds of such certificates of deposit, securities or other personal property which has escheated to the state under the provisions of ORS 120.210, may be reclaimed by the original owner or his or her heirs, or personal representatives, at any time within 10 years after such escheat, in the same

Section 36 (page 38)

Section 36. ORS 120.230 is amended to read:

120.230. (Owners' and representatives' right to reclaim property; limitation) The money or the proceeds of [such] the certificates of deposit, securities or other personal property which [has] have escheated to the state under [the provisions of] ORS 120.210, may be reclaimed by the original owner, or by his [or her] heirs [,] or personal representatives, at any time within 10 years after such escheat, in the same manner as property belonging to estates of deceased persons which have escheated to the state.

manner as property belonging to estates of deceased persons which have escheated to the state.

Section 37. (Reports by county clerks to Division of State Lands) County clerks, upon request, shall furnish the Director of the Division of State Lands the titles of estates of deceased persons which have remained open for more than three years and in which no heirs, or other parties whose right to inherit the proceeds thereof is being contested, have appeared to claim the estate.

Advisory Committee Comment

Section 37 is taken from ORS 178.080(6). See section 282 of this draft.

Part 5. Wills

Section 38. (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.

Advisory Committee Comment

Section 38 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 a will. The 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.

The comment on section 853.01, Wisconsin Probate Code, gives the following reasons for lowering the age of testamentary capacity to 18 years:

"(1) 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.. . . (2) 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. . . . (4) Minors can avoid existing limitations by resorting to legal devices which bypass probate: insurance, joint bank accounts, government bonds with beneficiary designations, etc. (5) 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 39. (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; or

(c) Acknowledge the signature previously made on the will by him or at his direction.

(2) Any person who signs the name of the testator as provided in paragraph (b) of subsection (1) of this section shall sign his own name on the will and write on the will that he signed the name of the testator at the direction of the testator.

Section 39 (page 41)

(3)(c) [Having been informed that the instrument is the will of the testator,] Attest [it by subscribing] the will by signing his name to [the will] it in the presence of the testator and at his request.

(3) 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 be subscribing his name to the will in the presence of the testator and at his request.

Advisory Committee Comment

Section 39 incorporates and replaces ORS 114.030, 114.040 and 114.050. The format of the section follows, in general, section 47, Model Probate Code. However, section 39 has not changed the present statutory requirements that the will be in writing, signed by the testator or by some other person under his direction in his presence, and attested by two or more competent witnesses, subscribing their names to the will in the presence of the testator. The section 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 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 section 47, Model Probate Code; section 50, Probate Code, West's Annotated California Codes; section 14-303, Idaho Code; section 279, Iowa Probate Code, and section 21, Decedent Estate Law, McKinney's Consolidated Laws of New York Annotated, to cite a few examples. The committee believes that this publication requirement is in line with the usual practice in this state.

Section 40. (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.

Advisory Committee Comment

Section 40 covers the interested witness situation. It replaces ORS 114.310, 114.320, 114.330 and 114.340. The general wording of the section follows section 281, Iowa Probate Code. The definition of an interested witness is generally taken from section 853.07, Wisconsin Probate Code.

In essence, the committee believes that section 40 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 for him 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 41. (Validity of execution 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.

Advisory Committee Comment

Section 41, governing the validity of a will, represents a broadening of 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 holographic will executed in California and containing provisions for both real and personal property would be good as to the personalty in

Section 41 (page 42)

Section 41. (Validity of execution of a will) A will is lawfully executed if it is in writing, signed by or at the direction of the testator and otherwise executed in accordance with the law of:

Oregon, but not as to the realty. Section 41 removes the difference between real and personal property and provides that the will would be good in Oregon 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.

The committee was of the opinion that 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, Uniform Probate Code; section 50, Model Probate Code, and section 283, Iowa Probate Code.

It should be noted, however, that the section requires that the will must be in writing and signed by the testator, as well as otherwise executed according to the law of the particular jursidiction. Thus, the section would not only replace ORS 114.060, but would repeal ORS 114.050 and would require the amendment of ORS 41.520 (see section 265 of this draft), since soldiers' and sailors' nuncupative wills would not be legal.

It was the considered decision of the committee 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 and with 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 42. (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 considered 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.

Advisory Committee Comment

Section 42 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 the committee that the adoption of the Uniform Act would provide for a uniformity of construction in many situations which Oregon practitioners will recognize as having in the past caused problems and uncertainties in the trust field. It is felt that the adoption of the Uniform Act will spell out many of the problems and uncertainties now existing in this area. See ORS 114.070, repealed by this draft.

Section 43. (Manner of revocation or alteration exclusive) A will may be revoked or altered only as provided in sections 44 to 47 of this Act.

Advisory Committee Comment

Sections 43 to 47 replace and recodify ORS 114.110 to 114.150.

Section 44. (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. The 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.

Advisory Committee Comment

Section 44 is practically identical in wording with ORS 114.110. The only changes are editorial in nature.

Section 45. (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 in which the revoked or invalid will or part thereof is incorporated by reference.

Advisory Committee Comment

Section 45 would replace and supersede ORS 114.120. The wording of the section is taken from section 284, Iowa Probate Code, which in turn was adopted from section 55, Model Probate Code. The comment under the Iowa Probate Code 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."

ORS 114.120 is discussed and to some extent criticized in Oregon Probate Law and Practice §§ 379 and 380. It is believed that section 45 conforms to the general purpose and intent of ORS 114.120, but avoids the difficulties and ambiguities so criticized.

For comparable provisions, see section 2-508, Uniform Probate Code, which appears similar to section 853.11(6), Wisconsin Probate Code.

Section 46. (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; or

(2) The testator and his spouse entered into a contract before the marriage that either makes provision for the spouse or provides that the spouse is to have no rights in the estate of the testator.

Advisory Committee Comment

Section 46, covering revocation by marriage, and section 47, covering revocation by divorce or annulment, would replace ORS 114.130. The wording of section 46 is taken from section 853.11, 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. The ORS section is discussed in Oregon Probate Law and Practice § 376, 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, Oregon Laws 1965, ORS 114.130 was amended by deleting 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."

Section 46 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 Oregon Probate Law and Practice § 376, the restrictive wording 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 wording of section 46, which would preserve the will and prevent a revocation if in fact that was the intent and desire of the testator.

One important change in section 46 is that the revocation is made 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 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 section 46 makes the revocation only effective if in fact the spouse survives the testator.

Section 47. (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.

Advisory Committee Comment

The wording of section 47 is in general the same as section 2, Senate Bill 197, introduced at the 1963 regular session of the Oregon Legislative Assembly at the request of the Bar Committee on Probate Law and Procedure. The 1963 bill failed to pass but was re-introduced as Senate Bill 305 at the 1965 regular session, where it passed without amendment in the Senate, but was amended in the House as indicated in the comment under section 46 of the proposed code.

The committees adopted the wording to cover the situation of revocation by divorce and annulment substantially as outlined in the original Bar Committee bill. The 1965 amendment, which in effect provides 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, if 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, 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, the committee feels that section 47, 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 48. (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 a revocation of the previous devise, either in law or equity;

but the property shall pass by the devise, subject to the same remedies on the 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.

Advisory Committee Comment

Section 48 is identical with ORS 114.140, with purely editorial changes. A similar provision is found in section 11.12.060, Washington Probate Code.

The discussion in Oregon Probate Law and Practice § 377 makes clear that, but for 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 49. (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 that is subject to the disposal of the testator at the time of his death.

Advisory Committee Comment

Section 49 covers ORS 114.150 and 114.230(3). These ORS sections are considered in Oregon Probate Law and Practice § 377.

Section 50. (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.

Advisory Committee Comment

Section 50 is identical in content with ORS 114.220, with merely editorial changes.

Section 51. (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.

Advisory Committee Comment

Section 51 is identical in content with ORS 114.230(1), with purely editorial changes.

Section 52. (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.

Advisory Committee Comment

Section 52 embodies ORS 114.230(2). The committee felt that the wording of the section, which is taken from section 269, Iowa Probate Code, is preferable to that of the present ORS section. The Iowa Probate Code section is adopted from section 56, Model Probate Code.

Section 53. (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 considered a direction for exoneration from encumbrances or against apportionment of estate taxes.

Advisory Committee Comment

In committee discussions on the proposed code a recurring question concerned the legal effect of a general testamentary direction to pay debts, charges, taxes and administration

Section 52 (page 50)

Section 52. (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 expressed in the will is clear and explicit to the contrary.

expenses. Printed will forms usually contain such a provision and it is found in most wills filed. The authorities contain varying interpretations of such general wording in wills when applied to specific problems. It was decided that the proposed code should provide guidance as respects exoneration of encumbrances and apportionment of estate taxes.

The sections of the proposed code (sections 161 to 163) on discharge of encumbrances provide rules for paying encumbrances on devised property "unless the will provides otherwise." It was considered desirable that the proposed code provide that a direction in a will "to pay my just debts" should not be considered a testamentary direction "to discharge encumbrances on devised property" and exonerate the devisee.

Similarly, the sections of the proposed code (sections 190 to 198) on apportionment of estate taxes provide for apportionment "unless the will otherwise provides." It was considered important that a general testamentary direction "to pay taxes and administration expenses" not be considered a direction not to apportion.

Section 54. (Non-ademption of specific devises in certain cases) (1) In the situations and under the circumstances provided in and governed by this section, specific devises will not fail or be extinguished by the destruction, damage, sale, condemnation or change in form of the property specifically devised. This section is inapplicable if the intent that the devise fail under the particular circumstances appears in the will or if the testator during his lifetime gives property to the specific devisee with the intent of satisfying the specific devise.

(2) 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 adeemed under the common law by the destruction, damage, sale or condemnation.

(3) If insured property which is the subject of a specific devise is destroyed or damaged, the specific devisee 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 the 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.

(4) 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 the death of the testator, including any security interest in the property and interest accruing before the 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.

(5) If property which is the subject of a specific devise is taken by condemnation prior to the death of the testator, the specific devisee has the right to:

(a) Any amount of the condemnation award unpaid at the time of the 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, for purposes of this section, is limited to the amount established on the appeal.

(6) 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 of the testator, 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 subsection does not apply if the testator, subsequent to the sale or award or receipt of insurance proceeds, is adjudicated competent and survives such adjudication for six months.

(7) If securities are specifically devised, 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 devised 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 the other securities are part of the testator's estate at his death, the specific devise is considered to include the additional or substituted securities. As used in this subsection, "securities" means the same as defined in subsection (11) of ORS 59.015.

(8) The amount a specific devisee receives as provided in this section 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.

Advisory Committee Comment

Section 54 is taken from section 853.35, Wisconsin Probate Code. The following quotation from the comment on the Wisconsin Probate Code section is considered 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

Section 55 (page 55)

Section 55. (When estate passes to issue of devisee; 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, unless otherwise provided in the will of the testator.

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 55. (When estate passes to issue of devisee; 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.

Advisory Committee Comment

Section 55 is identical in content with ORS 114.240, except for purely editorial changes. Section 55 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 sections 273 and 274, Iowa Probate Code, and section 11.12.110, Washington Probate Code.

Section 56. (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.

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 56 (page 56)

Section 56. (Children born or adopted after execution of will; pretermitted children) (1) If a testator is survived by a child who is 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 who is neither provided for in the will 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)(b)(A) The [portion of the estate in which the] after-born or after-adopted child may share [is limited to] only in the portion of the estate passing to the living children under the will.

(B) The share of each 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] be the total value of the portion of the estate passing to the living children under the will divided by the number of after-born and after-adopted children [with the] plus the number of living children for whom provision, other than nominal provision, is made in the will [, and given an equal share of the estate to each such child].

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 56 (page 57)

(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 57 (page 59)

Section 57. (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] a court having jurisdiction of the estate of the testator or to an executor named in the will.

(2) If it appears to [the] 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.

(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.

Advisory Committee Comment

Section 56 would replace ORS 114.250. The section is taken from section 5-3.2, Estates, Powers and Trusts Law enacted in New York in 1966 as chapter 952, Laws of 1966.

The committe was in agreement that it did not wish to perpetuate the problems and the palpable injustices inherent in the present Oregon statute. A cursory examination of the litigation involving this statute would be sufficient reason for adopting a different approach. It may be said that from

this starting point probably no other one of the sections of the proposed code caused more extended discussion than this one concerning the problem of pretermitted children. The committee agreed that such a provision should, so far as possible, try to carry out the desires of a testator. Obviously, under the present Oregon statute, a result 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 takes 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 section 56. 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 is contrary to ORS 114.250, which provides for children living at the time of execution of the will if they are not provided for by the will. The committee believes that the provision of section 56 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. The committee feels that ORS 114.250, where the testator had knowledge of his living children and did not provide for them, would enforce a result 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, unless he is provided for by a settlement or by the will, or mentioned in the will.

It should be explained that contrary to ORS 114.250, if the testator has three living children when he made his will and makes provision for two children, but none for the third, section 56 would not make any provision for the omitted child.

The committee feels 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:

> "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 57. (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.

Advisory Committee Comment

Section 57 embodies the provisions of ORS 115.110 and 115.130.

The civil liability to persons injured by failure to deliver the will, as now provided in ORS 115.110, is preserved. ORS 115.990, providing a criminal penalty for such failure, is repealed by the proposed code. In the opinion of the committee, the criminal penalty is never invoked. The committee agreed that the civil liability gives sufficient protection.

Section 58. (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.

Advisory Committee Comment

Section 58 would replace and supersede ORS 114.410, 114.420, 114.430 and 114.440, covering the deposit of wills with county clerks. The proposed code would terminate the provisions for depositing wills with the county clerk and section 58 would provide that, so far as possible, all wills now in the possession of the county clerks under the present statutes, would be returned to the testators or to the persons to whom the will is to be delivered following the deaths of the testators. 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 proposed code.

When this matter was being studied by the committee, data was submitted on the number of wills deposited and the procedures followed in Multnomah County, Union County, Lane County, Jackson County and Clackamas County. Following the detailed reports on these counties and general suggestions from committee members from 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."

Section 61 (page 62)

Section 61. (Tenancy by the entirety) If the slayer and the decedent held property as tenants by the entirety or with a right of survivorship, upon the death of the decedent an undivided one-half interest shall remain in the slayer for his lifetime and, subject thereto, the property shall [vest] pass to and be vested in the heirs or devisees of the decedent other than the slayer.

It was apparent from the discussion, participated in by committee members representing a substantial number of counties in central, eastern and southern Oregon, that no attempt was made by the county clerks' offices to check on whether the persons depositing the wills were living or were in fact deceased. Apparently, there is no general practice of the county clerks in checking whether intestate proceedings have been instituted for parties for whom wills were on deposit. As an example of the problem, since 1945, when ORS 114.410 to 114.440 became effective, in Multnomah County 1,339 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. The committee was strongly of the opinion that there is much greater probability of a will being found after the death of the testator if the will is in a safe deposit box. It is felt that the present statute had a tendency in many cases to provide merely a depository for wills and no effective provision 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. 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.

It should be noted that the present provision of ORS 115.110 for delivery of a will by a custodian is preserved in section 57 of the proposed code.

Part 6. Effect of Homicide on Intestate Succession, Wills, Joint Assets, Life Insurance and Beneficiary Designations

Advisory Committee Comment

The title of this part is taken from section 2-803, Uniform Probate Code. For comparable legislation, see sections 535 to 537, Iowa Probate Code, and chapter 11.84, Washington Probate Code.

This part would replace ORS 111.060. Oregon badly needs a revision of the law in this area. See Oregon Probate Law and Practice § 23 for some of the problems arising under the Oregon statute. In the light of this inadequate statute, and in view of the fact that the common law doctrines of the Restatement, Restitution, have not yet been generally accepted by the Oregon court, a complete statutory solution would seem to be desirable. As will be noted, the general wording and format of the following sections are taken from the Washington Probate Code.

Section 59. (Definitions) As used in sections 59 to 69 of this Act:

(1) "Decedent" means a person whose life is taken by a slayer.

(2) "Slayer" means a person who, with felonious intent, takes or procures the taking of the life of another.

Advisory Committee Comment

The wording of section 59 is taken from section 11.84.010, Washington Probate Code. However, the definition of a slayer has been modified to read: "A person who, with felonious intent, takes or procures the taking of the life of another." The wording of ORS 111.060 is: "Person who feloniously takes or causes or procures another so to take the life of another." Although "feloniously" is used in section 2-803, Uniform Probate Code, and sections 535 and 536, Iowa Probate Code, this word is criticized in Oregon Probate Law and Practice § 23. The committee considered it preferable to use the phrase "with felonious intent," since this would exclude killing by involuntary manslaughter or gross negligence.

Section 60. (Slayer considered to predecease decedent) Property which would have passed from the decedent or his estate to the slayer by intestate succession, by will, or by trust shall pass and be vested as if the slayer had predeceased the decedent.

Advisory Committee Comment

Section 60 achieves the result spelled out in ORS 111.060(1). The determination of these rights is more easily arrived at by the wording of section 60. Also note that the section includes property passing by trust agreement.

Section 61. (Tenancy by the entirety) If the slayer and the decedent held property as tenants by the entirety or with a right of survivorship, upon the death of the decedent an undivided one-half interest shall remain in the slayer for his lifetime and, subject thereto, the property shall vest in the heirs or devisees of the decedent.

Advisory Committee Comment

The problem and the background on the proposed solution contained in section 61 is discussed in a memorandum by Mr. Otto J. Frohnmayer, the principal draftsman of this part, as follows:

> ". . .note the problems which have arisen with tenancies by the entirety which have been held to be not within the intent of the statute, since it was held to deal only with interests which are deemed to pass upon death. In Wenker v. Landon, 161 Or. 265, 88 P.2d 971 (1939) it was held that an estate passing by right of survivorship does not in strict legal theory pass through the estate of the decedent. Hargrove v. Taylor, 236 Or. 451, 389 P.2d 36 (1964) overruled Wenker v. Landon, but a majority of the court still held that tenancies by the entirety were not within the meaning of the present Oregon statute on felonious killing, ORS 111.060. A constructive trust solution was utilized in the latter case, since Justice O'Connell held that the failure of the legislature to extend the statute to cases where property is held by the entirety was not to be regarded as an indication of a legislative intent to permit a spouse to profit by his own felonious conduct.
>
> "Reference must be had, in any legislation on this subject, to Article I, section 25 of the Oregon Constitution, which states that 'no conviction shall work corruption of blood, or forfeiture of estate.' The desirable policy would seem to be that heirs should be precluded from taking through a murder, but that they should not be prohibited from taking in their own right as next of kin.
>
> "The draft submitted for consideration follows very closely the suggested statute presented in Wade 'Acquisition of property by willfully killing another -- a statutory solution', 49 Harv. L. Rev. 715 (1936). The new Washington probate code chapter 11.84 also follows this statutory solution practically verbatim.. . ."

Section 62. (Vesting of property held jointly with slayer) If the slayer, the decedent and another or others were joint owners of property with a right of survivorship, the slayer shall not take as a survivor as against the other surviving owner or owners.

Advisory Committee Comment

Section 62 suggests a solution to the problem of a joint interest held by three or more persons, including the slayer and the decedent victim, under joint tenancy or survivorship. If there are survivorship tenants other than the slayer who survive the decedent victim, the survivorship title will be vested in the other surviving joint tenants to the exclusion of the slayer. This is a provision and solution which does not appear in ORS 111.060.

Section 63. (Reversions, vested remainders, contingent remainders and future interests) (1) Property in which the slayer holds a reversion or vested remainder subject to an estate for the lifetime of decedent shall pass to the heirs or devisees of the decedent for a period of time equal to the normal life expectancy of a person of the sex and age of the decedent at the time of his death. If the particular estate is held by a third person for the lifetime of the decedent, it shall continue in such person for a period of time equal to the normal life expectancy of a person of the sex and age of the decedent at the time of his death.

(2) As to a contingent remainder or executory or other future interest held by the slayer subject to become vested in him or increased in any way for him upon the condition of the death of the decedent:

(a) If the interest would not have become vested or increased if he had predeceased the decedent, the slayer shall be considered to have so predeceased the decedent; and

(b) In any case, the interest shall not be so vested or increased during a period of time equal to the normal life expectancy of a person of the sex and age of the decedent at the time of his death.

Section 64 (page 65)

(2) Property held either presently or in remainder by the slayer, subject to be divested by the exercise by the decedent of a power of revocation or a general power of appointment, shall pass to and be vested in the heirs or devisees of the decedent other than the slayer. Property so held by the slayer, subject to be divested by the exercise by the decedent of a power of appointment to a particular person or persons or to a class of persons, shall pass to such person or persons or in equal shares to the members of such class of persons to the exclusion of the slayer.

Advisory Committee Comment

The general outline of section 63 is taken from sections 11.84.060 and 11.84.080, Washington Probate Code. These provisions cover an area which is not touched by ORS 111.060. The general content and effect of section 63 would be to provide that where the slayer has a reversion or vested remainder or a contingent remainder or other executory future interest, the enjoyment of this interest will be postponed for a period equal to the normal life expectancy of the decedent if he had not been killed by the slayer.

Section 64. (Property appointed; powers of revocation or appointment) (1) Property appointed by the will of the decedent to or for the benefit of the slayer shall be distributed as if the slayer had predeceased the decedent.

(2) Property held either presently or in remainder by the slayer, subject to be divested by the exercise by the decedent of a power of revocation or a general power of appointment, shall pass to the heirs or devisees of the decedent. Property so held by the slayer, subject to be divested by the exercise by the decedent of a power of appointment to a particular person or persons or to a class of persons, shall pass to such person or persons or in equal shares to the members of such class of persons to the exclusion of the slayer.

Advisory Committee Comment

Section 64 is taken from section 11.84.090, Washington Probate Code. It covers material not touched upon in ORS 111.060. The general content of the section is clear in preventing the slayer from benefiting from a power of appointment by the death of the decedent victim.

Section 65. (Proceeds of insurance on life and other benefit plans of decedent) Proceeds payable to or for the benefit of the slayer as beneficiary or assignee of the decedent of the following interests pass to the secondary

beneficiary, or if there is no secondary beneficiary, to the personal representative of the decedent:

(1) Policy or certificate of insurance on the life of the decedent.

(2) Certificate of membership in any benevolent association or organization on the life of the decedent.

(3) Rights of the decedent as survivor of a joint life policy.

(4) Proceeds under any pension, profit-sharing or other plan.

Advisory Committee Comment

Section 65 is a paraphrase of ORS 111.060(2). It should be noted, however, that this part of the proposed code does not have any provision similar to ORS 111.060 covering disability policies. This particular area was seriously considered by the committee, which decided first that problems of profiting by a disablement of a person did not properly belong in a felonious death statute. It was then reported that certain representatives of the insurance industry had commented that they had never heard of disability insurance being payable to a beneficiary other than the disabled. Therefore reference to such insurance is omitted from this part. It should be noted also, however, that references to profit-sharing, pension and other employe benefit plans have been included within the coverage of this part.

Section 66. (Proceeds of insurance on life of slayer) If the decedent is beneficiary or assignee of any policy or certificate of insurance on the life of the slayer, the proceeds shall be paid to the personal representative of the decedent unless:

(1) The policy or certificate names some person other than the slayer or his personal representative as the secondary beneficiary.

(2) The slayer, by naming a new beneficiary or assignee, performs an act which would have deprived the decedent of his interest if the decedent had been living.

Advisory Committee Comment

Section 66 deals with an area not touched upon by the present Oregon statutes. The wording is taken from section 11.84.100, Washington Probate Code. The effect is to prevent the slayer from benefiting by the death of the decedent where decedent was the beneficiary of insurance on the life of the slayer.

Section 67. (Payment by insurance company, bank, trustee or obligor; no additional liability) Any insurance company making payment according to the terms of its policy, or any bank, trustee or other person performing an obligation to the slayer shall not be subjected to additional liability because of sections 59 to 69 of this Act if the payment or performance is made without written notice by a claimant of a claim arising from those sections. Upon receipt of written notice the person to whom it is directed may withhold any disposition of the property pending determination of his duties.

Advisory Committee Comment

Section 67 makes provision for the protection of those making payment in areas covered by this part where payment is made without written notice of claim by someone who would be otherwise entitled under the terms of this part. The provision is similar to the second sentence of ORS 111.060(2).

Section 68. (Rights of persons without notice dealing with slayer) Sections 59 to 69 of this Act shall not affect the rights of any person who for value and without notice purchases or agrees to purchase property that the slayer would

have acquired except for those sections, but all proceeds received by the slayer from the sale shall be held by him in trust for the persons entitled to the property as provided in those sections. The slayer shall be liable for any portion of the proceeds of the sale that he may have expended and for the difference, if any, between the amount received from the sale and the actual value of the property.

Advisory Committee Comment

Section 68 is taken from section 11.84.120, Washington Probate Code.

Section 69. (Record of conviction as evidence) The record of the conviction of a slayer for having participated in the death of a decedent shall be admissible in evidence in any action arising under sections 59 to 69 of this Act.

Advisory Committee Comment

Section 69 is similar in content to section 11.84.130, Washington Probate Code. The committee engaged in extended discussion on the approach to this problem of requiring a criminal conviction. It was brought out that there are situations where, after a criminal conviction of a felony death, the slayer sues an insurance company and convinces the jury that he did not feloniously slay the decedent. Another reason for not requiring a criminal felony conviction is that determination of rights under this part, which might otherwise be arrived at without contest, might be delayed for years if the determination were made contingent on a felony conviction (e.g., first degree murder conviction being appealed to the United States Supreme Court). The consensus was, however, that it was proper to use the conviction record as admissible evidence.

Part 7. Uniform Simultaneous Death Act

Advisory Committee Comment

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

This part of the proposed code would adopt the amendments to the Uniform Act proposed by the Commissioners on Uniform State Laws in 1953.

ORS 112.050, comparable to section 5 of the Uniform Act, reads as follows: "This chapter shall not apply to the distribution of the property of a person who has died before July 5, 1947." Section 5 was omitted from the Uniform Act by the 1953 amendments. ORS 112.050 is repealed by this draft.

Section 70. ORS 112.010 is amended to read:

112.010. (Disposition of property upon simultaneous death, generally) Where the title to property or the devolution thereof depends upon priority of death and there is no sufficient evidence that the persons have died otherwise than simultaneously, the property of each person shall be disposed of as if he had survived, except as provided otherwise in [this chapter] sections 70 to 77 of this 1969 Act.

Advisory Committee Comment

The 1953 amendments to the Uniform Act made no changes in section 1 thereof, comparable to ORS 112.010.

Section 71. ORS 112.020 is amended to read:

112.020. (Beneficiaries designated to take successively) [Where two or more beneficiaries are designated to take

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

Advisory Committee Comment

Section 2 of the Uniform Act, comparable to ORS 112.020, was amended in 1953 by the Commissioners to provide that if the holder of a life estate and a remainderman of the same estate die where there is no sufficient evidence that the two died otherwise than simultaneously, the remainderman will be deemed not to have survived and his estate will take nothing. This amendment was made as a result of the court's decision in Miami Beach First Nat'l Bank v. Miami Beach First Nat'l Bank, 52 So.2d 893 (Fla. 1951). In that case T granted a

life estate to A with the remainder in a class of persons of which B was a member. A and B were killed in a common accident. B's estate claimed B's share of T's estate under section 2 and the other remaindermen contended that the section did not apply. The court held that section 2 applied and that B's estate received B's share of T's estate. The Uniform Commissioners believed this to be a misinterpretation of section 2 and designed the first sentence of the amendment to nullify the result. The second sentence of the proposed amendment would continue the rule of the current section with slightly modified wording. It is meant to apply when all the beneficiaries die in a common accident by providing that the estates of each would receive the share that each beneficiary would have received had he survived.

Section 72. ORS 112.030 is amended to read:

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

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

Advisory Committee Comment

Subsection (1) of section 3 of the Uniform Act, comparable to ORS 112.030, remains unchanged. The 1953 amendments by the Commissioners added subsection (2) to solve the problem created in states not having joint tenancy. Oregon abolished joint tenancies in ORS 93.180.

Section 73. (Community property) Where a husband and wife have died, leaving community property, and there is no sufficient evidence that they have died otherwise than

simultaneously, one-half of all the community property shall pass as if the husband survived and the other one-half thereof shall pass as if the wife had survived.

Advisory Committee Comment

New section 4 of the Uniform Act was proposed in 1953 to cover the situation where community property is involved. This provision is needed in Oregon because of the many people living in Oregon who own community property in another state or who have sold community property and purchased property in Oregon with the proceeds.

Section 74. ORS 112.040 is amended to read:

112.040. (Insured and beneficiary) Where the insured and the beneficiary in a policy of life or accident insurance have died and there is no sufficient evidence that they have died otherwise than simultaneously the proceeds of the policy shall be distributed as if the insured had survived the beneficiary, except if the policy or any interest therein is community property of the insured and his spouse, and there is no alternative beneficiary except the estate or personal representatives of the insured, the proceeds of such interest shall be distributed as community property under section 73 of this 1969 Act.

Advisory Committee Comment

ORS 112.040 is comparable to section 4 of the Uniform Act. The exception provision as to community property was proposed by the 1953 amendments to section 4, and is added to ORS 112.040, for the reasons stated in the committee on section 73 of the proposed code.

Section 75. ORS 112.060 is amended to read:

112.060. (Law does not apply if decedent provides otherwise) [This chapter] Sections 70 to 77 of this 1969 Act

shall not apply in the case of wills, living trusts, deeds, [or] contracts of insurance [wherein] or any other situation where provision [has been] is made for distribution of property different from the provisions of [this chapter] sections 70 to 77 of this 1969 Act, or where provision is made for a presumption as to survivorship which results in a distribution of property different from that so provided.

Advisory Committee Comment

The 1953 amendments to the Uniform Act made changes in section 6 thereof, comparable to ORS 112.060. The phrase "or any other situation" was adopted from the Texas version of the Uniform Act. The clause "or where provision is made for a presumption as to survivorship which results in a distribution of property different from that so provided" was contained in Alabama's 1951 enactment. The Commissioners were of the opinion that the courts would construe the original Act the same as the amended one, if a liberal construction was adopted, but that the amendment would clarify and be helpful, saying: "Draftsmen of instruments listed in the Act quite often make provision for a presumption of survivorship. They may provide that a person shall not be deemed to have survived unless he shall survive by at least 30 days. They may, in connection with the so-called Marital Deduction in the Federal Estate Tax Law, provide that the beneficiary shall be deemed to have survived if there is no sufficient evidence that the testator and the beneficiary spouse died other than simultaneously."

Section 76. ORS 112.070 is amended to read:

112.070. (Construction and interpretation) [This chapter] Sections 70 to 77 of this 1969 Act shall be so construed and interpreted as to effectuate [its] their general purpose to make uniform the law in those states which enact the Uniform Simultaneous Death Act.

Advisory Committee Comment

No changes were made in section 7 of the Uniform Act, comparable to ORS 112.070, by the 1953 amendments.

Section 77. ORS 112.080 is amended to read:

112.080. (Citation of law) [This chapter] Sections 70 to 77 of this 1969 Act may be cited as the "Uniform Simultaneous Death Act."

Advisory Committee Comment

No changes were made in section 8 of the Uniform Act, comparable to ORS 112.080, by the 1953 amendments.

Part 8. Renunciation of Intestate Succession or Devise

Section 78. (Renunciation of intestate succession or devise) A person may renounce intestate succession or a devise of property, wholly or partially, by filing a signed declaration of such renunciation with the court and serving a copy on the personal representative within four months after the date of appointment of the personal representative. No interest in the property so renounced is considered to have vested in the heir or devisee and the renunciation is not considered 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.

Advisory Committee Comment

Section 78 is a new statutory provision having no counterpart in the present Oregon statutes. 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

Section 78 (page 74)

Section 78. (Renunciation of intestate succession or devise) A person may renounce intestate succession or a devise of property, wholly or partially, by filing a signed declaration of such renunciation with the court and serving a copy on the personal representative within four months after the date of appointment of the personal representative. No interest in the property so renounced is considered to have vested in the heir or devisee and the renunciation is not considered a transfer by gift of the property renounced, but the property so renounced 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.

his benefit. For comparable legislation, see section 853.21, Wisconsin Probate Code; section 2-801, Uniform Probate Code, and section 58, Model Probate Code. See also Oregon Probate Law and Practice § 552.

The wording of section 78 is taken primarily from the Uniform Probate Code section referred to above. 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 nonclaim statute and the proposed period for election against will and for contest of will. The section spells out affirmative action required of the person renouncing by filing a written renunciation and service on the personal representative. It provides that a renunciation is not considered a transfer by the party renouncing or a gift by the heir or devisee who renounces the inheritance or the devise.

Part 9. Dower and Curtesy Abolished

Section 79. (Dower and curtesy abolished) Dower and curtesy, including inchoate dower and curtesy, are abolished, but any right to or estate of dower or curtesy of the surviving spouse of any person who died before the effective date of this Act shall continue and be governed by the law in effect immediately before that date.

Advisory Committee Comment

Section 79 would abolish dower and curtesy, including inchoate dower and curtesy, except with respect to the surviving spouse of a person who may have died prior to the effective date of the proposed code. With respect to the rights of dower and curtesy of the surviving spouses of those landowners who may have predeceased the effective date of the proposed code, all the provisions of the present law will continue in effect.

The proposed code would substitute for present rights of dower and curtesy the right of a spouse of an intestate who died leaving children to inherit not only an undivided one-half of the personalty, as at present, but also an undivided one-half of the real property. If the decedent died testate, the proposed code would give an election against the will to the surviving spouse for an undivided one-quarter of the real estate, as well as of the personal property of the estate.

Thus, in either situation, the proposed code would give the surviving spouse a fee interest in real property in lieu of the present dower or curtesy interest.

The common law right of dower and curtesy has been modified or abolished in many states. In the opinion of the committee, present dower and curtesy laws have in practice become of less and less utility and value. Property acquired by a married couple is usually taken as a tenancy by the entirety, except when title of valuable property is taken as a tenancy in common for tax purposes. Proceedings for admeasurement and assignment of consummate dower and curtesy are becoming rarities in our practice. Yet, in the absence of a proceeding for admeasurement and assignment of the consummate dower or curtesy interest, the value of this interest to the spouse is illusory. Oregon Probate Law and Practice § 111, comments as follows:

> "Upon the death of the husband what was theretofore dower inchoate is called dower consummate, but it is not yet an estate in land. It is only a chose in action, a right to have dower assigned. . . .
>
> ". . . A dictum in McDermid v. Bourhill, that the right of dower is 'an estate which vests in the wife immediately on the death of her husband' is accordingly not a correct statement of Oregon law.
>
> "At this stage, and prior to assignment or admeasurement, the widow has no right to any particular tract, nor to any portion of any particular tract, nor is she a tenant in common with the heirs . . ." (Citations omitted)

The proposed code does not in any respect modify the law with respect to dower or curtesy consummate. Inchoate interests are mere expectancies or possibilities and legislation affecting or abolishing them does not impair any property right or obligation of any contract. This is well established in other jurisdictions and it is the holding of our own Supreme Court in United States National Bank v. Daniels, 188 Or. 356, 177 P.2d 246 (1947).

The comment on section 2-201, Uniform Probate Code, states:

> ". . . Dower encumbers titles and provides inadequate protection for widows in a society which classifies most wealth as personal property. Hence the states have tended to substitute a forced share in the whole estate for dower and the widower's comparable common law right of curtesy. . . ."

The committee has taken cognizance of the trend toward the abolition of common law estates of dower and curtesy and considers that the proposed code is in keeping with the trend away from an agrarian economy.

Section 80 (page 77)

Section 80. ORS 113.090 is amended to read:

113.090. (Statute of limitation for recovery of dower or curtesy) No action or suit shall be brought after 10 years from the death of a decedent to recover or reduce to possession curtesy or dower by the surviving spouse of [such] the decedent.

In the committee's opinion, by giving the surviving spouse an undivided fee title to the real property of the estate, the proposed code makes a more appropriate and useful provision for the surviving spouse than is given under present law.

Section 80. (Statute of limitation for recovery of dower or curtesy) (ORS 113.090) No action or suit shall be brought after 10 years from the death of a decedent to recover or reduce to possession curtesy or dower by the surviving spouse of such decedent.

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 81 (page 79)

(1)(b) In any county where property of the decedent was located at the time of his death or is located at the time the proceeding is commenced; or

ARTICLE III. INITIATION OF ESTATE PROCEEDINGS

Section 81. (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.

Advisory Committee Comment

The present statutory provisions for venue are contained in ORS 115.140 and 115.310. These sections are discussed in Oregon Probate Law and Practice § 573. 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 wording is commented on by the authors. They call attention to decisions where administration proceedings have been held void through failure to comply with the provisions of these statute sections. 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, the committee has considered section 3-204, Uniform Probate Code; section 12, Iowa Probate Code;

section 11.16.050, Washington Probate Code, and section 61, Model Probate Code, which has been adopted in section 856.01, Wisconsin Probate Code.

Section 81 has been drafted to eliminate the problems inherent in our present statutes. 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 domicle; 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, in section 82 of the proposed code, 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, sections 81 and 82 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 82. (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 considered 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 for the other county a transcript of the proceeding with all the original papers filed therein, and the court for the other county thereupon has exclusive jurisdiction of the proceeding to the same extent and with like effect as though the proceeding were in the court on original jurisdiction.

Advisory Committee Comment

Section 82 would give the probate court of the county to which the proceeding has been transferred the same status and jurisdiction as if the proceeding had been completed in the original jurisdiction. The wording is taken from ORS 109.345 and 126.116. Our present probate code does not contain specific wording providing for and regulating the transfer to another county, although there are adequate statute 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 83. (Special administrators) (1) If, prior to appointment and qualification of a personal representative, property of a 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.

(2) The special administrator shall qualify by filing bond in the amount ordered by the court, conditioned upon the faithful performance of his trust.

(3) 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;

(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.

(4) 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.

(5) 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.

(6) 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.

Advisory Committee Comment

Section 83 is a revision of ORS 115.330. One 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 or medical investigator and necessary other details in connection with the disposal of the body. The only other substantive change from the

Section 84 (page 83)

Section 84. (Petition for appointment of personal representative and probate of will) Any interested person may petition for the appointment of a personal representative and for the probate of a will. The petition shall include the following information, so far as known:

(1) The name, age, domicile, post-office address, date and place of death, and Social Security account number or [Treasurer's] taxpayer identification number of the decedent.

[(6) If the decedent died wholly or partially intestate,] (5) The names, relationship to the decedent and post-office addresses of [the heirs] persons who are or would be his heirs upon his death intestate, and the [birth dates] ages of any [of them] who are minors.

[(5)] (6) If the decedent died testate, the names and post-office addresses of the devisees [and any pretermitted children], and the [birth dates] ages of any who are minors.

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 84. (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, post-office address, date and place of death, and Social Security account number or Treasurer's identification number of the decedent.

(2) Whether the decedent died testate or intestate.

(3) The facts relied upon to establish venue.

(4) The name and post-office 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 post-office 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 the decedent and post-office addresses of the heirs, and the birth dates of any of them who are minors.

(7) A statement of the extent and nature of assets of the estate, to enable the court to set the amount of bond of the personal representative.

Advisory Committee Comment

Section 84 replaces ORS 115.020 and 115.120. It will be noticed that the present law is changed materially in that section 84 provides that any interested 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 section 88 of the proposed code preserves the preference rights, it was the unanimous decision of the committee that the provision that any person may file the petition would eliminate many of the problems involved in the present statute. Section 3-205, Uniform Probate Code, provides that the petition may be filed by any person interested. Section 11.28.110, Washington Probate Code, does not specify who may petition for the appointment. The committee considered that any person who paid the fees and filed a petition complying with section 84 would of necessity be an interested person.

Section 84 is more specific than ORS 115.020. Subsections (1) and (7) require that additional facts be included in the petition. The utility of this additional information to the court is obvious.

Section 85. (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.

Advisory Committee Comment

Subsection (1) of section 85 would replace ORS 115.160. Reference is made to section 13 of the proposed code, 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).

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

New section 84a (page 84)

Section 84a. (Information of escheat to Division of State Lands) 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 petitioner shall deliver or mail to the Director of the Division of State Lands a copy of the petition, and shall file in the estate proceeding proof by an affidavit of the delivery or mailing.

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 86 (page 85)

Delete all of section 86.

Renumber subsequent sections accordingly.

Section 87 (page 85)

Section 87. (Testimony of attesting witnesses to will) (1) Upon [the] an ex parte 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] probate of a will, an

Section 85 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. Section 85 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.

Oregon Probate Law and Practice § 583, states, in discussing ORS 115.160: "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."

Section 85 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 181 of the proposed code provides for distribution to a foreign personal representative where the Oregon proceeding is an ancillary probate.

Section 86. (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 petition.

Advisory Committee Comment

The wording of section 86 is adapted from section 1-208, Uniform Probate Code. It supplements section 12 of the proposed code. It provides suitable opportunity to file objection to an ex parte petition for probate.

Section 87. (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 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.

Advisory Committee Comment

Section 87 is a revision of ORS 115.170, with editorial changes. However, the last sentence of subsection (1) is new. This sentence points out that the affidavit of the attesting witness may be made at the time of execution of the

Section 87 (page 86)

(1)(cont'd.) 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] other facsimile 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.

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 88 (page 87)

Section 88. (Preference in appointing personal representative) Upon the filing of the petition, if there is no will or there is a will and it has been proved, the court shall appoint a qualified person it finds suitable as personal representative, giving preference [as follows] in the following order:

(1) To the executor named in the will.

(2) To the surviving spouse of the decedent or his nominee.

(3) To the nearest of kin of the decedent or his nominee.

(4) To the Director of the Division of State Lands if it appears that the decedent died wholly intestate and without heirs.

(5) To any other person.

will or at any time thereafter. ORS 115.170 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 committee, 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, 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 88. (Preference in appointing personal representative) Upon the filing of the petition, if there is no will or there is a will and it 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 of the decedent or his nominee.

(3) To the nearest of kin of the decedent or his nominee.

Advisory Committee Comment

Section 88 would replace ORS 115.190 and 115.310. The 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 statutes. However, subject to this proper and essential discretion in the court, the preference provisions of the present statutes are generally preserved in section 88. 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. The committee believes that this provision will provide a flexibility not now present.

Section 89. (Persons not qualified to act as personal representatives) 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 90 of this Act.

(7) A judge of the district court, circuit court, Oregon Tax Court or Supreme Court of this state.

Advisory Committee Comment

Section 89 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 reasons requiring disqualification under subsection (4) would similarly apply where an attorney had resigned from the bar "under fire."

The other substantive change, appearing as subsection (6), is the exception that would permit a nonresident executor

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 89 (page 88)

(6) A nonresident of this state, except that a nonresident named executor in the will may qualify if he appoints an active member of the Oregon State Bar as a resident agent to accept service of summons and process in all actions affecting the estate, and files the appointment in the probate proceeding [, and filed a bond as provided in section 90 of this Act].

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 90 (page 89)

Section 90. (Necessity and amount of bond; bond notwithstanding will) (1) Unless a testator declares that no bond shall be required of the executor of his estate, or unless the personal representative is the sole heir or devisee or is the Director of the Division of State Lands, the personal representative shall not act nor shall letters be issued to him until he files with the clerk of the court a bond. The bond shall be executed by a surety company authorized to transact surety business in this state, or by one or more sufficient personal sureties approved by the court. A personal surety must be a resident of this state. 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.

named in a will to serve if he files a bond and appoints a resident agent in the same manner as provided for nonresident corporations. A typical case would be where a testator had nominated a Vancouver, Washington, resident as executor and 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 wording of subsection (7) is predicated on the assumption that probate jurisdiction will be vested in the circuit court. The subsection would disqualify only those judicial officers who might exercise jurisdiction in probate matters.

Section 90. (Necessity and amount of bond; bond notwithstanding will) (1) Unless a testator declares that no bond shall be required of the executor of his estate, the personal representative shall not act nor shall letters be issued to him until he files with the clerk of the court a bond executed by a surety company authorized to transact surety business in this state. 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 persons, 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 of the estate.

(b) The anticipated income during administration.

(c) The probable indebtedness and taxes.

(3) Nothing in this section affects the provisions of ORS 709.230 and 709.240, relating to a trust company acting as personal representative.

Advisory Committee Comment

Section 90 replaces and changes materially ORS 115.430. The principal change is that section 90 eliminates any provision for 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. The committee agreed 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 ORS 115.430.

Section 91. (Increasing, reducing or requiring new bond) The court may increase or reduce the amount of bond of a personal representative, 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 on the bond may be discharged from liability by an order made pursuant to ORS 33.510 and 33.520.

Advisory Committee Comment

Section 91 replaces the present provisions of ORS 115.430(4), 115.450 and 115.460. Rather than include the complicated wording of these statute sections, the provisions of ORS 33.510 and 33.520, covering the general subject of discharge of surety, are incorporated by reference.

Section 92. (Letters testamentary or of administration) (1) Letters testamentary or letters of administration shall be issued to the personal representative appointed by the court upon his filing with the clerk of the court the bond, if any, required by the court.

(2) Letters testamentary may be 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 the decedent.

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 the estate are pending, do hereto subscribe my name and affix the seal of the court this_____day of_____, 19____.

_____Clerk of the Court

By _____
Deputy

(Seal)

---

(3) Letters of administration may be in the following form:

LETTERS OF ADMINISTRATION

No._____

THIS CERTIFIES that_____ has (have) been appointed and is (are) at the date hereof the duly appointed, qualified and acting administrator(s) of the estate of_____, deceased, and that no will of the 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 the estate are pending, do hereto subscribe my name and affix the seal of the court this____ day of_____, 19___.

_____Clerk of the Court

By _____
Deputy

(Seal)

Advisory Committee Comment

Section 92 would replace ORS 115.190, 115.210 and 115.350. The wording of the suggested forms of letters has been somewhat simplified from the present suggested forms.

Section 93. (Removal of personal representative) (1) When a personal representative ceases to be qualified as provided in section 89 of this Act, or becomes incapable of discharging his duties, the court shall remove him.

(2) When a personal representative has been unfaithful

Section 93 (page 93)

(3) When grounds of removal of a personal representative appear to exist, the court, on its own motion or on the petition of any interested person, 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] as provided in section 10 of this Act.

to or neglectful of his trust, the court may remove him.

(3) When grounds of removal of a personal representative appear to exist, the court, on its own motion or on the petition of any interested person, 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.

Advisory Committee Comment

Section 93 would replace ORS 115.470 and 115.480. The wording is taken from section 857.15, Wisconsin Probate Code. It covers the situations where the personal representative ceases to be qualified, as provided in section 89 of the proposed code, 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 for removal appear to exist.

Section 94. (Powers of surviving personal representative) (1) Every power exercisable by co-personal representative may be exercised by the survivors or survivor of them when the appointment of one is terminated, unless the will provides otherwise.

(2) Where one of two or more persons nominated as co-executors is not appointed, those appointed may exercise all the powers incident to the office, unless the will provides otherwise.

Advisory Committee Comment

Section 94 is taken almost verbatim from section 3-419, Uniform Probate Code. It replaces similar provisions in ORS 115.500(1), and ORS 115.510.

Section 95. (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, the will is set aside, declared void or inoperative, the letters shall be revoked and letters of administration issued.

(3) If, after administration has been granted, a will of the decedent 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 named in the will, except that he shall not exercise powers given in the will which by its terms are personal to the personal representative named therein.

Advisory Committee Comment

Subsections (1) and (4) of section 95 have been taken from sections 857.21 and 857.23, Wisconsin Probate Code, which in turn are based upon sections 98 to 100, Model Probate Code. Subsections (2) and (3) are the same as ORS 115.200 and 115.340.

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 96 (page 95)

Section 96. (Notice to [creditors] interested persons by successor personal representative) (1) If the personal representative dies, is removed by the court or resigns after the notice to [creditors] interested persons required by section 121 of this Act has been published but before the time for presenting claims required by the notice has expired, the successor personal representative shall cause notice to [creditors] interested persons 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.

(2) The period of time between the death, removal or resignation and the date of the first republication of the notice under subsection (1) of this section shall be added to the period required for presentation of claims by the original notice [to creditors].

Section 96. (Notice to creditors by successor personal representative) (1) If the personal representative dies, is removed by the court or resigns after the notice to creditors required by section 121 of this Act has been published but before the time for presenting claims required by the notice has expired, the successor personal representative shall cause notice to creditors 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.

(2) The period of time between the death, removal or resignation and the date of the first republication of the notice under subsection (1) of this section shall be added to the period required for presentation of claims by the original notice to creditors.

(3) No notice by the successor personal representative shall be required under subsection (1) of this section if the period for filing claims expired prior to the death, removal or resignation of the original personal representative.

Advisory Committee Comment

Section 96 is a new section that spells out when a successor personal representative is required to publish a notice to creditors. The present probate code contains no guidelines for this 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 it 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 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 successor. 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 a notice to creditors. This provision is taken from section 11.40.010, Washington Probate Code.

Section 97. (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 proceeding the name and post-office address of the attorney.

Advisory Committee Comment

Section 97 is a new section requiring the personal representative to file in the estate proceeding the name and address of the attorney for the estate. This section will be useful not only to furnish information to the clerk of the court 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 section 82, Iowa Probate Code. The comment on the Iowa Probate Code section 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 98. (Contest of will) When a will has been admitted to probate, any interested person 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 97 (page 96)

Section 97. (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 proceeding the name and post-office address of the attorney unless that information appears in the petition or the order appointing the personal representative.

Advisory Committee Comment

Section 98 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 for creditors to file claims from six months to four months.

ARTICLE IV. ADMINISTRATION OF ESTATES GENERALLY

Part 1. Support of Spouse and Children

Advisory Committee Comment

In considering a simplified approach to the problem of support of the widow or widower and children of the deceased, and 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 one-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 that 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.

The committee was cognizant of the problems which have arisen from the confusing and in some cases contradictory provisions of the present statutes. After extended discussion and consideration, the committee decided to eliminate any reference to homestead rights or exempt property, upon which our present support statutes are based, 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. The committee, 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 99. (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 is 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, or cause or permit mechanics' 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 those hazards, to the extent of the proceeds of the insurance, they shall 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.

Advisory Committee Comment

Section 99 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.

Section 99 would grant the right of occupancy for one year to the widow or 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 probate 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.

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 99 (page 100)

(2) The occupants shall keep the abode insured, to the extent of the fair market value of the improvements, against fire and other hazards within the extended coverage provided by fire policies. In the event of loss or damage from those hazards, to the extent of the proceeds of the insurance, they shall restore the abode to its former condition.

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 100 (page 101)

(3) [Citation] Notice to persons whose distributive [share] shares of the estate may be diminished by the granting of the petition, unless the court by order shall direct otherwise; and

Section 100. (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; and

(4) Hearing.

Advisory Committee Comment

As noted in the introductory comment on this part of the proposed code, section 100 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 minor or incompetent children. It would replace ORS 116.015. There is an important difference, however, from the present probate code, in that section 100 would require not only a proper showing to the court of the need and circumstances, including nonprobate 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 101. (Petition for support and answer) (1) The petition for support under section 100 of this Act 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.

Advisory Committee Comment

Section 101 would require that full information be available to the court before it makes its order for support. Unlike our present probate 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 102. (Temporary support) Pending hearing upon the petition under section 100 of this Act, temporary support may be allowed by order of the court in an amount and of a nature as the court considers reasonably necessary for the welfare of the surviving spouse and any minor or incompetent child of the decedent.

Advisory Committee Comment

Section 102 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 103. (Modification or termination of support) Provision for support under section 100 of this Act ordered by the court may be modified or terminated by the court by further order.

Advisory Committee Comment

Section 103, providing for modification or termination of the support by court order, is not spelled out in the present probate code, but is a useful provision.

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 104 (page 103)

(2) The court, in determining provision for support, shall take into consideration the solvency of the estate, property available [therefor] for support other than property of the estate, and property of the estate inherited by or devised to the spouse and children.

Section 104. (Nature of support) (1) Provision for support under section 100 of this Act 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.

Advisory Committee Comment

Broad power is given by section 104 to the court to transfer to the surviving spouse or children 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 the section, payments may be continued for two years after the death of the decedent, 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 that may be available for the support of the surviving family.

Section 105. (Limitations on support) If it appears to the court that after provision for support under section 100 of this Act 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.

Advisory Committee Comment

Section 105 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 of the decedent. ORS 116.015 provides that no order for further support shall be made if the estate is insolvent.

Section 106. (Priority of support; treated as administration expense) Provision for support under section 100 of this Act ordered by the court has priority over claims against the estate and other expenses of administration. The provision shall not be charged against the distributive share of the person receiving support, but shall be treated as an expense of administration.

Advisory Committee Comment

Section 106 specifies 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 107. (Small estates; setting apart whole estate; termination of administration) If it appears that necessary and reasonable provision for support under section 100 of this Act 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.

Advisory Committee Comment

Section 107 is a rewritten version of ORS 116.020. The changes are that the net value of the estate to be set over

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 107 (page 104)

Section 107. (Small estates; setting apart whole estate; termination of administration) If it appears, after the expiration of four months after the date of the first publication of notice to interested persons, that necessary and reasonable provision for support [under section 100 of this Act] of the spouse and any minor or incompetent child of the decedent 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] may so order. There shall be no further proceeding in the administration of the estate [unless further property is discovered], and the estate shall summarily be closed.

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 108 (page 105)

Section 108. [(Surviving spouse's election to take against will)] (Right to elective share; effect of election) (1) If a decedent is domiciled in this state at the time of his death and dies testate, the surviving spouse of the decedent has a right to elect to take the share provided by this section. The elective share consists of one-fourth of the value of the net estate of the decedent, such share to be reduced by the value of the following property given to the surviving spouse under the will of the decedent:

(a) Property given outright;

(b) The present value of legal life estates [, if capable of valuation with reasonable certainty]; and

is not limited to $1,000, and the provision is not limited to intestate estates. There is no separate provision 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.

Part 2. Elective Share of Surviving Spouse

Advisory Committee Comment

The fundamental change in this part of the proposed code from ORS 113.050 and 113.060 is that, to accord with the proposed abolition of dower and curtesy and the policy of the proposed code to make no distinction between realty and personalty, the election is not limited to personalty, as now provided, but is granted as to an undivided one-quarter interest in both realty and personalty. Secondly, provision is made for consideration of nonprobate assets and income, and the elective share is barred if the spouse receives at least one-half the total of the estate property and nonprobate assets. This part also indicates the manner in which the estate property should be applied to the elective share and the method of contribution by the beneficiaries. The wording of sections in this part follows quite closely that of sections of the Wisconsin Probate Code.

Section 108. (Surviving spouse's election to take against will) (1) If a decedent is domiciled in this state at the time of his death and dies testate, the surviving spouse of the decedent has a right to elect to take the share provided by this section. The elective share consists of one-fourth of the value of the net estate of the decedent, reduced by the value of the following property given to the surviving spouse under the will of the decedent:

(a) Property given outright;

(b) The present value of legal life estates, if capable of valuation with reasonable certainty; and

(c) The present value of the right of the surviving spouse to income or an annuity, or a right of withdrawal, from any property transferred in trust by the will that is capable of valuation with reasonable certainty without regard to the powers forfeited under subsection (2) of this section.

(2) Except as to property applied under subsection (1) of this section to reduce the elective share, an election to take under this section forfeits any other right to take under the will and under the law of intestate succession. If the will would otherwise create a power of appointment in the surviving spouse, the spouse by electing to take under this section retains the power only if it is not a general power of appointment as defined in subsection (5) of ORS 118.010 and the testator has not provided otherwise, but the spouse forfeits any general power of appointment. A power to pay more than the income or annuity or withdrawals, the value of which reduced the elective share under paragraph (c) of subsection (1) of this section, or to apply additional principal or income in behalf of the electing spouse, may not be exercised in favor of the electing spouse.

(3) The right to elect may be barred under section 109 of this Act, or may be denied or the share reduced under section 110 of this Act.

Advisory Committee Comment

Section 108 gives to a surviving spouse the right to elect an undivided one-quarter interest in the reduced net estate. It will correct present inequities by allowing the spouse to accept property given by will, but reduces the undivided one-quarter interest by the amount so given by the will. This provision will therefore preserve the testamentary disposition in favor of the spouse without any increase in the

net cost to the estate. On the other hand, the section spells out that by election the spouse forfeits benefits not specifically enumerated as reducing the elective share, and forfeits general powers of appointment and rights to invasion of trust principal.

"Net estate" is elsewhere defined in the proposed code as the real and personal property of a decedent, except property used for the support of his surviving spouse and children and for the payment of obligations of the estate. Thus, the electing spouse would be entitled to provision made by the court for support, in addition to the elective share.

The following is from the comment on section 861.05, Wisconsin Probate Code, with indicated changes and deletions to make the comment applicable to section 108:

> "An election against a will by a widow under existing law often results in distortion of the estate plan; dower gives her a one-half interest in each parcel of realty; the elective share in personalty passes to her outright free of any trust set up by the will. This section preserves the testamentary scheme to a large degree by reducing the elective share of one-quarter by interests passing to the spouse under the will if those interests are capable of valuation. Thus if she is given a life interest under a trust, and that interest can be valued on the basis of life expectancy tables, an election would not destroy the trust; but the wife could elect only the difference between the value of her interest under the trust and her one-quarter elective share.
>
> "An election to take against the will forfeits all rights in the estate (except those preserved in reducing the elective share); this includes a right to share in intestate property . . . It should, however, be noted that where the spouse takes under the will, . . . the Intestate Succession chapter will give the spouse a share in intestate property; . . . In the latter situation a testator would normally want the spouse to share in intestate property. Where the spouse elects against the will, however, the spouse is already taking a share of intestate property since that is included in the net probate estate on which the share is computed; moreover, under section 113 the intestate property is used to satisfy the elective share.
>
> "The impact of election on powers of appointment and on powers of a trustee deserves special treatment. Subsection (2) sets forth the rules. The existing law is that an electing spouse

> retains powers of appointment created by the will, on the basis of the concept of a power as not an interest in property . . . This subsection provides for forfeiture of general and unclassified powers of appointment created in the spouse by the will. If the will creates a special power . . . such as a 'power to appoint among our issue,' the spouse may retain such a power unless the will itself provides for forfeiture by an election; the reason is that such a power is primarily intended to benefit the class among whom appointment may be made, to allow for flexibility, rather than to benefit the donee. Powers in a trustee which may confer direct benefits on the spouse, such as a power to invade principal to meet the needs of the spouse, will likewise normally be nullified by an election against the will. The theory underlying this section is that the spouse may not elect against the will and still derive benefits under it, except as those benefits are used to reduce the elective share.
>
> "Subsection (3) ties this section with the ensuing sections, which may in appropriate cases operate to restrict or nullify the right to elect."

Section 109. (How elective share barred) (1) The right of the surviving spouse to elect under section 108 of this Act is subject to bar by the terms of a written agreement signed by both spouses. Such an agreement may be entered into before or after marriage.

(2) The surviving spouse is barred if he receives at least one-half of the total of the following property, such property to be reduced by the amount of the federal estate tax payable by reason of such property:

(a) The net estate;

(b) Joint annuities furnished by the decedent;

(c) Proceeds of insurance on the life of the decedent, whether or not he had any of the incidents of ownership at his death;

Section 109 (page 109)

(2)(d) Transfers by the decedent within three years before the date of death of the decedent to the extent to which the decedent did not receive full consideration in money or money's worth.

(d) Transfers within three years before the date of death of the decedent to the extent to which the decedent did not receive consideration in money or money's worth;

(e) Transfers by the decedent during his lifetime as to which he had retained power, alone or in conjunction with any person, to alter, amend, revoke or terminate such transfer or to designate the beneficiary;

(f) Payments from the employer of the decedent or from a plan created by the employer or under a contract between the decedent and his employer, excluding workmen's compensation and social security payments;

(g) Property appointed by the decedent by will or by deed executed within three years before the date of his death, whether the power is general or special, but only if the property is effectively appointed in favor of the surviving spouse; and

(h) Property in the joint names of the decedent and one or more other persons, except such proportion as is attributable to consideration furnished by persons other than the decedent.

(3) For the purpose of subsection (2) of this section, the surviving spouse is considered to receive:

(a) Any property as to which the spouse is given all the income and a general power to appoint the principal.

(b) Life insurance proceeds settled by the decedent on option, if the spouse is entitled to the interest and has a general power to appoint the proceeds or to withdraw proceeds, or if the spouse is entitled to an annuity for life or

instalments of the entire principal and interest for any period equal to or less than normal life expectancy of the spouse.

(4) As used in subsection (2) of this section, "property in the joint names" means all property held or owned under any form of ownership with right of survivorship, including cotenancy with remainder to the survivor; stocks, bonds or bank accounts in the name of two or more persons payable to the survivor; United States Government bonds in co-ownership form or payable on death to a designated person, and shares in credit unions or building and loan associations payable on death to a designated person or in joint form.

Advisory Committee Comment

Subsection (1) of section 109 permits the right to elect to be barred by written agreement entered into either before or after marriage. ORS 108.140 provides that pre-nuptial agreements are effective as to property rights between the spouses. It is intended that the subsection would change present Oregon law by making the right of election subject to bar not only by a pre-nuptial but by a post-nuptial agreement.

Subsection (2), which would bar election if the surviving spouse receives at least one-half of the total of probate and nonprobate property, would correct what has in some instances caused serious inequities or distortion of careful estate plans. Frequently, a substantial part of a decedent's estate passes "outside" probate. Under our present law, a widow can accept substantial provisions made for her by life insurance or inter vivos trusts and inter vivos transfers of property and still have the unimpaired election to receive an undivided one-quarter of the estate personal property. The following is from the comment on section 861.07, Wisconsin Probate Code:

> "This section replaces obsolete concepts of jointure . . . and is generally new. It is designed to facilitate advance family planning. Subsection (1) provides for barring the surviving spouse by simple written agreement. . . . It applies to both antenuptial and postnuptial agreements. Such an agreement could, of course, be set aside by the court if the surviving spouse

lacked capacity or was subject to undue influence or if the agreement was the product of overreaching or misrepresentation. No attempt has been made to embody such tests in the statute, but they are left to court determination as is true of a challenge on such grounds to any voluntary transfer or agreement. The statute reflects the present judicial policy of favorable treatment of agreements settling property rights between husband and wife, particularly in cases involving second marriages.

"Subsection (2) is a completely new approach. The existing law allows a surviving widow to elect against a will and receive her statutory rights in the probate estate even though the deceased husband gave her the majority of his assets through nonprobate arrangements, such as life insurance payable to her or joint ownership passing to her by survivorship. This is obviously unfair, and this statutory provision bars the surviving spouse where he or she has received a majority of both probate and nonprobate assets considered together. In addition, the statute recognizes that such property may be tied up in an arrangement which would qualify for the marital deduction, rather than passing outright, and still constitute a bar."

Section 110. (Denial of election or share reduction when decedent and surviving spouse living apart) In any case where the decedent and the surviving spouse were living apart at the time of the death of the decedent, whether or not there was a decree for legal separation, the court in its discretion may deny any right to elect against the will, may reduce the elective share of the spouse to such amount as the court determines reasonable and proper, or may grant the full elective share in accordance with the circumstances of the particular case. The court shall consider the following factors in deciding what elective share, if any, should be granted: Length of the marriage, whether the marriage was a

first or subsequent marriage for either or both of the spouses, the contribution of the surviving spouse to the property of the decedent either in the form of services or transfers of property, length and cause of the separation, and any other relevant circumstances.

Advisory Committee Comment

The last sentence of ORS 107.280, which covers a decree of permanent or unlimited separation from bed and board, reads:

> "The court may, in making such award, decree that dower and curtesy, as well as homestead rights under ORS 116.010 and the election provided in ORS 113.050, are extinguished and barred."

Section 278 of this draft amends ORS 107.280 to delete this sentence. The deleted material permitting the court in a separation decree to bar the surviving spouse's election is replaced by section 110. This section gives the court the right to either deny, reduce or grant the elective right, both in a voluntary separation and in a judicial separation. The comment on section 861.09, Wisconsin Probate Code, is as follows:

> "This section is new and changes existing law. The inequity of allowing election where the surviving spouse has deserted the decedent during lifetime should be obvious. The existing law allows even an adulterous widow to claim dower . . . The difficulty, however, of providing a fixed rule for separated couples has led to the proposed section which would vest discretion in the court to deal with individual cases on the basis of all available facts. In some cases of separation no right to elect should be given; in others a full elective share is proper; in still others a reduced share would be consistent with the facts. The judicial burden should not be great since the number of cases will be few, and the issues are no more troublesome than a property division in a contested divorce. The presence of this section should operate to deter election in many instances where the surviving spouse might otherwise elect.
>
> "The phrase 'living apart' is designed to mean more than physical separation. Thus the section would not apply merely because an elderly husband or wife was in a nursing home while the other spouse resided elsewhere."

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 111 (page 113)

Section 111. (What constitutes election) The surviving spouse is considered to have elected to take under the will unless, within 90 days after the date of the admission of the will to probate or 30 days after the date of the filing of the inventory, whichever is later, he serves on the personal representative or his attorney and files in the estate proceeding a statement that he elects to take under section 108 of this Act instead of under the will. The surviving spouse may bar any right to take under section 108 of this Act by filing in the estate proceeding a writing, signed by the spouse, electing to take under the will.

Section 111. (What constitutes election) The surviving spouse is considered to have elected to take under the will unless, within 90 days after the date of the admission of the will to probate, he serves on the personal representative or his attorney and files in the estate proceeding a statement that he elects to take under section 108 of this Act instead of under the will. The surviving spouse may bar any right to take under section 108 of this Act by filing in the estate proceeding a writing, signed by the spouse, electing to take under the will.

Advisory Committee Comment

Section 111 is similar in wording to ORS 113.060. There are, however, two differences. The time is shortened from six months to 90 days after the admission of the will to probate, and the surviving spouse is given the right to file a writing electing to take under the will. Because the proposed code shortens the period for preferred treatment of claims and the time for filing a will contest from six months to four months, the committee considered 90 days after admission of the will to probate sufficient time to decide whether or not to elect against the will. The last sentence is taken from section 861.11, Wisconsin Probate Code. The usefulness of this provision to estate administration is apparent.

Section 112. (Election by guardian of surviving spouse) An election under section 108 of this Act may be filed on behalf of an incompetent surviving spouse by a guardian of the spouse. A guardian may elect against the will only if additional assets are needed for the reasonable support of the surviving spouse, taking into account the probable needs of the spouse, the provisions of the will, any nonprobate property arrangements made by the decedent for the support of the spouse and any other assets, whether or not owned by the spouse, available for such support. The election shall be

subject to the approval of the court, with or without notice to other interested persons.

Advisory Committee Comment

Section 112 will replace ORS 126.300. In explanation of the wording restricting the right of the guardian to elect, which is taken from section 861.11, Wisconsin Probate Code, is the following Wisconsin Probate Code comment:

> "Although 233.14 allows election by a guardian, no criterion for such election is stated; whereas this section allows election in such a case only if additional assets are needed for the reasonable support of the spouse; election merely to swell the estate subject to guardianship is undesirable for the entire family."

Section 113. (Payment of elective share) Estate property shall be applied in satisfaction of the elective share in the following order, unless the will directs otherwise:

(1) Any intestate property;

(2) After the intestate property is exhausted, each devisee shall contribute ratably to the elective share out of the portion of the estate passing to him under the will, except that in abating the interests of the devisees the character of the testamentary plan adopted by the testator shall be preserved so far as possible. However, persons to whom the will gives tangible personal property not used in trade, agriculture or other business are not required to contribute from such property unless the particular gift forms a substantial part of the total estate and the court specifically orders contribution because of such gift.

Advisory Committee Comment

Section 113 is new. There is no equivalent section in the present statutes indicating the manner in which the elective share is to be selected and paid from the estate. The impact of election on distribution of the estate to other

Section 113 (page 114)

(2) After the intestate property is exhausted, each devisee shall contribute ratably to the elective share out of the portion of the estate passing to him under the will, except that in abating the interests of the devisees the character of the testamentary plan adopted by the testator shall be preserved so far as possible. [However, persons to whom the will gives tangible personal property not used in trade, agriculture or other business are not required to contribute from such property unless the particular gift forms a substantial part of the total estate and the court specifically orders contribution because of such gift.]

beneficiaries under the will is presently left to judicial determination. The wording specifically exempting from contribution to the elective share heirlooms, pictures, home furniture and other specific bequests will be useful in an area which has caused problems in the past.

Part 3. Title and Possession of Property

Section 114. (No distinction between real and personal property) Sections 1 to 208 of this Act shall apply without distinction between real and personal property.

Advisory Committee Comment

The wording of section 114 is taken, generally, from section 3-101, Uniform Probate Code. The rationale of the concept of making no distinction between real and personal property is described in the following comment on section 852.01, Wisconsin Probate Code, a section setting forth the basic rules for intestate succession:

> "This section makes one very substantial change in the legal structure of intestate succession in Wisconsin. Existing law treats real property in a different manner than personal property and even within the classification of real property draws a sharp distinction between the homestead and other real property. These distinctions are products of our inherited system of descent and distribution, drawn from the English law of prior centuries and abandoned in England by statute in 1925; the separate descent of the homestead is added as a purely American statutory innovation. The result of this hodgepodge of legislation is that inheritance rights are dependent upon the kind of property owned by the decedent. There is no longer any sound policy reason for retaining these distinctions, and the modern trend is toward a single system of inheritance (intestate succession) with abolition of common-law dower and curtesy. This statute provides a single rule for inheritance of all kinds of property. Although there is a strong argument for special treatment of the home, the present law of homestead and descent is illustrative of the complexities involved in attempting any such distinction. Moreover, most homes are owned jointly by husband and wife and do not pass under the intestate law at all (but go to the survivor

because of the survivorship right in joint tenancy)."

It is recognized that many of the most difficult problems in our present probate code arise because of this artificial distinction between real and personal property. The proposed code, in all the areas of intestate succession and administration, would resolve these technical difficulties by abolishing all distinction between real and personal property.

Section 115. (Devolution of and title to property)

(1) Upon the death of a decedent, title to his property vests:

(a) In the absence of testamentary disposition, in his heirs, subject to support of spouse and children, rights of creditors, administration and sale by the personal representative; or

(b) In the persons to whom it is devised by his will, subject to support of spouse and children, rights of creditors, right of the surviving spouse to elect against the will, administration and sale by the personal representative.

(2) The power of a person to leave property by will, and the rights of creditors, devisees and heirs to his property, are subject to the restrictions and limitations expressed or implicit in sections 1 to 208 of this Act to facilitate the prompt settlement of estates.

Advisory Committee Comment

The wording of section 115 is taken, generally, from section 3-101, Uniform Probate Code. It would change the present law of Oregon in that it would vest title at the date of death to the personal property of the estate, as well as to the real property, in the heirs or devisees. The section spells out that this vesting is subject to support of spouse and children, creditors' rights, elective share of the surviving spouse, administration and sale by the personal representative. See ORS 111.020 and 111.030.

Section 116. (Possession and control of decedent's estate) A personal representative has a right to and shall take possession and control of the estate of the decedent, except that he shall not be required to take possession of or be accountable for property in the possession of an heir or devisee unless in his opinion possession by the personal representative is reasonably required for purposes of administration.

Advisory Committee Comment

The wording of section 116 is based upon that of section 3-409, Uniform Probate Code. It would replace ORS 116.105. The section spells out what has been a difficult practical problem in the present probate code. The proposed code recognizes the factual situation that much of the real and personal property of an estate should remain, and rightfully so, in the possession of those to whom it is left by will or intestacy who were in actual possession at the time of the decedent's death. Section 116 specifies that the personal representative may recognize such possession and is only required to take actual possession where it is required for purposes of administration.

Part 4. Duties and Powers of Personal Representatives

Advisory Committee Comment

This part adopts to a considerable extent the approach to administration of estates of the Uniform Probate Code. The general approach of the Uniform Probate Code to this matter is that the personal representative is given power to act without hearing, order or adjudication of the probate court, unless he desires to secure such hearing, order or adjudication.

This new approach will be most noticeable in the sections of this part covering sale, mortgage, lease and other dealings with property of the estate. These powers of the personal representative are given without the requirement of petition, hearing, notice and court order and confirmation of these transactions. The concept does not seem radical when it is remembered that the Oregon courts have always recognized the right of a testator to give his executor exactly

the same power to operate without court order as the proposed code would do in the absence of testamentary instructions. Logically and factually, there seems no reason why the personal representative in an intestate situation or in the absence of testamentary provisions should not be given the same power over the administration of the estate as now given by a testator by his will.

It should be noted further that in the usual will where the executor is authorized to act without court order or supervision in the sale of estate assets, the executor is operating without bond. In the proposed code, in an intestate situation, a surety bond is required in all cases, and the court is given a wider discretion to require a surety bond in testate situations where the court deems such protection advisable. The proposed code also imposes a liability upon the personal representative for a breach of his fiduciary duty "to the same extent as a trustee of an express trust." It would seem, therefore, that under the proposed code the actual protection to the estate is much greater than under our present probate code.

General comment should be made as to certain other fundamental differences between the present probate code and the proposed code. First, no distinction is made in the proposed code as between real and personal property; they are included and treated identically in all the powers granted in this part. Second, the provisions concerning the title and possession of property, both real and personal, are spelled out in the proposed code. No such specific provisions occur in the present probate code. There is a fundamental change in this area from our present law. In the proposed code, title to both real and personal property is vested in the heirs or devisees; under the present law, title only to the real property is so vested.

This part sets out more comprehensively and in greater detail than our present statutes the powers and duties of the personal representative in a number of areas. The committee believes this feature will have particular value to attorneys who may not specialize in probate practice, many of whom have expressed the difficulty of finding code provisions covering specific powers, duties and problems.

Section 117. (Time of accrual of duties and powers of personal representative) The duties and powers of a personal representative commence upon the issuance of his letters. The powers of a personal representative relate back in time to give his acts occurring prior to appointment the same effect as those occurring thereafter. A personal

Section 119 (page 119)

Section 119. (Personal representative to proceed without court order; application for authority, approval or instructions) A personal representative shall proceed with the administration, settlement and distribution of the estate without adjudication, order or direction of the court, except as provided in sections 1 to 208 of this Act. However, [he] a personal representative or an interested person may apply to the court for authority, approval or instructions on any matter concerning the administration, settlement or distribution of the estate, and the court, without hearing or upon such hearing as it may prescribe, shall instruct the personal representative or rule on the matter as may be appropriate.

representative may ratify and accept acts on behalf of the estate done by others where such acts would have been proper for a personal representative.

Advisory Committee Comment

Section 117 is taken from section 3-401, Uniform Probate Code. We do not find an equivalent of this most useful section in the present Oregon statutes. The value of spelling out this provision is self-evident.

Section 118. (General duties of personal representative) A personal representative is a fiduciary who is under a general duty to and shall collect the income from property of the estate in his possession and preserve, settle and distribute the estate in accordance with the terms of the will and sections 1 to 208 of this Act, as expeditiously and with as little sacrifice of value as is reasonable under the circumstances.

Advisory Committee Comment

The wording of section 118 is taken from section 3-403, Uniform Probate Code. The section incorporates the present provisions of ORS 116.105.

Section 119. (Personal representative to proceed without court order; application for authority, approval or instructions) A personal representative shall proceed with the administration, settlement and distribution of the estate without adjudication, order or direction of the court, except as provided in sections 1 to 208 of this Act. However, he may apply to the court for authority, approval or instructions on any matter concerning the administration, settlement or distribution of the estate, and the court, without hearing or upon such hearing as it may prescribe, shall instruct the personal representative or rule on the matter as may be appropriate.

Advisory Committee Comment

Section 119 is taken from section 3-404, Uniform Probate

Code. The thrust of the section was commented on in the introductory comment on this part of the proposed code. It gives full authority to the personal representative to proceed without court order, unless he desires the authority, approval or instructions of the court in particular situations.

Section 120. (Information to devisees, heirs, Division of State Lands and others) (1) Upon his appointment a personal representative shall deliver or send by ordinary mail to the devisees and heirs named in the petition for appointment of personal representative, at the addresses there shown, information that shall include:

(a) The title of the court where the estate proceeding is pending and the clerk's file number;

(b) The name of the decedent and the place and date of his death;

(c) Whether or not a will of the decedent has been admitted to probate;

(d) The name and address of the personal representative and his attorney; and

(e) The date of the appointment of the personal representative.

(2) The failure of the personal representative to give information under subsection (1) of this section is a breach of his duty to the persons concerned, but shall not affect the validity of his appointment, powers or duties.

(3) If it appears from the petition for appointment of a personal representative that there is no known person to take by descent the net intestate estate, the personal representative shall deliver or send by ordinary mail to the Director of the Division of State Lands a copy of the petition and the information required by subsection (1) of this section.

(4) A personal representative may inform other persons of

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 120 (page 120)

Section 120. (Information to devisees [,] and heirs [, Division of State Lands and others]) (1) Upon his appointment a personal representative shall deliver or [send by ordinary] mail to the devisees and heirs named in the petition for appointment of personal representative, at the addresses there shown, information that shall include:

Delete all of subsections (3) and (4).

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 120 (page 121)

[(5)] (3) Within 30 days after the date of his appointment a personal representative shall [file] cause to be filed in the estate proceeding proof by an affidavit of the delivery or mailing required by this section. The affidavit shall include a copy of the information delivered or mailed and the names of the persons to whom it was delivered or sent.

his appointment by delivery or ordinary mail.

(5) A personal representative shall file in the estate proceeding proof by an affidavit of the delivery or mailing required by this section. The affidavit shall include a copy of the information delivered or mailed and the names of the persons to whom it was delivered or sent.

Advisory Committee Comment

Subsections (1), (2) and (4) of section 120 are taken from section 3-405, Uniform Probate Code. In the case of an intestate estate, no provision is contained in the present probate code for notice to the heirs of the institution of the probate and the appointment of the personal administrator. ORS 115.220, first enacted in 1963 and amended in 1965, provides that in a testate proceeding a copy of the will shall be mailed to each legatee and devisee. The committee agreed that it seemed advisable that an informal notice be given to the heirs at law in an intestate situation and to the devisees in a testate estate, notifying them of the institution of the probate and furnishing the necessary information required by section 120. This seemed a more sensible provision than the present one for mailing a copy of the will. It is obvious that upon notification any party properly interested can procure a copy of the will. The committee believes that from the standpoint of due process alone the notice provision is sensible. In addition, since the proposed code gives the personal representative broad powers to operate without specific court approval, notice to interested persons seems desirable.

Opposition in the past to a notice requirement of this type has been based to some extent on a fear that technical failure to give notice to some party could be held a jurisdictional defect in the probate proceeding. The provision is, therefore, spelled out that failure to give the notice is not jurisdictional and does not affect the validity of the appointment or the powers or duties involved.

Subsection (3) replaces and changes ORS 115.310(2). ORS 115.310(2) provides that no order appointing a personal representative may be granted by the court in a possible escheat situation until there has been filed proof of service of a copy of the petition for appointment upon the State Land Board. Subsection (3) provides for delivering or mailing the same information to the Director of the Division of State Lands by the personal representative as is given to the heirs at law. Since, in the case of escheated property, the State of Oregon is in the position of an heir 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. The committee 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. Section 120 would obligate the personal representative to send the State Land Board a copy of the petition, as now required, and also the information of his appointment otherwise required to be sent to heirs and devisees.

Section 121. (Publication of notice to creditors) (1) Upon his appointment a personal representative shall cause a notice to creditors to be published once in each of two successive weeks in:

(a) A newspaper published in the county in which the estate proceeding is pending; or

(b) If no newspaper is published in the county in which the estate proceeding is pending, a newspaper designated by the court.

(2) The notice shall include:

(a) The name of the decedent;

(b) The name and address of the personal representative and his attorney;

(c) A statement requiring all persons having claims against the estate to present them, within four months after the date of the 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 estate proceeding proof by an affidavit of the publication of notice required by this section. The affidavit shall include a copy of the published notice.

Advisory Committee Comment

Section 121 is a redraft of ORS 116.505. The first basic change is that the number of publications is cut from five to two. The committee considered that the first publication is the one most likely to be seen by those who systematically

Section 121 (page 122)

Section 121. (Publication of notice to [creditors] interested persons) (1) Upon his appointment a personal representative shall cause a notice to [creditors] interested persons to be published once in each of two [successive] consecutive weeks in:

(2)(a) The title of the court where the estate proceeding is pending;

[(a)] (b) The name of the decedent;

[(b)] (c) The name [and address] of the personal representative and his attorney and the address at which claims are to be presented;

[(c)] (d) A statement requiring all persons having claims against the estate to present them, within four months after the date of the first publication of the notice, to the personal representative at the address designated in the notice for the presentation of claims; and

[(d)] (e) The date of the first publication of the notice.

check such notices, and that two publications would be adequate. The second change is that the section designates the information which must appear in the published notice. The committee felt that the notice should be kept as simple as possible and that the four items required by subsection (2) gave adequate notice. Finally, it was felt that, in view of the present state of the technology of communications, the period for filing claims could reasonably be cut from six to four months, to attempt to shorten the time of probate. Beyond this, section 121 merely clarifies the wording of the present statute.

Section 122. (Inventory; filing; contents) Within 60 days after the date of his appointment, unless a longer time is granted by the court, a personal representative shall file in the estate proceeding an inventory of all the property of the estate that has come into his possession or knowledge. The inventory shall show the estimates by the personal representative of the respective true cash values as of the date of the death of the decedent of the properties described in the inventory.

Advisory Committee Comment

Sections 122 to 126, covering inventory and appraisement, would supersede and replace ORS 116.405 to 116.465. The background for these sections is taken principally from sections 361 to 365, Iowa Probate Code. For other comparable provisions, see chapter 11.44, Washington Probate Code; chapter 858, Wisconsin Probate Code; and sections 3-406, 3-407 and 3-408, Uniform Probate Code.

Section 122 includes much of the wording of ORS 116.405, with the following differences. The initial period for filing an inventory is changed from one month to 60 days, which the committee felt was a more realistic period. The requirement of the oath is eliminated, as is done in all the other provisions of the proposed code. Section 122 makes a basic change in that the inventory shall include the personal representative's estimate of the true cash value of the items he lists therein. This would permit the personal representative to include his own appraisal of such items as bank accounts, cash items, securities whose quotations are listed on the major stock exchanges and shown in the daily newspapers and other items where an appraisal is not necessary to arrive at the actual true cash value.

Section 123. (Property discovered after inventory filed) Whenever any property of the estate not included in the inventory comes into the possession or knowledge of the personal representative, he shall either file in the estate proceeding a supplemental inventory within 30 days after the date of receiving possession or knowledge, or include the property in his next accounting.

Advisory Committee Comment

Section 123 would replace ORS 116.415. However, it allows 30 days for the preparation and filing of a supplemental inventory, and further gives the personal representative the option of including the after-discovered property in his next accounting.

Section 124. (Appraisement; employment and appointment of appraisers) (1) The personal representative may employ a qualified and disinterested appraiser to assist him in the appraisal of any property of the estate the value of which may be subject to reasonable doubt. Different persons may be employed to appraise different kinds of property.

(2) The court in its discretion may direct that all or any part of the property of the estate be appraised by one or more appraisers appointed by the court.

(3) Property for which appraisement is required shall be appraised at its true cash value as of the date of the death of the decedent. Each appraisement shall be in writing and shall be signed by the appraiser making it.

(4) Each appraiser is entitled to be paid for his services from the estate a reasonable fee and necessary expenses.

Section 124 (page 124)

(4) Each appraiser is entitled to be paid [for his services] a reasonable fee from the estate [a reasonable fee] for his services and to be reimbursed from the estate for his necessary expenses.

Advisory Committee Comment

Section 124 embodies a fundamental change in the appraisement procedure. The power to employ the services of "qualified and disinterested appraisers" is placed in the hands of the personal representative, in much the same manner as the other professional helper (the attorney for the estate) is retained. The section, rather than setting out fixed fees as now contained in ORS 116.425, provides, in subsection (4), that the appraiser shall be paid "a reasonable fee and necessary expenses." Members of the committee have not only heard criticisms from their clients and the general public of the appraisers' fees in some instances, but have received criticism from realtor and professional appraiser groups. They appear to feel, and in the opinion of the committee justly so, that the relationship of the appraiser to the personal representative should be similar to the present attorney relationship.

So far as appraising real estate is concerned, the following recommendations are quoted from a letter received from Oregon Chapter #14, American Institute of Real Estate Appraisers:

> "I. That some form of qualification as evidenced by membership in a properly recognized professional organization or by examination or by demonstration, be a requirement of eligibility to appraise an estate or a portion of an estate and that appointment be made only for such portion of an estate for which proper qualification is so evidenced.
>
> "II. That appraisal fees be agreed upon in advance (prior to assignment) and that they be based on the investigation and analysis necessary for a proper appraisal, rather than on the amount of value found. A procedure somewhat similar to that which is in current use by the State Highway Commission is suggested.
>
> "III. That any appraiser for an estate or a portion of an estate should sign and attest to his opinion of value only on types of assets for which his qualifications are in evidence.
>
> "IV. That the over-all value of an estate be submitted to the Court by the attorney conducting probate thereof, and that such be a composite of values found on various types of assets; each by persons qualified to appraise the specific types involved."

In general, the committee believes that the provisions of section 124 meet the criticisms and suggestions referred to.

The section requires a qualified and disinterested appraiser. Different appraisers may be employed to appraise different kinds of assets. The employment would be on a reasonable fee and expenses basis, which would take into account the difficulty and expertise required in individual appraisals.

Power is retained in the probate court to direct that all or any part of the property be appraised by one or more appraisers appointed by the court. It may well be that the personal representative in certain cases would fail or neglect to arrange for the appraisal, or that he would prefer to have the court take direction and appointment of the appraisal and the appraisers.

Subsection (3) replaces ORS 116.435 and substitutes the requirement that each article shall be appraised "at its true cash value as of the date of the death of the decedent." This wording has been adopted in preference to the phrase "full and true value," which now appears in the inheritance tax statutes (ORS 118.640).

Section 125. (Naming or appointment of personal representative does not discharge claim against him) The naming or appointment of any person as personal representative shall not operate to discharge the person from any claim which the decedent had against him, and the claim shall be included in the inventory. If the person agrees to act as personal representative, he shall be liable for such claim as for so much money in his hands at the time the claim became due and payable; otherwise he is liable for such claim as any other debtor of the deceased.

Advisory Committee Comment

Section 125 replaces and incorporates most of the substance of ORS 116.440. The wording of the ORS section has been changed to include not only executors but personal representatives of intestate estates. The necessity of this statute and the reason for the wording incorporated from the ORS section are explained in Oregon Probate Law and Practice § 626, as follows:

> "At common law, if testator appointed as executor of his estate a person who was his debtor and the latter accepted the appointment,

the debt was thereby discharged unless there were not sufficient other assets to satisfy creditors. This rule of law has been expressly changed by statute which provides that such a claim is not discharged and must be included in the inventory. Furthermore, if the person so named accepts the appointment and administers the estate, the amount of the indebtedness is treated as 'so much money in his hands' for which he must account. The same rule apparently applies in the case of an administrator.

"This particular wording of our statute becomes important in case of the insolvency of the executor or administrator. In some states a similar statute provides that the debt of the personal representative 'shall be assets', instead of 'so much money', in his hands. Under such a statute 'a debt due from an executor is placed on the same footing with debts due the estate from other sources, and he and his sureties are only required to account for the actual value thereof.' In those states, accordingly, in case of the personal representative's insolvency, his sureties need only pay a portion of the indebtedness. But under our statute providing that the debt of the personal representative is deemed 'so much money' it is held that the estate is entitled to recover the full amount of the representative's debt. . . ." (Citations omitted)

Section 126. (Discharge or devise in will of claim of testator) The discharge or devise in a will of a claim of the testator against a personal representative or against any other person shall be of no effect as against creditors of the decedent. The claim shall be included in the inventory and for purposes of administration shall be regarded and treated as a specific legacy in that amount.

Advisory Committee Comment

Section 126 is identical with ORS 116.445, except for minor editorial changes.

Section 127. (Transactions authorized for personal representative) Except as restricted or otherwise provided by the will or by court order, a personal representative, acting reasonably for the benefit of interested persons, is authorized to:

(1) Direct and authorize disposition of the remains of the decedent pursuant to ORS 97.130 and incur expenses for the funeral, burial or other disposition of the remains in a manner suitable to the condition in life of the decedent.

(2) Retain assets owned by the decedent pending distribution or liquidation, including those in which the personal representative is personally interested or which are otherwise unsuitable for trust investment.

(3) Receive assets from fiduciaries or other sources.

(4) Complete, compromise or refuse performance of contracts of the decedent that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other courses of action, may:

(a) Execute and deliver a deed upon satisfaction of any sum remaining unpaid or upon receipt of the note of the purchaser adequately secured; or

(b) Deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement.

(5) Satisfy written pledges of the decedent for

contributions, irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented as claims.

(6) Deposit funds not needed to meet currently payable debts and expenses, and not immediately distributable, in bank or saving and loan accounts, or invest the funds in short-term United States Government obligations.

(7) Abandon burdensome property when it is valueless, or is so encumbered or is in a condition that it is of no benefit to the estate.

(8) Vote stocks or other securities in person or by general or limited proxy.

(9) Pay calls, assessments and other sums chargeable or accruing against or on account of securities.

(10) Sell or exercise stock subscription or conversion rights.

(11) Consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution or liquidation of a corporation or other business enterprise.

(12) Hold a security in the name of a nominee or in other form without disclosure of the interest of the estate, but the personal representative shall be liable for any act of the nominee in connection with the security so held.

(13) Insure the assets of the estate against damage and loss and himself against liability to third persons.

(14) Advance or borrow money with or without security.

(15) Compromise, extend, renew or otherwise modify an

obligation owing to the estate. If the personal representative holds a mortgage, pledge, lien or other security interest, he may accept a conveyance or transfer of the encumbered asset in lieu of foreclosure in full or partial satisfaction of the indebtedness.

(16) Accept other real property in part payment of the purchase price of real property sold by him.

(17) Pay taxes, assessments and expenses incident to the administration of the estate.

(18) Employ qualified persons, including attorneys, accountants and investment advisors, to advise and assist the personal representative and to perform acts of administration, whether or not discretionary, on behalf of the personal representative.

(19) Prosecute or defend actions, claims or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties.

(20) Continue any business or venture in which the decedent was engaged at the time of his death to preserve the value of the business or venture.

(21) Incorporate or otherwise change the business form of any business or venture in which the decedent was engaged at the time of his death.

(22) Discontinue and wind up any business or venture in which the decedent was engaged at the time of his death.

(23) Provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate.

(24) Satisfy and settle claims and distribute the estate as provided in sections 1 to 208 of this Act.

(25) Perform all other acts required or permitted by law or by the will of decedent.

Advisory Committee Comment

Section 127 has been taken, with substantial changes, from section 3-416, Uniform Probate Code. It would, among its various provisions, cover powers given by ORS 116.110, 116.125, 116.130, 116.135, 116.170, 116.175, 116.180, 116.785, 116.790, 116.795 and 116.800. A detailed comment upon each of the specific authorities given would seem unnecessary. Subsections (1), (2) and (3) grant broad powers not prescribed by present statutes. The provision for performing contracts made by the deceased is broader than that of the present statute. It would specifically sanction practices which now do not have legislative authority. Subsection (7), on abandonment of burdensome property, and subsections (8) to (12), on dealing with securities of the estate, do not have counterparts in our present probate code. Subsection (17), authorizing personal representatives to employ attorneys, accountants and investment authorities, also supplies an authority not found in our present probate code. To summarize, an examination of section 127 will make it clear that many essential acts of administration, which now have to be performed without express legislative sanction, are covered by this comprehensive section.

Section 128. (Right to perfect lien or security interest) The personal representative shall have the same rights to perfect a lien or security interest as the decedent would have had if he were living.

Advisory Committee Comment

Section 128 is ORS 116.120, with editorial changes.

Section 129. (Power to sell, mortgage, lease and deal with property) (1) A personal representative has power to sell, mortgage, lease or otherwise deal with property of the estate without notice, hearing or court order.

(2) Exercise of the power of sale by the personal

representative is improper, except after notice, hearing and order of the court, if:

(a) The sale is in contravention of the provisions of the will; or

(b) The property is specifically devised and the will does not authorize its sale; or

(c) The inventory value of the property to be sold exceeds $5,000, the bond of the personal representative has not been increased by the amount of cash to be realized on the sale and the court has not directed otherwise.

Advisory Committee Comment

As noted in the introductory comment to this part of the proposed code, section 129 would give the personal representative power to sell, mortgage, lease or otherwise deal with property of the estate without petition, notice, hearing or court order, except as indicated hereafter. It gives not only full power to the personal representative in this area, but the widest protection to those dealing with the personal representative against procedural irregularity or jurisdictional defect in the administration. This protection is not found in our present probate code.

The philosophy of section 129 is described in the comment on section 860.01, Wisconsin Probate Code, as follows:

> "This section gives to all personal representatives the power that is given to executors in most wills. It is the power which all personal representatives have always had over personal property in Wisconsin. Though a personal representative is given unrestricted power to sell, mortgage or lease property he will be held financially responsible to the persons interested if he acts carelessly or unreasonably. He 'must act not only honestly or with good faith in the narrow sense but must also exercise the duty of loyalty toward the beneficiary for whose benefit the power of sale is to be exercised and with such care and skill as a man of ordinary prudence would exercise in dealing with his own property.'"

Section 129 would replace some 33 sections of the present probate code, ORS 116.705 to 116.890, covering over six pages of Oregon Revised Statutes, which probably cause more practical difficulties and problems to attorneys representing

Section 129 (page 132)

(2)(c) A bond of the personal representative has been required and filed, the [inventory value] sale price of the property to be sold exceeds $5,000 [,] and the bond of the personal representative has not been increased by the amount of cash to be realized on the sale, [and] unless the court has [not] directed otherwise.

estates than all of the other sections of the present code combined. Yet, with the broad power given, adequate protection is provided in succeeding provisions, both to the parties dealing with the personal representative and to the parties interested as heirs, devisees and creditors.

Subsection (2) contains certain limits and safeguards on the unrestricted power to sell property, in that it requires notice, hearing and court order where the sale is made in contravention of specific provisions in the will or where the property is specifically devised and the will does not authorize its sale by the executor. Notice, hearing and court order are also required where the bond has not been increased by the amount of cash to be realized on the sale in cases where the value of the property sold exceeds $5,000. In the usual case the amount of the bond will probably be based upon the value of the liquid assets. If the bond is not made sufficient in amount to protect on the cash paid to the personal representative on the sale, such protection should be provided. The court in any case is given the right to direct what additional protection is required in this situation.

Section 130. (Court order for sale, mortgage or lease) Upon proof satisfactory to the court by an interested person that a sale, mortgage or lease of property of the estate is required for paying claims, support of spouse and children, elective share of surviving spouse or administration expenses, or for distribution, and that the personal representative has failed or declined to act, the court may order the personal representative to make the sale, mortgage or lease.

Advisory Committee Comment

Section 130 is taken from section 860.11, Wisconsin Probate Code. It would permit any interested person to apply to the court for an order of sale, mortgage or lease, which would protect and justify the personal representative in proceeding.

Section 131. (Title conveyed free of claims of creditors) Property sold, mortgaged or leased by a personal representative shall be subject to liens and encumbrances against the decedent or his estate, but shall not be subject

to rights of creditors of the decedent or liens or encumbrances against his heirs or devisees. The filing and allowance of a claim in an estate does not make the claimant a secured creditor.

Advisory Committee Comment

Section 131 is taken from section 860.05, Wisconsin Probate Code. It is merely a statement of the present Oregon law, although its exact parallel is not now found in our statutes.

Section 132. ORS 116.835 is amended to read:

116.835. (Validation of certain sales) The following are the subject of validating Acts [applicable to this chapter]:

(1) Certain sales of decedent's real property made prior to 1903 where confirmation of sale was premature, validated by page 133, section 2, General Laws of Oregon 1903.

(2) Certain sales of decedent's property made prior to 1907 under power in will, validated by chapter 175, General Laws of Oregon 1907.

(3) Certain sales of decedent's real property made prior to 1917 where publication of the notice of sale was improper, validated by section 2, chapter 114, General Laws of Oregon 1917.

(4) Certain sales by executors or administrators made prior to 1943, validated by chapter 26, Oregon Laws 1943.

Section 133. (Nonliability of transfer agents) A transfer agent or a corporation transferring its own securities incurs no liability to any person by making a transfer of

securities in an estate as requested or directed by a personal representative.

Advisory Committee Comments

Section 133 is taken from section 860.01, Wisconsin Probate Code. It may avoid some technical problems now raised by transfer agents in transferring securities sold by personal representatives.

Section 134. (Persons dealing with personal representative; protection) A person dealing with or assisting a personal representative without actual knowledge that the personal representative is improperly exercising his power is protected as if the personal representative properly exercised the power. The person is not bound to inquire whether the personal representative is properly exercising his power, and is not bound to inquire concerning the provisions of any will or any order of court that may affect the propriety of the acts of the personal representative. No provision in any will or order of court purporting to limit the power of a personal representative shall be effective except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative. The protection expressed in this section extends to instances where some procedural irregularity occurred in proceedings leading to issuance of letters.

Advisory Committee Comment

Section 134 is an almost verbatim copy of section 3-415, Uniform Probate Code. The effect of the section is to grant absolute protection to purchasers and other persons dealing with personal representatives. It is felt that such a broad and absolute protection is necessary in view of the fact that the personal representative is operating, in dealing with estate property, without specific court order or adjudication.

Section 135. (Sale or encumbrance to personal representative voidable; exceptions) (1) Any sale or encumbrances to the personal representative, his spouse, agent or attorney, or any corporation or trust in which he has more than a one-third beneficial interest, is voidable unless:

(a) The transaction was consented to by all interested persons affected thereby, except any who were under legal disability for whom no guardian had been appointed; or

(b) The will expressly authorizes the transaction by the personal representative with himself.

(2) The title of a purchaser for value without notice of the circumstances of the transaction with the personal representative is not affected unless the purchaser should have known of the defect in the title of his seller.

Advisory Committee Comment

Section 135 is taken substantially verbatim from section 3-414, Uniform Probate Code. The section would replace ORS 116.820, which reads in part: "All purchases of the property of the estate by an executor or administrator, however made, whether directly or indirectly, are prohibited, and if made are void, except when made in compliance with another statute, or the will of the decedent, or a contract, or other instrument, executed by the decedent." ORS 116.820 is discussed in Oregon Probate Law and Practice §§ 754 and 755, where the authors mention a number of problems either inherent in the ORS section quoted or not dealt with by the section. It is believed that section 135, particularly in its use of the term "voidable" rather than "void," and in its protection of an innocent purchaser for value without notice of the circumstances of the transaction, is a definite improvement over the ORS section it would replace.

Section 136. (Improper exercise of power; breach of fiduciary duty) If the exercise of power by the personal representative in the administration of the estate is

Section 135 (page 136)

(1)(a) The transaction was consented to by all interested persons affected thereby [, except any who were under legal disability for whom no guardian had been appointed] ; or

(b) The will expressly authorizes the transaction by the personal representative with himself [.] ; or

(c) The transaction was made in compliance with another statute or with a contract or other instrument executed by the decedent.

improper he shall be liable for breach of his fiduciary duty to interested persons for resulting damage or loss to the same extent as a trustee of an express trust. Exercise of power in violation of a court order is a breach of duty. Exercise of power contrary to the provisions of the will may be a breach of duty.

Advisory Committee Comment

Section 136 is taken from section 3-413, Uniform Probate Code. For a discussion of the problems covered by the section, see Oregon Probate Law and Practice § 638. The section spells out that the liability of the personal representative for breach of duty is that of the trustee of an express trust. This is a more forthright statement than that contained in some of the Oregon cases. The definition of interested persons is a broad one, including heirs, devisees, creditors and others having a property right in or claim against the estate which may be affected by the proceedings. The personal representative is made liable for breach of his fiduciary duty for resulting damage or loss to these persons.

Section 137. (Co-personal representatives; when joint action required) (1) When two or more persons are appointed co-personal representatives, the concurrence of all is required on all acts connected with the administration and distribution of the estate, except:

(a) Any co-personal representative may receive and receipt for property due the estate.

(b) When the concurrence of all cannot readily be obtained in the time reasonably available for emergency action.

(c) Where any others have delegated their power to act.

(d) Where the will provides otherwise.

(e) Where the court otherwise directs.

(2) Persons dealing with a co-personal representative who are actually unaware that another has been appointed to

serve with him shall be as fully protected as if the person with whom they dealt had been the sole personal representative.

Advisory Committee Comment

Section 137 is taken from section 3-418, Uniform Probate Code, with paragraph (1)(e) added. There is no corresponding section in the present probate code. For a general discussion, see 31 Am Jur 2d, Executors and Administrators, §625. The comment on the Uniform Probate Code section states:

> "With certain qualifications, this section is designed to compel co-representatives to agree on all matters relating to administration when circumstances permit. Delegation by one to another representative is a form of concurrence in acts that may result from the delegation. A co-representative who abdicates his responsibility to co-administer the estate by a blanket delegation breaches his duty to interested persons as described by Section 3-403. Section 3-416(16) authorizes delegation, but only that which is reasonable and for the benefit of interested persons."

It is believed that section 137 will resolve uncertainties in an area apparently not specifically covered by Oregon statutory or case law.

Section 138. (Personal liability of personal representative) (1) The personal liability of a personal representative to third parties, as distinguished from his fiduciary accountability to the estate, arising from the administration of the estate is that of an agent for a disclosed principal.

(2) A personal representative is not personally liable on contracts properly entered into in his fiduciary capacity in the course of administration of the estate unless he expressly agrees to be.

(3) A personal representative is not personally liable for obligations arising from possession or control of property of the estate or for torts committed in the course of administration of the estate unless he is personally at fault.

(4) Claims based upon contracts, obligations and torts of the types described in subsections (2) and (3) of this section may be allowed against the estate whether or not the personal representative is personally liable therefor.

Advisory Committee Comments

There is no present Oregon statute covering the subject matter of section 138. For a discussion of the case law in this area, see Oregon Probate Law and Practice §§ 638 and 646.

The committee agreed that it would be of value to spell out in the proposed code a specific section delineating the areas in which personal liability would attach. The wording of the section is taken from section 3-509, Uniform Probate Code.

Section 139. (Discovery of property, writings and information) (1) The court may order any person to appear and give testimony as provided in ORS chapter 45 if it appears probable:

(a) That he has concealed, secreted or disposed of any property of the estate of a decedent;

(b) That he has been intrusted with property of the estate of a decedent and refuses or neglects to account therefor to the personal representative;

(c) That he has concealed, secreted or disposed of any writing, instrument or document relating or pertaining to the estate;

(d) That he has knowledge or information that is necessary to the administration of the estate; or

(e) That, as an officer or agent of a corporation, he has refused to allow examination of the books and records of the corporation which the decedent had the right to examine.

(2) If the person cited as provided in subsection (1)

of this section refuses to appear or to answer questions asked of him as authorized by the order of the court, he is in contempt and may be punished as for other contempts.

Advisory Committee Comment

Subsection (1) of section 139 would rewrite and replace ORS 116.305, 116.310 and 116.320. Additional wording has been included covering the right to examine books and records of a corporation that the decedent had a right to examine. It was considered preferable to make a general reference to the procedure set out in ORS chapter 45 for taking testimony, rather than limiting it to the present wording of ORS 116.310.

Subsection (2) rewrites ORS 116.315 to provide for punishment for refusal to appear or answer questions as a contempt.

Section 140. (Power to avoid transfers) The property liable for the payment of charges, administration expenses and claims against the estate of a decedent shall include property transferred by him with intent to defraud his creditors or transferred by any means which is in law void or voidable as against his creditors. The right to recover such property so far as necessary for the payment of charges, administration expenses and claims against the estate shall be in the personal representative, who shall take necessary steps to recover it. Such property shall constitute general assets for the payment of creditors.

Advisory Committee Comments

Section 140 would replace ORS 116.330, 116.335 and 116.340. The wording is taken from section 3-410, Uniform Probate Code, and section 368, Iowa Probate Code.

Section 141 (page 141)

(2) Claims presented within four months after the date of the first publication of notice to [creditors] interested persons shall be paid, as provided in section 151 of this Act, before claims presented after the four-month period.

(3) Claims not presented before the expiration of 12 months after the date of the first publication of notice to [creditors] interested persons, or before the date the personal representative files his final account, whichever occurs first, are barred from payment.

ARTICLE V. CLAIMS; ACTIONS AND SUITS

Part 1. Claims Against Estates

Section 141. (Presentation of claims; time limitations) (1) Claims against the estate of a decedent, other than claims of the personal representative as creditor of the decedent, shall be presented to the personal representative.

(2) Claims presented within four months after the date of the first publication of notice to creditors shall be paid, as provided in section 151 of this Act, before claims presented after the four-month period.

(3) Claims not presented before the expiration of 12 months after the date of the first publication of notice to creditors, or before the date the personal representative files his final account, whichever occurs first, are barred from payment.

(4) If a claim is presented after the expiration of the 12-month period, but before the final account is filed, the claim is not barred if the court finds that the late presentment was caused by excusable neglect.

Advisory Committee Comment

Section 141 would replace ORS 116.510, with, however, two differences. First, as noted in the comment on section 121 of the proposed code, the period for priority of payment of claims has been shortened from six months to four months. Second, while under the present statute claims are barred if not presented before the final account is filed, subsection (3) would bar claims if they are not presented either before the expiration of 12 months from the first publication of notice to creditors, or before the filing of the final account, whichever occurs first. However, a claim presented after the 12-month period but before the final account is filed is not barred if the court finds the late filing was the result of excusable neglect. The purpose of the 12-month

provision is to permit a determination of the estate indebtedness and a partial distribution within a reasonable time when an estate cannot be closed for an extended period.

Section 142. (Form and verification of claims) Each claim presented shall:

(1) Be in writing.

(2) Describe the nature and the amount thereof, if ascertainable.

(3) State the names and addresses of the claimant and his attorney.

(4) Be accompanied by the affidavit of the claimant or someone on his behalf who has personal knowledge of the fact, stating that the amount claimed is justly due, or if not due, when it will or may become due; that no payments have been made which are not credited; and that there is no just offset thereto, to the knowledge of the affiant, except as stated.

Advisory Committee Comment

Section 142 is a rewritten version of ORS 116.515. However, subsections (2) and (3) call for necessary information not detailed by the present statute.

Section 143. (Waiver of presentment, defect or insufficiency) The presentment of a claim and any defect of form or insufficiency of a claim presented may be waived by the personal representative or by the court.

Advisory Committee Comment

Section 143 is taken from section 302, Texas Probate Code, and does not have an exact counterpart in our present probate code. It provides protection to the personal representative in making payment on a claim which does not comply with statutory requirements, but represents a legal obligation of the estate.

Section 142 (page 142)

(3) State the names and addresses of the claimant and, if any, his attorney.

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 144 (page 143)

Section 144. (Written evidence of claim) When it appears that there is written evidence of a claim which has been presented to the personal representative, the claimant, upon demand by the personal representative, [may demand that the evidence be produced or] shall produce the evidence or account for its nonproduction [accounted for].

Section 144. (Written evidence of claim) When it appears that there is written evidence of a claim presented to the personal representative, the personal representative may demand that the evidence be produced or its nonproduction accounted for.

Advisory Committee Comment

Section 144 is an edited version of the last sentence of ORS 116.515.

Section 145. (Claims on debts due) If a claim on a debt due is presented and allowed, allowance shall be in the amount of the debt remaining unpaid on the date of allowance.

Advisory Committee Comment

Section 145, together with following sections on secured debts, debts not yet due and contingent and unliquidated claims would replace ORS 117.120, 117.130 and 117.170. The committee considered it preferable to treat in separate sections the classes of claims covered by the present statutes. Section 145 provides, as does ORS 117.170, that the allowance of a claim on a debt due shall be in the amount of its value at the date of allowance.

Section 146. (Claims on secured debts due) (1) A claim on a debt due for which the creditor holds security may be presented as a claim on an unsecured debt due, or the creditor may elect to rely entirely on the security without presentation of the claim.

(2) If the claim is presented, it shall describe the security. If the security is an encumbrance that is recorded, it is sufficient to describe the encumbrance by reference to the volume, page, date and place of recording.

(3) If the claim is presented and allowed, allowance shall be in the amount of the debt remaining unpaid on the date of allowance.

(4) If the creditor surrenders the security, payment shall be on the basis of the amount allowed.

(5) If the creditor does not surrender the security, payment shall be on the basis of:

(a) If the creditor exhausts the security before receiving payment, the amount allowed, less the amount realized on exhausting the security; or

(b) If the creditor does not exhaust the security before receiving payment or does not have the right to exhaust the security, the amount allowed, less the value of the security determined by agreement or as the court may order.

(6) The creditor shall not exercise remedies reserved under his security until at least 30 days after the date the claim is presented and after notice to the personal representative of his intention to exercise his remedy, but the court, on cause shown, may shorten the period.

(7) The personal representative may convey the secured property to the creditor in consideration of the release of the security and satisfaction or partial satisfaction of the claim.

Advisory Committee Comment

Section 146 follows the general wording of section 3-511, Uniform Probate Code. It expresses the option of the creditor to either file a claim as a nonsecured debt, with surrender of his security, or rely on his security without presentation of a claim. On the other hand, if the creditor files a claim but retains his security, he is entitled to the value of the claim less the amount already realized on the security or less the agreed value of the security upon which the value of the security has not been realized.

To provide the personal representative an opportunity to deal with the secured creditor and protect the interests of the estate before a foreclosure of the security is instituted,

Section 147 (page 145)

Section 147. (Claims on debts not due) A claim on a debt not due, whether or not the creditor holds security therefor, may be presented as a claim on a debt due. If the claim is allowed, allowance shall be in an amount equal to the value of the debt on the date of allowance. [Payment on the basis of the amount allowed discharges the debt and the security, if any, held by the creditor therefor; but] The creditor, after allowance of the claim, may withdraw the claim without prejudice to his other remedies. Payment on the basis of the amount allowed discharges the debt and the security, if any, held by the creditor therefor.

Section 148 (page 145)

(2) If the debt becomes absolute or liquidated before distribution of the estate, the claim shall be paid in the same manner as a claim on an absolute or liquidated debt [of the same class].

subsection (6) requires that foreclosure of the security cannot be commenced until a claim is filed, notice is given to the personal representative and 30 days elapse after the claim is filed, unless the court shortens the time.

Subsection (7) gives the personal representative the right to convey the secured property to the creditor in satisfaction of the claim and in consideration of the release of the security.

Section 147. (Claims on debts not due) A claim on a debt not due, whether or not the creditor holds security therefor, may be presented as a claim on a debt due. If the claim is allowed, allowance shall be in an amount equal to the value of the debt on the date of allowance. Payment on the basis of the amount allowed discharges the debt and the security, if any, held by the creditor therefor; but the creditor, after allowance of the claim, may withdraw the claim without prejudice to his other remedies.

Advisory Committee Comment

The effect of section 147 is the same as ORS 117.170, which provides: "A debt not due upon being presented shall, if absolute, be satisfied by the payment of such sum as the court or judge thereof may prescribe by order to be equal to its present value." Since the provision would in effect require a discount of the unmatured claim as of the present value, the creditor is for his protection given the right to withdraw the claim after allowance and without prejudice to his other remedies on the claim.

Section 148. (Claims on contingent and unliquidated debts) (1) A claim on a contingent or unliquidated debt shall be presented as any other claim.

(2) If the debt becomes absolute or liquidated before distribution of the estate, the claim shall be paid in the same manner as a claim on an absolute or liquidated debt of the same class.

(3) If the debt does not become absolute or liquidated before distribution of the estate, the court shall provide for payment of the claim by any of the following methods:

(a) The creditor and personal representative may determine, by agreement, arbitration or compromise, the value of the debt, and upon approval thereof by the court, the claim may be allowed and paid in the same manner as a claim on an absolute or liquidated debt.

(b) The court may order the personal representative to make distribution of the estate, but to retain sufficient funds to pay the claim if and when the debt becomes absolute or liquidated. The estate may not be kept open for this purpose more than two years after distribution of the remainder of the estate. If the debt does not become absolute or liquidated within that time, the funds retained, after payment therefrom of any expenses accruing during that time, shall be distributed to the distributees.

(c) The court may order the personal representative to make distribution of the estate as though the claim did not exist. If after distribution the debt becomes absolute or liquidated, the distributees are liable to the creditor to the extent of the estate received by them. Payment of the debt may be arranged by creating a trust, giving a mortgage, securing a bond from a distributee or by such other method as the court may order.

Advisory Committee Comment

Section 148 follows the same format as the preceding sections. The wording is taken from section 424, Iowa Probate Code. It meets the problem of the contingent or unliquidated claim by giving the personal representative and

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 150 (page 147)

Section 150. (Claims of personal representative) A claim of a personal representative shall be filed with the clerk of the court within the time required by law for presentment of claims [and shall be presented to the court for allowance or disallowance]. Upon application by the personal representative or by any person interested in the estate the claim may be [reconsidered] considered by the court on the hearing of the final account of the personal representative.

the creditor the option of reaching an understanding on the value of the debt and, upon approval by the court, having the claim paid in the same manner as an absolute or liquidated debt. On the other hand, the court may order the personal representative to withhold sufficient funds to pay the claim if and when the debt becomes absolute or liquidated. However, there is a limitation of two years on the time the estate may be held open for this purpose. If distribution is made subject to the contingent or unliquidated claim, liability therefor is transferred to the distributees and broad discretion is given the court to secure the payment of the debt when and if it may become payable.

Section 149. (Compromise of claims) The personal representative may compromise a claim against the estate of a decedent.

Advisory Committee Comment

For provisions similar to section 149, see section 473.427, Missouri Probate Code, and section 859.31, Wisconsin Probate Code. No comparable provision is found in our present statutes, but the good sense of this provision to estate administration seems clear. In view of the broad discretion and the responsibility and accountability given the personal representative in the proposed code, court approval is not required when a claim against the estate is compromised. It should be borne in mind, however, that the personal representative is authorized to seek the guidance and direction of the court whenever he so desires.

Section 150. (Claims of personal representative) A claim of a personal representative shall be filed with the clerk of the court within the time required by law for presentment of claims and shall be presented to the court for allowance or disallowance. Upon application by the personal representative or by any person interested in the estate the claim may be reconsidered by the court on the hearing of the final account of the personal representative.

Advisory Committee Comment

Section 150 would replace ORS 116.580 and 116.585. The section requires presentation to the court for allowance or rejection as now provided. Upon application of the personal

representative or other interested person reconsideration may be had at the hearing on the final account.

Section 151. (Payment of claims) Upon the expiration of four months after the date of the first publication of notice to creditors, the personal representative shall, after making provision for support of spouse and children, for expenses of administration, for claims already presented which have not been allowed or allowance of which has been appealed and for claims which may yet be presented, proceed to pay the claims presented within four months after the date of the first publication of notice to creditors and allowed against the estate, in the order of priority prescribed by section 152 of this Act. After payment of those claims, claims presented after the four-month period shall be paid in the same order.

Advisory Committee Comment

Section 151 embodies the provisions of ORS 117.030 and 117.110. The wording is adapted from that of section 3-508, Uniform Probate Code. The present six months' period for priority of claims payment has been changed to four months, as commented upon previously. Priority claims may be paid as soon as the four months' period has expired, and the personal representative does not have to wait for court order or account to be filed.

Section 152. (Order of payment of expenses and claims) (1) If the applicable assets of the estate are insufficient to pay all claims in full, the personal representative shall make payment in the following order:

(a) Support of spouse and children.

(b) Expenses of administration.

(c) Expenses of a plain and decent funeral and disposition of the remains of decedent.

Section 151 (page 148)

Section 151. (Payment of claims) Upon the expiration of four months after the date of the first publication of notice to [creditors] interested persons, the personal representative shall, after making provision for support of spouse and children ordered by the court, for expenses of administration [,] and for claims already presented which have not been allowed or allowance of which has been appealed [and for claims which may yet be presented], proceed to pay the claims presented within four months after the date of the first publication of notice to [creditors] interested persons and allowed against the estate, in the order of priority prescribed by section 152 of this Act. After payment of those claims, claims presented after the four-month period shall be paid in the same order.

Section 152 (page 148)

Section 152. (Order of payment of expenses and claims) (1) If the applicable assets of the estate are insufficient to pay all expenses and claims in full, the personal representative shall make payment in the following order:

(d) Debts and taxes with preference under federal law.

(e) Reasonable and necessary medical and hospital expenses of the last illness of the decedent, including compensation of persons attending him.

(f) Taxes with preference under the laws of this state that are due and payable while possession is retained by the personal representative.

(g) Debts owed employes of the decedent for labor performed within 90 days immediately preceding the date of death of the decedent.

(h) The claim of the State Public Welfare Commission for the net amount of public assistance, as defined in ORS 411.010, paid to or for the decedent, and the claim of the Oregon State Board of Control for care and maintenance of any decedent who was at a state institution to the extent provided in ORS 179.610 to 179.770.

(i) All other claims against the estate.

(2) If the applicable assets of the estate are insufficient to pay all expenses or claims of any one class specified in subsection (1) of this section in full, each expense or claim of that class shall be paid only in proportion to the amount thereof.

Advisory Committee Comment

Although section 152 preserves the priorities as set out in ORS 117.030 and 117.110, except as noted, the wording of the section follows that of section 3-506, Uniform Probate Code. The priority of expenses of last sickness has been changed from that set forth in ORS 117.110(1) to conform to the priority of federal taxes under federal law. Secured debts are covered by section 146 of the proposed code, and are not given priority as now provided by ORS 117.110. The provision for "expenses of last sickness" has been reworded

to include not only medical and hospital expenses, but expenses for compensation of persons attending the deceased. Subsection (2) is a paraphrase of ORS 117.140.

Section 153. (Allowance and disallowance of claims) (1) A claim presented to the personal representative shall be considered allowed as presented unless within 60 days after the date of presentment of the claim the personal representative mails or delivers a notice of disallowance of the claim in whole or in part to the claimant or his attorney. The personal representative shall file in the estate proceeding the claim as presented and a copy of the notice of disallowance.

(2) A notice of disallowance of a claim shall inform the claimant that the claim has been disallowed in whole or in part and, to the extent disallowed, will be barred unless the claimant proceeds as provided in section 154 of this Act.

(3) Not less than 30 days before the date of the filing of the final account the personal representative may rescind his previous allowance of an unpaid claim, if the claim was allowed because of error, misinformation or excusable neglect. Notice of rescission of prior allowance of the claim shall be given by mailing or delivering a notice to the claimant or his attorney stating that the prior allowance is rescinded and the reasons therefor.

Advisory Committee Comment

Subsection (1) of section 153 embodies a different approach than that now provided by ORS 116.520, in that under the proposed code it is unnecessary to indorse the allowance on the claim. Under the subsection, unless the personal representative within 60 days after the claim is presented sends a notice of disallowance to the claimant, the claim is automatically allowed. The committee considered that the present practice of requiring an indorsement of allowance upon

Section 153 (page 150)

(3) [Not less than 30 days before the date of the filing of the final account] The personal representative may rescind his previous allowance of an unpaid claim, if the claim was allowed because of error, misinformation or excusable neglect. Not less than 30 days before the date of the filing of the final account the personal representative shall give notice of rescission of [prior] his previous allowance of [the] a claim [shall be given by mailing or delivering a notice] to the claimant or his attorney [stating that the prior allowance is rescinded and the reasons therefor] in the same manner and containing the same information as a notice of disallowance.

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 154 (page 151)

Section 154. (Procedure by claimant on disallowance of claim) (1) If the personal representative disallows a claim in whole or in part, the claimant, within [60] 30 days after the date of mailing or delivery of the notice of disallowance, may either:

each claim imposes an unnecessary burden on the personal representative. It was recognized that ordinarily the claims filed are examined and allowed and therefore affirmative action should be required only in the case of claims which had to be disallowed. The present provisions for automatic rejection unless action is taken seemed to the committee to be opposed to usual practice, in that a legitimate claimant should be entitled to assume he would receive payment of his debt in the same manner as if the decedent were alive, unless notified to the contrary.

Subsection (3) provides protection to the personal representative by allowing him to rescind a previous allowance of a claim by reason of error, misinformation or excusable neglect, with notice to the claimant or his attorney.

Section 154. (Procedure by claimant on disallowance of claim) (1) If the personal representative disallows a claim in whole or in part, the claimant, within 60 days after the date of mailing or delivery of the notice of disallowance, may either:

(a) File in the estate proceeding a request for summary determination of the claim by the probate court, with proof of service of a copy of the request upon the personal representative or his attorney; or

(b) Commence a separate action or suit against the personal representative on the claim in any court of competent jurisdiction. The action or suit shall proceed and be tried as any other action or suit.

(2) If the claimant fails to request a summary determination or fails to commence a separate action or suit as provided in subsection (1) of this section, the claim, to the extent disallowed by the personal representative, is barred.

Advisory Committee Comment

Section 154, together with the following sections covering the procedure on disallowance of a claim, would

replace ORS 116.525 to 116.550. Under the proposed code the claimant is given the option of either asking for a summary hearing or having the matter tried as a separate action or suit. However, the proposed code, in giving the same election as provided by present Oregon statutes, departs from present practice in that, if a summary hearing is requested, no appeal may be taken from the order on the summary hearing. The claimant is given 60 days to request summary determination or commence a separate action or suit.

Section 155. (Separate action or suit required by personal representative) If the claimant files a request for summary determination of the claim as provided in section 154 of this Act, the personal representative, within 30 days after the date of service of a copy of the request upon the personal representative or his attorney, may notify the claimant in writing that if he desires to prove the claim he must commence a separate action or suit against the personal representative on the claim within 60 days after the date of receipt of such notice. If the claimant fails to commence a separate action or suit within 60 days after the date of receipt of the notice, the claim, to the extent disallowed by the personal representative, is barred.

Advisory Committee Comment

Section 155 gives the personal representative the right to ask that a separate action or suit be brought by the claimant, as is now provided by ORS 116.525. Unless after such a demand a claimant files the action or suit, the claim is considered barred. This is similar to the provision in ORS 116.545.

Section 156. (Summary determination procedure) In a proceeding for summary determination by the probate court of a claim disallowed in whole or in part by the personal representative:

(1) The personal representative shall move or plead to the claim as though the claim were a complaint filed in an action or suit.

(2) The court shall hear the matter without a jury, after notice to the claimant and personal representative. Upon the hearing the court shall determine the claim in a summary manner and shall make an order allowing or disallowing the claim in whole or in part.

(3) No appeal may be taken from the order of the court made upon the summary determination.

Advisory Committee Comment

Section 156 is similar in content to ORS 116.530, except that guidelines are provided for the procedure involved. However, as mentioned, no appeal may be taken from the summary determination by the probate court. This provision was put in so that the present duplicate procedure on contesting rejected claims would be eliminated under the proposed code. The requirement of ORS 116.555 as to testimony other than that of the claimant has been eliminated. It was considered preferable not to bind the court in this matter.

Section 157. (Interested persons heard in summary determination or separate action or suit) Any person interested in the estate may be heard in a proceeding for summary determination by the probate court of a claim, and may intervene in a separate action or suit against the personal representative on the claim.

Advisory Committee Comment

It is considered important that specific rights be given to interested persons to appear either in the summary hearing on disallowance of a claim or in the separate action or suit brought for its determination. Reference is made to the definition of interested person, which includes heirs, devisees, creditors and others having a property right in or claim against the estate and fiduciaries representing

interested persons. The general wording of section 157 is taken from section 312, Texas Probate Code. It carries out the same provision for appearance by interested parties as ORS 116.580 and 116.585.

Section 158. (Creditor may obtain order for payment) A creditor whose claim has been allowed or established by summary determination or separate action or suit, and has not received payment within six months after the date of the first publication of notice to creditors may apply to the court and secure an order directing the personal representative to pay the claim to the extent that funds of the estate are available for such payment.

Advisory Committee Comment

The wording of section 158 is taken from section 3-508, Uniform Probate Code. This useful section should enable allowed or contested claims to be paid after determination without undue delay, and will be of benefit in expediting the closing of estates.

Section 159. (Waiver of statute of limitations) A claim barred by the statute of limitations may not be allowed by the personal representative or by any court except upon the written direction or consent of those distributees and creditors who would be adversely affected by allowance of the claim.

Advisory Committee Comment

Section 159 is a departure from ORS 116.555, which provides for an absolute bar whether the statute is pleaded or not. See section 411, Iowa Probate Code, which allows the personal representative discretion whether or not to plead the statute of limitations on a claim he believes to be just. The committee decided that a better approach was to give the right to waive the statute to those distributees and creditors who would be adversely affected if the statute were waived. Situations can be visualized in solvent estates where the

Section 158 (page 154)

Section 158. (Creditor may obtain order for payment) A creditor whose claim has been allowed or established by summary determination or separate action or suit, and who has not received payment within six months after the date of the first publication of notice to [creditors] interested persons, may apply to the court [and secure] for an order directing the personal representative to pay the claim to the extent that funds of the estate are available for such payment.

Section 159 (page 154)

Section 159. (Waiver of statute of limitations) A claim barred by the statute of limitations may not be allowed by the personal representative or by any court except upon the written direction or consent of those [distributees and creditors] interested persons who would be adversely affected by allowance of the claim.

beneficiaries would desire that an otherwise just claim be paid and the statute not be invoked.

Section 160. (Extension of statute of limitations) If a claim is not barred by the statute of limitations on the date of death of the decedent, the claim is not barred by the statute of limitations thereafter until at least one year after the date of death.

Advisory Committee Comment

The committee felt the one year extension would be sufficient to allow a creditor to file his claim or to institute administration proceedings. The wording of section 160, is that of section 412, Iowa Probate Code, except that the period has been changed from six months to one year. The one-year period conforms to ORS 12.190 and 12.220.

Part 2. Discharge of Encumbrances

The following sections of the proposed code on discharge of encumbrances would replace ORS 116.140 to 116.165. The general rule of those sections is that the devisee shall take specifically devised property subject to an encumbrance existing on that 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 specified. This differs from the approach of section 2-607, Uniform Probate Code, which would entitle the devisee to exoneration if the encumbrance was created after execution of the will.

The committee 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 § 636, and cases there cited.

The exceptions to the general rule above outlined are:

(1) Where exoneration is provided for by the terms of the will; (2) where the encumbrance is other than a security instrument or material or labor lien; (3) where the encumbrance is paid from rents and profits from the devised property; and (4) where the encumbrance is discharged at the request of a beneficiary out of property passing to him. In addition to the Uniform Probate Code section referred to above, see section 278, Iowa Probate Code; section 11.12.040, Washington Probate Code; section 863.13, Wisconsin Probate Code; and section 189, Model Probate Code.

Section 161. (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 subsection (3) or (4) of this section.

(3) Unless the will provides otherwise, the devisee of specifically devised property may require than 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; 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) of this section, 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.

Advisory Committee Comment

The purport of section 161 is covered by the introductory comment to this part of the proposed code. The section conforms to 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."

Section 53 of the proposed code 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.

Section 161 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 probate codes cited is the specific devisee required to take property subject to this type of encumbrance, any more than in the present Oregon statutes. See ORS 116.165.

Section 162. (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.

Advisory Committee Comment

Section 162 would cover the general content of ORS 116.140 and 116.165. As is brought out in the discussion in Oregon Probate Law and Practice § 636, these two statutes seem patently inconsistent. The general wording of section 162 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 163. (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 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 161 of this Act.

Advisory Committee Comment

The wording of section 163 is taken from section 3-516, 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 161 of the proposed code, 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.

Part 3. Actions and Suits

Section 164. 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.]

Advisory Committee Comment

The only substantive change by this amendment to ORS 121.020 is to make the section applicable to both actions and suits. The other changes are editorial.

Since sections 164 and 166 of the proposed code will be all that will remain of the present ORS chapter 121, the following explanation of why the remainder of ORS chapter 121 can be properly eliminated is offered. Except for ORS 121.010, 121.020, 121.080 and 121.090, this chapter has remained in the statutes 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 138 of the proposed code. Enforcement of payment of approved claims by the personal representative is covered by section 158 of the proposed code, 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.

The committee 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 listed in ORS 121.050 could be placed in evidence without the benefit of that section.

The committee 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 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 sections 95 and 96 of the proposed code. ORS 121.080, 121.090 and 121.100 are covered in the sections of the proposed code on claims.

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

The balance of ORS chapter 121 covers the liability of distributees to contribution for the debts of the testator. The general question of abatement is covered in section 179 of the proposed code. See also section 171 of the proposed code. Beyond this, however, the committee 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 141.

ORS 121.230 to 121.370 are discussed in Oregon Probate Law and Practice §§ 557 and 675. The following is quoted from First National Bank of Portland v. Connolly, 172 Or. 434, 138 P.2d 613, 143 P.2d 243 (1943):

> "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 present statute 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 v. Harris, 225 Or. 175, 357 P.2d 419, and In re Horger Estate, 225 Or. 492, 358 P.2d 484.

Since equitable remedies are available to creditors and are not dependent upon statutory provisions or sanction, the committee felt it desirable to eliminate the remainder of ORS chapter 121, which as stated was enacted in 1862, has never been substantially amended and has been of doubtful utility during the succeeding 106 years.

Section 165. (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.

Advisory Committee Comment

The committee was advised that upon enactment of the proposed code the amendment of ORS 13.080 by section 262 of this draft remain in chapter 13 of Oregon Revised Statutes, where it now appears. The committee felt it would be advisable to include in the probate code a reference to ORS 13.080. To avoid misunderstanding, section 165 provides that an action pending on the date of death of a decedent may be continued without presentation of a claim against the estate.

Section 166. ORS 121.090 is amended to read:

121.090. (Action against representative not to be commenced until claim presented and disallowed; 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] disallowed. 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

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 166 (page 162)

Section 166. ORS 121.090 is amended to read:

121.090. (Action against representative not to be commenced until claim presented and disallowed; liability on claim presented after four months from notice to [[creditors]] interested persons) [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] disallowed. 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]] interested persons, 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] sections 151 and 152 of this 1969 Act.

under and pursuant to the provisions of [ORS 116.510] sections 151 and 152 of this 1969 Act.

Advisory Committee Comment

Section 166 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 sections of the proposed code on claims. To clear up present uncertainty on the application of ORS 121.090, it is also specifically amended to encompass actions for death by wrongful act.

ARTICLE VI. ACCOUNTING, DISTRIBUTION AND CLOSING

Part 1. Allocation of Income

Section 167. (Allocation of income) Unless the will of the decedent otherwise provides, income from the assets of the estate of a testate decedent received after the death of the decedent and before final distribution, including income realized from property which is sold or otherwise expended for the prupose of discharging liabilities, claims, debts, expenses of administration and inheritance and estate taxes, shall be determined in accordance with the rules applicable to a trustee under ORS 129.010 to 129.140 and distributed as follows:

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

(2) To all other devisees, except devisees of pecuniary devises which are not in trust and do not qualify for the marital deduction provided for in section 2056 of title 26, United States Code, the remaining income in proportion to their respective interests in the assets of the estate which have not been distributed to them or expended for the payment of inheritance or estate taxes charged against their

particular share of the estate, computed at the time of each such distribution on the basis of inventory values. As used in this subsection, "remaining income" means the total income from all property which is not specifically devised, less the taxes, ordinary repairs and other expenses incurred in the management and operation of all such property from which the estate is entitled to income, any interest paid during the period of administration on account of such property, and the taxes imposed on income, excluding taxes on capital gains, which are paid from the estate during the period of administration and which are not charged against the property specifically devised.

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

Advisory Committee Comment

The Oregon Supreme Court has stated that the Uniform Principal and Income Act (ORS 129.010 to 129.140) does not apply to estates. In re Feehely's Estate, 179 Or. 250, 170 P.2d 757 (1946). The first question before the committee, therefore, was whether to amend the Oregon statutes to include revisions of the Uniform Act made since enactment of the Oregon statutes and incorporate them by reference in the proposed code, or to include the substance of those revisions and basic matters in the proposed code. In preparing the proposed code the committee has consistently avoided incorporating by reference matters it felt belonged in the code. The inconvenience and technical interpretation problems involved in the usual incorporation by reference has ruled out this approach in other cases, and the committee considered that the same considerations should apply here.

Section 167 limits its application to income received after the decedent's death and before final distribution. It also limits its application to testate estates. It was felt that there were no pressing problems in intestate situations, since the residue is divided and the income allocated in the same way. The section would have no application if the will provided for income allocation different from that set out in the section.

Section 167 (page 166)

(2)(cont'd.) particular share of the estate, computed at the time of each such distribution on the basis of inventory values. As used in this subsection, "remaining income" means the total income from all property which is not specifically devised, less the taxes, ordinary repairs and other expenses incurred in the management and operation of all such property from which the estate is entitled to income, any interest paid during the period of administration on account of such property, any interest paid on general pecuniary devises, and the taxes imposed on income, excluding taxes on capital gains, which are paid from the estate during the period of administration and which are not charged against the property specifically devised.

Section 167 refers to the Uniform Act as codified in Oregon statutes (ORS 129.010 to 129.140), for the definitions of income and principal. However, income received from assets sold or expended during probate for payment of administration expenses, claims and taxes is treated as income, even though the expended assets would not become part of the residue. This is contrary to In re Feehely's Estate, supra.

Subsection (1) provides that the net income received from specifically devised property is distributed to the specific devisee.

Subsection (2) covers general devises. It includes the periodic adjustment rule as proposed by the later revision of the Uniform Principal and Income Act. It also, however, provides that spouses receiving pecuniary bequests which qualify under the marital deduction provisions of the Internal Revenue Code share in the income in the same way as a residuary devisee. It was the intent of the committee that section 167 be so drafted that periodic adjustments would not be required on payment of ordinary claims or administration expenses, but only where payment of estate and inheritance taxes or substantial claims should require an equitable apportionment. In the interest of simplicity the apportionment, when required, would be on the basis of inventory values.

The section has been discussed with trust officers of banking institutions and with others who deal with problems of allocations of income in estates, and the committee believes the section represents the consensus of experts in this field.

In its work on the section and the subject of allocation of income, the committee was assisted materially by Mr. Charles J. McMurchie. The following remarks made by Mr. McMurchie at a meeting of the committee on October 14, 1966, excerpted from the minutes of that meeting, are of interest in considering the problem of allocation of income and the solution proposed by section 167:

> "The Oregon Supreme Court has spoken very little on this subject. . . . the court has held that the Uniform Principal and Income Act does not apply to estates, and as a result we have the situation now that pretty much whatever is brought before the court as a suggested method of allocating income earned during administration is adopted and approved by the court in the final account if the matter is even raised in the final account.
>
> "Everything I say is 'the general rule' or 'the Restatement of Trusts' rule and is not necessarily the rule in Oregon.

"The recipient of a specific devise or bequest or a bequest of an annuity is entitled to the income earned by the property bequeathed during the period of administration. This assumes, of course, that you have a residue out of which you can pay expenses of administration and taxes.

"The next category is a general legacy. A general legacy is usually pecuniary in nature. You may have a general legacy which is in the nature of a specific legacy such as a gift of a number of shares of stock which you don't own at the time of your death. However, even then the legacy would be in the nature of a pecuniary legacy during the period of administration. For one reason or another, the rule has grown up over the years that an outright pecuniary bequest is not entitled to share in the income earned during administration except in the event that the legacy is not satisfied within the 'common law period of administration,' whatever that is in Oregon. There is some feeling that if you have not satisfied a pecuniary legacy within one year after the date of death, the legatee is entitled to interest at the going rate on the bequest from that date until such time as it is paid. This is consistent with the common law except we don't know what the common law period of administration is in Oregon.

(Note: Section 184 of the proposed code provides for paying three percent interest on general pecuniary devises after one year from the appointment of the personal representative, unless the will provides otherwise.)

"Contrary to the situation where an outright pecuniary legacy is entitled to no income, courts have generally held that a pecuniary legacy in trust is entitled to participate in the income earned during the period of administration. The amount of the income is another problem, but the general rule is that it is entitled to its proportionate share of the income. The question is whether you must make periodic adjustments in the ratio of the fixed value bequest to the entire estate -- whether you must make periodic adjustments so that the general legacy in trust actually gets a proportionate share of the income earned by the estate. This is a problem that is not covered in Oregon -- that is, whether or not this general rule and the distinction between an outright bequest and a bequest in trust is the law in Oregon or should be the law in Oregon.

"Residue. The present rule and the Restatement rule is that gifts of the entire residue or a portion of the residue in trust and a portion outright all are entitled to share pro rata in the income.

"With respect to the so-called pre-residuary legacies, I don't believe there is any significant problem that needs to be resolved except in the limited situations where people are using pecuniary marital deduction bequests or a pre-residuary marital bequest or pecuniary or net estate type bequests where you don't give a fractional share of the residual estate. This area is not covered by the Uniform Principal and Income Act revision and I think probably needs to be covered because a pecuniary gift intended to take advantage of the marital deduction is certainly to be distinguished from a pecuniary bequest of $10,000 or $25,000 to a person other than the testator's spouse. I think that the pre-residuary marital deduction, whether it be pecuniary or not, should receive a pro rata share of the income.

"To go back to the problem of the allocation of income to the pre-residuary legatees. Where a general legacy of $250,000 is given to A and the residue to B with a provision that all of the taxes and expenses be paid out of the residue, the problem is whether you start out by taking the inventory values of the gross estate and $250,000 over that inventory value times the income to determine what the recipient gets throughout the period of administration, or whether you try to determine what will be the net residue available for actual distribution and make an allocation of income on the basis of $250,000 over that net. These two methods are called the gross share or the net share methods.

"The so-called gross share rule, where you allocate on the basis of inventory values, without adjustment, is the easiest method. It is not the most equitable because of the fact that the recipient of the general legacy is not actually getting his share of the total income after the taxes and expenses are paid. Of course, the net share rule has the disadvantage of being more difficult and also has inequities.

"The answer to the problem, which is suggested by the revision to the Uniform Principal and Income Act, is to require periodic adjustments in the ratio of the value of general

legacy to the entire estate at each time when you make at least a major expenditure. These adjustments would be made when you paid such things as inheritance taxes, attorneys' fees, executor's commission, federal estate tax. . . .

"The same problem arises much more often and with much more case authority when you are concerned with the allocation of income among residuary legatees and there is a provision in the will for payment of these expenses or taxes out of a particular share of the residue only. What do you do in these instances? Do you apply the gross share, the net share or the periodic adjustment rule? The same problem occurs in the area of charitable bequests where you have a charitable bequest which is out of the residue, but is not going to bear a portion of the taxes.

"In each of these areas, the solution proposed by the revised Principal and Income Act is the periodic adjustment rule. This is far and away the most equitable rule and certainly when you get into estates where there are significant amounts of income, it can make a substantial difference whether a residuary legatee's share of the estate is going to be reduced at the end of 15 months by a substantial amount to pay federal estate taxes. At that time the executor should make an adjustment and establish a new ratio of the shares of the residue remaining and carry that ratio forth from that time, at all times using inventory values for this purpose.

"One thing which I did not touch on and which is a problem that is more crucial in Oregon than in many jurisdictions is raised by a case which many of you may be familiar with, In re Feehely's Estate, 179 Or. 250. There the court held that income on assets which are expended and which will never become a part of the residue of the estate, is to be added to the residue and not distributed as income for the reason that the testator never really intended the income beneficiary to get the income earned on those assets. This is the English rule. It was then but no longer is the general rule. The court relied extensively on the fact that it was the general rule and the rule of the Restatement of Trusts which it no longer is. No one has taken this problem to the Supreme Court again so we are bound by that decision and to some extent, it affects the general question of whether or not you make periodic adjustments. It does in effect adopt the net share rule.

". . . Section 5 of the Revised Uniform Principal and Income Act which was adopted by the National Conference of Commissioners in 1962. . . has never been considered by the Oregon State Bar Committee on Uniform Laws. It is, to my way of thinking, at least the first step in the solution to the problem. The only other way is if you draft your will with detailed instructions as to how income should be allocated. Unfortunately many attorneys today are not aware of the problems in this area and wills are drafted without these problems in mind.

"The provision. . .would either have to be adopted as a part of the Uniform Principal and Income Act or it would have to become a part of the general probate code. This provision still leaves it available to the testator's attorney to draw a will which will change the results of the Act. However, it does contain specific detail covering most of the problems I have just discussed and what will happen if there is no language in the will to cover the problem. It adopts the more equitable rule, the combination of the gross share and net share rule, requiring periodic adjustments. The Act also provides that income received by a trustee under this subsection should be treated as income of the trust. Subparagraph (b) you will note is contrary to the Feehely rule.

"My recommendation is that the revised Uniform Principal and Income Act makes a substantial step forward and I think it is the right step in solving this problem. I have only one suggested change and that is that some language should be inserted to make it clear that the legatee of a pecuniary bequest which is intended to take advantage of the marital deduction provisions of the Internal Revenue Code would also share in the income in the same way as a residuary legatee."

(See October 1963 issue of Trusts and Estates, page 916; also, 2 A.L.R.3d 1061; III Scott on Trusts, Sec. 234.)

Part 2. Partial Distribution

Advisory Committee Comment

The following sections of the proposed code on partial distribution would replace ORS 117.350 to 117.390. The

content of the sections is in general the same as that of the replaced statute sections.

Section 168. (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; and

(3) The distribution may be made without loss to creditors or injury to the estate or to any person interested therein.

Advisory Committee Comment

The wording of section 168 is based on that of sections 353 and 354, Iowa Probate Code. The three subsections include the substance 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 persons do not have to wait until the semiannual account is filed and six months have elapsed since the publication of notice to creditors.

Section 169. (Undertaking of distributee) The court may require a bond or other security for the protection of

Section 168 (page 172)

(2) After such partial distribution sufficient assets will remain to pay support of spouse and children, expenses of administration, unpaid claims and all known unpaid creditors of the decedent or of the estate; and

creditors and other interested persons who might suffer loss because of distribution under section 168 of this Act.

Advisory Committee Comment

The effect of section 169 is the same as subsection (3) of ORS 117.361.

Section 170. (Discharge of personal representative) The distribution of the assets in accordance with the order of the court under section 168 of this Act shall be a full discharge of the personal representative with respect to all property embraced in such order.

Advisory Committee Comment

Section 170 is subsection (4) of ORS 117.361, with editorial changes.

Section 171. (Petition and order for refund by distributee) If, after partial distribution under section 168 of this Act, 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 section 10 of this Act. 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.

Advisory Committee Comment

Section 171 is a rewrite, with editorial changes, of ORS 117.380 and 117.390.

Part 3. Accounting and Distribution

Section 172. (Liability of personal representative) A 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; or

(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.

Section 172 (page 174)

(3)(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].

(f) Wrongful acts or omissions of his co-personal representatives 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.

Advisory Committee Comment

Sections 172 and 173 are adapted from section 172, Model Probate Code, and would replace ORS 117.640 and 117.650. Similar provisions are found in sections 157, 158 and 160, Iowa Probate Code. An addition to our statutory and case law in this area is subsection (2) of section 172, 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 173. (Personal representative not liable) A personal representative shall not be liable for or chargeable in his accounts with:

(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 174. (Accounting by personal representative) (1) A personal representative shall make and file in the estate proceeding a verified account of his administration:

(a) Unless the court orders otherwise, annually within 30 days after the anniversary date of his appointment.

(b) Within 30 days after the date of his removal or resignation or the revocation of his letters.

(c) When the estate is ready for final 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 the personal representative is chargeable according to the inventory, or, if there was a prior account, 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 the 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 final settlement and distribution, the account shall also include:

(a) A statement that all Oregon income and inheritance 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

Section 174 (page 176)

(3)(a) A statement that all Oregon income and inheritance 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.

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 account required by paragraph (a) of subsection (1) of this section, and in lieu of the information required by subsection (2) of this section, 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) of this section.

Advisory Committee Comment

Section 174 would replace ORS 117.010 and 117.610. Except as hereafter noted, it contains the content of those present statutes. The wording is adapted from ORS 126.336, relating to accounting by guardians. The provision for filing a semiannual account has been eliminated. This requirement has been criticized by attorneys for many years. In the committee's 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 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 175. (Notice 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 20 days before the expiration of the time fixed for filing objections, the personal representative 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 need not be mailed to the personal representative.

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

Advisory Committee Comment

Section 175 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 persons to whom the notice of the final account and petition for distribution is mailed were 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 claims. 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 175 (page 178)

(1)(cont'd.) objections thereto in a notice thereof. Not less than 20 days before [the expiration of] the time fixed [for filing objections] in the notice, the personal representative shall cause a copy of the notice [thereof] to be mailed to:

Delete all of paragraph (d).

Redesignate paragraph (e) as paragraph (d).

Section 177 (page 179)

Section 177. (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 portion of the estate or 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:

Section 176. (Objections to final account and petition) Any person entitled to notice under section 175 of this Act may, within the time fixed for such filing, file his objections to the account and petition in the estate proceeding, specifying the particulars of the objections. Upon the filing of objections the court shall designate the time for hearing thereon.

Advisory Committee Comment

Section 176 incorporates the substance of ORS 117.620. However, a fundamental difference of procedure should be noted. Section 175 of the proposed code provides for fixing a time for filing objections to the final account and petition for distribution. Section 176 provides that a time for hearing is designated by the court when objections have been filed. The committee 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 persons who are entitled to notice under section 175 of the proposed code. Thus, creditors whose claims have been barred by the nonclaim statute or whose claims have been paid would not be entitled to object.

Section 177. (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 against will by the 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 Oregon income and inheritance taxes, and personal property 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 and of the extent and character of their interest therein, subject only to the right of appeal and the right to vacate the decree.

Advisory Committee Comment

The wording of section 177 is based on that of section 183, Model Probate Code. The present code does not have a specific provision for a decree of final distribution. It was the intention of the committee to provide finality and conclusiveness to such a decree. It will be noted that the decree designates the persons 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 ORS 118.250, 118.840 and 316.530.

Subsection (3) is taken from paragraph (d) of section 183, Model Probate Code. The committee believes this subsection 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 178. (Effect of approval of final account) To the extent that the final account is approved, the personal representative and his surety, subject to the right of appeal, to the power of the court to vacate its final orders and to the provisions of section 186 of this Act, are 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.

Advisory Committee Comment

The wording of section 178 is that of section 179, 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 186 of the proposed code.

Section 179. (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) of this section, 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 section 56 of this Act, dealing with the shares of pretermitted heirs, and in section 108 of this Act, 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.

(3) A general devise charged on any specific property or fund is, for purposes of abatement, considered 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 considered a general devise to the extent of the 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.

(4) 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.

(5) 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.

Advisory Committee Comment

Section 179 is taken from section 3-602, Uniform Probate Code. It follows the plan of abatement set out in ORS 116.720, 116.730, 116.735 and 117.330. 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 of the decedent.

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

Subsection (4), 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 (5) would replace ORS 117.330 and 117.340 and conforms to the general purpose and effect of those statutes.

Section 180. (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 interest of the distributee in the estate; 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 assignees of the distributee.

Advisory Committee Comment

The first sentence of section 180 is taken from section 3-603, Uniform Probate Code. The second sentence is adapted from section 471, 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 the committee that the personal representative should be subject to the same defenses as could be asserted against the decedent if he were alive.

It seemed desirable to the committee that the common law "right of retainer" should be codified, although it is well established in our decisions. See Stanley v. U.S. National Bank of Portland, 110 Or. 648, 224 P. 835 (1924); Boise Payette Lumber Co. v. National Surety Corporation, 167 Or. 553, 118 P.2d 1006 (1941); and In re Miller's Estate, 189 Or. 246, 218 P.2d 966 (1950).

Section 181. (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 a 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.

Advisory Committee Comment

For a comparison with section 181, see section 12, Uniform Ancillary Administration of Estates Act. This section may be compared to ORS 116.186. However, no exactly comparable statute now appears in the Oregon statutes.

Section 181 codifies the statement in Thomas Kay Woolen Mills Co. v. Sprague, (D.C.Or.) 259 Fed.338 (1919), that in case of an ancillary administration in Oregon 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 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.

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 183 (pages 185 and 186)

Delete all of section 183 and substitute the following:

Section 183. ORS 117.680 is amended to read:

117.680. (Compensation of personal representative) (1) The compensation provided by law for [an executor or administrator] a personal representative is a commission upon the whole estate accounted for by him, as follows:

(a) Upon the property subject to the jurisdiction of the court, including income and realized gains:

[(a)] (A) Seven percent of any sum up to $1,000.

[(b)] (B) Four percent of all above $1,000 and not exceeding $10,000.

[(c)] (C) Three percent of all above $10,000 and not exceeding $50,000.

[(d)] (D) Two percent of all above $50,000.

(b) One percent of the property, exclusive of life insurance proceeds, not subject to the jurisdiction of the court, but reportable for Oregon inheritance tax or federal estate tax purposes.

(2) In all cases, such further compensation as is just and reasonable may be allowed by the court [or judge thereof,] for any extraordinary and unusual services not ordinarily required of [an executor or administrator] a personal representative in the discharge of his trust.

(3) When a decedent by his will has made special provision for the compensation of a 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 of the court a written renunciation of the compensation provided by the will.

Section 182. (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 fees in the proceeding.

Advisory Committee Comment

The content of section 182 is substantially the same as ORS 117.660. The second sentence is section 3-421, 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 attorney fees.

Section 183. (Compensation of personal representative) (1) Upon application to the court a 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 to that property, 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 over $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 a 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 of the court a written renunciation of the compensation provided by the will.

Advisory Committee Comment

Section 183 would replace ORS 117.660, 117.670 and 117.680.

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 184 (page 187)

Section 184. (Interest on pecuniary devises) General pecuniary devises not entitled to a share of income under subsection (2) of section 167 of this Act shall bear interest payable from the residuary estate at the rate of three percent per annum for a period beginning one year after the first appointment of a personal representative until payment, unless a contrary intent is indicated by the will.

New section 184a (page 187)

Section 184a (Order of escheat) If it appears to the court, at any time after the expiration of four months after the date of the first publication of notice to interested persons, that there is no known person to take by descent the net intestate estate, the court shall order that the estate escheat to the State of Oregon and that the whole of the estate, after payment of claims against the estate, taxes and expenses of administration, be distributed to the Division of State Lands. There shall be no further proceeding in the administration of the estate, and the estate shall summarily be closed.

Subsection (1) is comparable to that part of ORS 117.680 specifying that "the compensation provided by law for an executor or administrator is a commission upon the whole estate accounted for by him." The committee felt it should clarify the wording quoted as it has been construed by 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 over $60,000, rather than over $50,000, as in the present statute. The four percent bracket will apply to the first $60,000, with a $250 minimum. Provision is also made for a fee of one percent on the nonprobate assets reportable for inheritance or estate tax purposes.

ORS 117.680 was last amended in 1951. Since that time 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 184. (Interest on pecuniary devises) General pecuniary devises bear interest at the rate of three percent per annum for a period beginning one year after the first appointment of a personal representative until payment, unless a contrary intent is indicated by the will.

Advisory Committee Comment

Section 184 is adapted from section 3-604, Uniform Probate Code. The committee 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 185. (Disposition of unclaimed assets) If a report filed in the estate proceeding by the personal representative not less than 30 days after the date of 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.

Advisory Committee Comment

Section 185 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 wording 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. Under section 185 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 probate code. For comparable legislation, see section 109, Iowa Probate Code,and section 3-612, Uniform Probate Code.

Section 186. (Discharge of personal representative) Upon the filing of receipts or other evidence satisfactory to the court that distribution has been made as ordered in

Section 186 (page 189)

(cont'd.) 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, in its discretion and upon such terms as may be just, within one year after [notice thereof] entry of the order of discharge, permit a suit to be brought against the personal representative and his surety if the order of discharge was taken through the mistake, inadvertence, surprise or excusable neglect of the claimant.

Section 187 (pages 189 and 190)

Delete all of paragraphs (a), (b) and (c) of subsection (1), and redesignate paragraphs (d) and (e) as paragraphs (a) and (b), respectively.

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, 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 mistake, inadvertence, surprise or excusable neglect of the claimant.

Advisory Committee Comment

The wording of section 186 is that of section 193, Model Probate Code. The section gives finality to the order of discharge, except that the provisions of ORS 18.160 are incorporated to relieve by reason of mistake, inadvertence, surprise or excusable neglect. Lothstein v. Fitzpatrick, 171 Or. 648, 138 P.2d 919 (1943), held that ORS 18.160 applies to final orders of probate courts. Except as provided in ORS 116.195 there is no specific provision in the present probate 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.

Section 187. (Recording of copies of records in other counties where real property situated) (1) If real property belonging to the estate 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 that other 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 that 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.

Advisory Committee Comment

Section 187 is a rewrite of ORS 116.190. The only fundamental change 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 committee 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 188. (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.

Advisory Committee Comment

Section 188 is ORS 117.710 without change. The committee submitted this section to the Law Improvement Committee, and

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 189 (page 191)

(3) Payment or delivery may not be made pursuant to this section 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.

it was introduced at the 1965 legislative session. It was enacted as section 1, chapter 345, Oregon Laws 1965.

Section 189. (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 nonresident decedent, upon an affidavit made by or on behalf of the foreign personal 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; and

(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 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.

Advisory Committee Comment

Section 189 is taken from sections 4-201, 4-202 and 4-203, Uniform Probate Code. It would replace ORS 116.186. The 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 90 days is now 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.

The committee decided the simpler procedure provided by the Uniform Probate Code was an improvement over ORS 116.186. It 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.

Part 4. Apportionment of Estate Taxes

Advisory Committee Comment

This part 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 specified 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 committee 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 committee 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. It might be added that members of our subcommittee considering this subject differed on the application and interpretation of Beatty v. Cake, 236 Or. 498, 387 P.2d 355, 390 P.2d 176 (1964); 242 Or. 128, 407 P.2d 619 (1965).

The committee finds no conflict of this part with ORS 118.110 as it applies to the Oregon estate tax.

Section 192 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 191.

Section 193 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 195 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 196 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 197 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.

Section 190. (Definitions) For purposes of sections 190 to 198 of this Act:

(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 subsection (1) of ORS 118.100 and interest and penalties imposed in addition to the tax.

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

Section 191. (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 sections 190 to 198 of this Act, the method described in the will shall control.

Section 192. (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 191 of this Act, 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 sections 190 to 198 of this Act, the determination of the probate court in respect thereto shall be prima facie correct.

Section 193. (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 sections 190 to 198 of 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.

Section 194. (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 191 of this Act, and to that extent no apportionment shall be made against the property. This subsection 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 195. (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 196. (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 197. (Foreign fiduciaries and estates; tax credits) A personal representative acting in another state or a person required to pay the tax domiciled in another state may institute an action in the courts of this state and may

recover a proportionate amount of the federal estate tax, of an estate tax payable to another state or of a death duty due by a decedent's estate to another state, from a person interested in the 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 198. (Construction) Sections 190 to 198 of this Act 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.

ARTICLE VII. ESTATES OF ABSENTEES

Advisory Committee Comment

This part of the proposed code would replace and supersede ORS 120.310 to 120.400. The committee considered that the present statutory requirement that disappearance or absence must continue for seven years before estate proceedings may be commenced is 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 proposed code, 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 present Oregon statutes the court merely finds a legal presumption of death based on an arbitrary period of absence for seven years, whereas the proposed code 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 present statute sections on estates of persons presumed to be dead are discussed in Oregon Probate Law and Practice § 862, 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 (1904), 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. The committee considers that these criteria are met in the proposed code.

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 statutes to administer and protect his property.

Section 199. (Petition for administration of estate of absentee) Administration may be had upon the estate of an absentee. A petition for administration shall state, in addition to the information required by section 84 of this Act:

(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.

(a) 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

(b) 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.

Advisory Committee Comment

Except for paragraph (3)(b), section 199 is based on section 510, Iowa Probate Code. However, the committee felt a minimum period of one year's absence would be adequate in view of the provisions for notice, search and court findings. The section also provides for administration where the death in a specific time, place and circumstance is probable but cannot be proved by reason of failure to find or identify the body.

Section 200. (Setting date of hearing on petition; notice of hearing) (1) Upon the filing of a petition under section 199 of this Act, the clerk of the court shall set a date for hearing not less than 30 days after the date of filing the petition, unless the court shall set an earlier date. 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-known 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.

Advisory Committee Comment

Section 200 is taken from sections 511, 512 and 513, 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 201. (Appointment of person to represent absentee; directing 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 considers 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.

Advisory Committee Comment

The provision in section 201 for appointment of a guardian ad litem is taken from section 514, Iowa Probate Code. Since the petitioner will be in many cases an heir, devisee or creditor, the provision for a disinterested person to make the search for the missing person seems of value. The remainder of the section follows section 71, Model Probate Code, and section 3-222(b), Uniform Probate Code. The thrust of the section is to substitute an active effective search for the missing person for a legal presumption of death.

Section 202. (Hearing on petition) 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.

Advisory Committee Comment

Section 202 corresponds to section 514, Iowa Probate Code. The comment on the Iowa Probate Code section 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, the section requires an affirmative finding of the fact of death by the court, based upon an adequate search.

Section 203. (Effect of finding of death) The finding of the court that the absentee has died shall be conclusive as to the estate of the absentee only if:

(1) Notice of the hearing on the petition was given as required by section 200 of this Act; and

(2) The court finds that diligent search for the absentee was made.

Advisory Committee Comment

Section 203 is adapted from section 81, Model Probate Code. The following is quoted from the comment on the Model Probate Code section:

> "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 204. (Mode of procedure) Upon the entry of the order establishing death of the absentee, administration of the estate of the absentee, whether testate or intestate, shall proceed as provided for the estates of other decedents, except as otherwise provided in sections 199 to 208 of this Act.

Advisory Committee Comment

Section 204 is adapted from section 515, Iowa Probate Code.

Section 205. (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 provided in this section. The personal representative shall pay claims allowed and proved, shall file an account of his administration for the period of time preceding revocation of letters 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.

Advisory Committee Comment

Section 205 is a rewritten form of ORS 120.380.

Section 206. (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.

Advisory Committee Comment

Section 206 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 207. (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 after the date of the substitution.

Advisory Committee Comment

Section 207 covers the substance of ORS 120.390.

Section 208. (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 administration is not granted, the applicant shall pay the costs, expenses and charges.

Advisory Committee Comment

Section 208 is ORS 120.400, with editorial changes.

ARTICLE VIII. INHERITANCE TAX

Advisory Committee Comment

The Advisory Committee and the Bar Committee on Probate Law and Procedure adopted the recommendation of their joint subcommittee that a proposed Oregon estate tax law, to replace the present inheritance tax statutes, be drafted and presented to the Legislative Assembly. A draft has been prepared which has the approval of both committees. It has been submitted to the Committee on Taxation of the Oregon State Bar for study and consideration. However, as part of the estate tax draft, tax rates must be computed and arrived at which would provide revenue substantially the same as that produced by the present inheritance tax. In view of the technical problems and the time involved in working out the details of the proposed estate tax law and determining appropriate rates, it was decided to include in the proposed code minimal procedural amendments and repeals of the present inheritance tax statutes to conform to changes made by other portions of the proposed code. The inclusion of these amendments and repeals in the proposed code does not evidence or indicate a recommendation by the committee in favor of the present inheritance tax statutes and against an Oregon estate tax law, which as stated both committees favor. We trust the inclusion of these technical amendments will not be so construed.

The proposed amendments and repeals of present inheritance tax statutes are purely procedural. No change is proposed in the present statute sections on taxable property, deduction or rates, except an amendment of ORS 118.010 to delete a reference to dower and curtesy in subsection (1) thereof. Similarly, no changes are proposed in the sections covering lien, payment and compromise of tax, except as follows: 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. ORS 118.300 and 118.350 are amended to delete certain present functions of the probate court and substitute functions to be performed by the State Treasurer. The amendment of ORS 118.300 would also reduce the required amount of the bond to be given in the case of deferred payment of the tax.

The present sections on administration of inheritance tax are 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 section 84 of the proposed code would permit the State Treasurer to make application as an interested person. The present provisions for furnishing information to the State 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 present inheritance tax law in which substantial amendment is proposed is that dealing with appraisal and judicial approval. The 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 objection to the taxes found owing by administrative agency was filed. The amendments would provide that if objection was made to the determination of the tax by the administrative agency, the matter would be set for hearing by the probate court upon notice to the State Treasurer and to interested persons, 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 122 to 124 of the proposed code.

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 217 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 objection to the tax determined by the State Treasurer and for hearing and redetermination of the tax by the probate court.

Section 209. ORS 118.010 is amended to read:

118.010. (<u>Property, transfers and interests subject to</u>

tax) (1) All property, tangible or intangible, and any interest therein, within the jurisdiction of the state, whether belonging to the inhabitants of this state or not which passes or vests by [dower, curtesy,] survivorship, will or by statutes of inheritance of this, or any other state, or by revesting, repayment or settlement of any previously escheated estate or part thereof, or by the exercise or nonexercise of a general power of appointment as provided in subsection (5) of this section, or by deed, grant, bargain, sale or gift, or as an advancement or division of his or her estate, made in contemplation of the death of the grantor or bargainor or intended to take effect in possession or enjoyment after the death of the grantor, bargainor or donor to any person or persons, or to any body or bodies, politic or corporate, in trust or otherwise, or by reason whereof any person or body politic or corporate shall become beneficially entitled, in possession or expectation, to any property or income thereof, is subject to tax at the rate specified in ORS 118.100, to be paid to the State Treasurer for the use of the state.

(2) (a) Whenever property, other than real property held by the entirety, is held in the joint names of two or more persons, or deposited in banks or other institutions or depositories in the joint names of two or more persons and payable to either or the survivor, upon the death of one of such persons the right of the surviving joint tenant or tenants, person or persons to the immediate ownership or possession and enjoyment of such property shall be deemed a

taxable transfer in the same manner as though the whole property to which such transfer relates belonged absolutely to the deceased joint tenant or depositor and had been devised or bequeathed to the surviving joint tenant or tenants, person or persons, excepting therefrom such parts thereof as may be shown to have originally belonged to such surviving joint tenant or person, and never to have been acquired from the decedent for less than a fair consideration in money or money's worth, and if the property has been acquired from decedent for less than such fair consideration, there shall be excepted from the value of the property a portion equal to the amount of the consideration so furnished.

(b) Upon the death of one of the tenants of real property held by the entirety, the right of the surviving tenant to the immediate ownership or possession and enjoyment of such property shall be deemed a taxable transfer in the same manner as though one-half of the whole property to which such transfer relates belonged absolutely to the deceased tenant and had been devised or bequeathed to the surviving tenant.

(3) Any transfer of property made by a decedent by deed, grant, bargain, sale or gift, within three years prior to the decedent's death without a valuable and adequate consideration therefor, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of ORS 118.005 to 118.840; but no such transfer made before such three-year period shall be treated as having been made in contemplation of death if:

(a) No gift taxes were payable under ORS chapter 119 on such transfer; or

(b) All gift taxes payable under ORS chapter 119 on such transfer were paid when due.

(4) In the event of death of one of the tenants of property held by the entirety, after sale thereof upon an executory or instalment contract, the transfer of the decedent's interest in the unpaid balance owing upon such contract at the time of death shall be deemed a taxable transfer in the same manner as under paragraph (b) of subsection (2) of this section.

(5) When, after August 3, 1955, property passes or vests subject to a general power of appointment, for the purposes of the taxes imposed by ORS 118.005 to 118.840 by reason of the death of the donor, the donee is deemed to have acquired the full taxable interest from the donor. For the purposes of the taxes imposed by ORS 118.005 to 118.840 by reason of the death of the donee of such a general power, an appointee, or beneficiary who takes where the power of appointment is not exercised is deemed to have acquired from the donee the full taxable interest of the property which passes or vests by reason of the exercise or nonexercise of the power by the donee. A general power of appointment is one which the donee may exercise in favor of himself, his estate, his creditors or the creditors of his estate, during lifetime or at death, and includes one under which the donee may convey or transfer ownership of the property to whomever he may choose. A power to consume, invade, or appropriate property for the benefit of the donee which is limited by an

ascertainable standard relating to the health, education, support, or maintenance of the donee shall not be deemed a general power of appointment.

Section 210. 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 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] section 217 of this 1969 Act, 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 211. 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 has power to sell as much of the property embraced in any inheritance, 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 212. 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 and trustees thereof, may elect, with 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. It it is personal property, the person or persons so electing shall give a bond to the state in [the penalty of three times] double the amount of [such] the 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 213. ORS 118.350 is amended to read:

118.350. (Compromise and compounding tax; 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] estate, 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] the 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 214. 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 section 122 of this 1969 Act; [provided, that] but when [such] an interest is contingent, defeasible or of such a nature that its [full and] true cash value cannot sooner be ascertained, [at the date of decedent's death] it shall be [appraised] determined 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 theretofore upon the particular estates upon which the devise, bequest, 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] an 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 possibility 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 215. ORS 118.660 is amended to read:

118.660. (Delivery to State Treasurer of tax return and copy of inventory) (1) [Every] The executor, administrator or trustee of [any] an 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] beneficial interest therein, 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 or trustee personally or by his attorney of record[, and shall file with the clerk proof of such delivery].

(2) [Every such] The executor, administrator or trustee or, if none is appointed, an heir or other representative of the decedent, shall, as soon as practicable, [make and] file with the State Treasurer a [schedule, list or statement, verified by his oath and] return 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

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 217 (page 221)

Section 217. (Determination of tax by State Treasurer; notice) The State Treasurer shall determine the amount of the tax. If he determines that there is a deficiency in the amount of the tax as computed [by] in the return, he shall give notice of the deficiency to the person who filed the return and to the attorney for that person.

Section 218 (page 221)

Section 218. ORS 118.700 is amended to read:

118.700. (Filing objection to determination of tax; redetermination by court; appeal) (1) Within 60 days after notice of 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] objection thereto in writing, and pray for a [reassessment and] redetermination of [such] the tax.

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 216. Section 217 of this Act is added to and made a part of ORS 118.005 to 118.840.

Section 217. (Determination of tax by State Treasurer; notice) The State Treasurer shall determine the amount of the tax. 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 person who filed the return.

Section 218. ORS 118.700 is amended to read:

118.700. (Filing objection 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] objection thereto in writing, and pray for a [reassessment and] redetermination of [such] the tax.

(2) Upon [any] objection 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] the objection[,] 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] 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.

ARTICLE IX. GUARDIANSHIPS AND CONSERVATORSHIPS

Advisory Committee Comment

The amendments of ORS 126.006, 126.106, 126.126, 126.131, 126.146, 126.151, 126.166, 126.186, 126.338, 126.411, 126.426, 126.431, 126.476 and 126.495 of the present guardianship code proposed by this article would supersede and replace present ORS chapter 127, covering the subject of conserving property of missing persons. The amendments would provide very simply that the present guardianship code include and apply to guardianships of the estate for missing persons, in addition to the present coverage of minors, incompetents and spendthrifts.

The bulk of ORS chapter 127 was enacted in 1937. The portion of the chapter covering persons missing during war was enacted in 1945. The annotations to Oregon Revised Statutes indicate 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 P.2d 769 (1964). This decision would indicate that the powers given guardians by the guardianship code are much broader than the powers provided by ORS chapter 127.

The committee agreed that the broad and familiar procedural and notice provisions of the 1961 guardianship code would provide a vehicle for administration and conservation of the property of missing persons superior to that of the somewhat limited ORS chapter 127.

The amendments do not change the substance of the present guardianship code, but merely include in its provisions an additional category of ward, namely, "missing persons." It should be noted, however, that because of the unusual nature of the problem more adequate requirements are provided for notice to the missing person. Thus, not only is publication required, but it is also required that notice be given the missing person by registered mail and by mail to be forwarded by the United States Social Security Administration, which has a very complete system of nation-wide 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.

Since the amendments would replace the portion of ORS chapter 127 covering persons missing during war, it should be noted that the definition of a missing person 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." This clause of the definition would cover those persons referred to in ORS 127.310 to 127.350.

It was also the consensus of the committee that certain procedural amendments to the guardianship and conservatorship statutes should be enacted to bring these statutes into harmony with the philosophy of the probate sections of the proposed code.

Section 8 of the proposed code provides that a probate commissioner may act upon uncontested petitions for appointment of guardians and conservators to the extent authorized by rule of court. Section 5 provides that jurisdiction in guardianships and conservatorships is vested in the circuit court.

ORS 126.011 is repealed because that statute section is now outdated.

ORS 126.446, prescribing a one-year time limitation on the order for sale of real property, is also repealed. This present time limitation probably has 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.

Comments on the procedural amendments follow the sections in this article.

Part 1. Guardianships

Section 219. 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, is unable unassisted to property 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) "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.

[(6)] (7) "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)] (8) "Ward" means any person for whom a guardian has been appointed.

Section 220. 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 221. ORS 126.111 is amended to read:

126.111. (Venue for appointment of guardians) The venue for the appointment of a guardian [shall be] is:

(1) In the county where the proposed ward resides; [or]

(2) [If the proposed ward does not reside in this state,] In any county in which any property of the proposed ward is located; [,] or

(3) In any county in which the proposed ward is physically present.

Advisory Committee Comment

Section 221 amends ORS 126.111, specifying venue for appointment of guardians, to simplify the initiation of guardianships. The amendment conforms the ORS section to the simplified venue provisions in the proposed probate code.

Section 222. 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 post-office 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 post-office address of the proposed guardian, and that the proposed guardian is qualified to serve as guardian.

(5) A general description and the probable value of the property of the proposed ward and any income to which he is entitled. If any moneys are paid or payable to the proposed ward by the United States through the Veterans Administration, the petition shall so state.

(6) The name and address of any person or institution having the care, custody or control of a proposed ward who is an incompetent or minor.

(7) The reasons why the appointment of a guardian is sought, the relationship, if any, of the petitioner to the proposed ward and the interest, if any, of the petitioner in the appointment.

Section 223. 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 224. 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.

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 224 (page 229)

(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 or certified mail to his last-known address and by postage prepaid letter to be forwarded through the United State Social Security Administration to his last-known address available to that agency.

(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.

Advisory Committee Comment

Section 224 amends ORS 126.146 to supply an obvious omission in the present statute, in addition to inclusion of the provision as to missing persons previously commented upon.

Section 225. 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 226. 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 qualified 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 minor.

(4) The relationship by blood or marriage of the proposed guardian to the proposed ward.

Section 227. Section 228 of this Act is added to and made a part of ORS 126.006 to 126.565.

Section 228. (Term of bond; new bond; increasing or reducing bond) (1) The bond of a guardian shall continue in effect until his final account is approved and an order of discharge is entered, but a surety may terminate his obligation upon notice in writing to the guardian and the court specifying a date, not less than 30 days after the date of

the notice, when such termination is to become effective. Prior to the date so specified the guardian shall execute and file in the guardianship proceeding a new bond by a qualified surety in like amount and upon the same conditions. If the guardian fails to do so, his authority as guardian shall cease on the effective date of termination of the obligation of the surety on his bond. The letters of guardianship shall thereupon be canceled 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 of a guardian 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 interested person.

Advisory Committee Comment

Section 228 would replace ORS 126.176. The principal change is to expand the provision for termination of liability of a surety and to spell out the effect of failure to provide a substitute bond.

Section 229. 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 post-office 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

_____ guardian of the _____
(name of guardian) (person

_____ for _____,
or estate or person and estate) (name of ward)

a(n) _____,
(incompetent [or], minor, missing person or spendthrift)

that the named guardian has qualfied and has the authority and shall perform the duties of guardian of the _____
(person or estate

_____ for the named ward as provided by law.
or person and estate)

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

By_____, Deputy

(Seal)

Section 230. 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] section 124 of this 1969 Act.

Section 231. 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 knowledge 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] section 139 of this 1969 Act.

Section 232. 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 property of the 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.]

Advisory Committee Comment

Section 232 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 as provided by this statute section.

The amendment deletes the reference to ORS 126.406 to 126.495, describing the procedure for approval of a mortgage of the ward's property. The committee does not see valid reasons for the present duplicated provisions authorizing mortgages of the ward's property. ORS 126.265 seems adequate to cover the procedure for approval of such mortgages. For this reason, sections 234, 235, 236, 237, 239 and 243 are amendments of present ORS sections to limit those sections to proceedings for sale or lease of the ward's property. The procedure for approval of mortgages, therefore, will be provided solely by ORS 126.265.

Section 233. 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, to each person to whom copies of other accounts are required to be mailed or delivered as provided in subsection (1) of this section, to the executor or administrator of a deceased ward's estate and to 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 234. 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 235. 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 post-office 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 236. 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 237. 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

Section 238 (page 240)

(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 or certified 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.

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 238. 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 239. 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 240. 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.

Advisory Committee Comment

Sections 240 and 241 amend ORS 126.441 and 126.456, respectively, 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 sale provisions in the guardianship code conform.

Section 241. 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 242. ORS 126.461 is amended to read:

126.461. (Conveyance of real property; effect) [A conveyance executed by the guardian under ORS 126.456 shall set forth the book and page of the journal of the court where the order for and the order confirming or directing the sale of the real property are entered.] The effect of [the] a conveyance of real property by a guardian under ORS 126.456 shall be the same as though made by the ward while not under legal disability.

Advisory Committee Comment

Section 242 amends ORS 126.461 to eliminate the present requirement for showing the journal book and page of the order of sale in a guardian's deed. In many places this information is not obtainable for days after the order is entered. Deletion of the requirement was considered sensible to avoid unnecessary delay in closing a sale. A similar requirement in ORS 126.471 is deleted by the amendment of that ORS section by section 243 of this draft.

Section 243. 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 [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].

(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] a conveyance of real property by a guardian under subsection (1) of this section 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 244. 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 post-office 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 245. ORS 126.490 is amended to read:

126.490. (Collateral attack on sale, mortgage, lease or other disposition of ward's property) No proceedings for the sale, exchange, surrender, partition, mortgage, pledge or lease [(including a lease executed for the purposes of exploring or prospecting for and extracting, removing and disposing of oil, gas, other hydrocarbons and all other minerals or substances, similar or dissimilar, that may be produced from a well drilled pursuant to such lease)] of any property of the

ward by a guardian of the estate are subject to collateral attack on account of any irregularity in the proceedings if the court which ordered the sale, exchange, surrender, partition, mortgage, pledge or lease had jurisdiction to do so.

Section 246. 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] a 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 or bequeathed by a ward who was a missing person subsequently found to be dead and who did not make a valid will after 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 247. ORS 126.540 is amended to read:

126.540. (Discharge of guardian; exoneration of surety; vacating order) The court, after hearing objections filed pursuant to ORS 126.338 to the final account and 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, at any time within one year after notice thereof, vacate the order discharging the guardian to permit recovery against the guardian and the surety on his bond, or either of them, when it appears that the failure of the claimant to object to the final account of the guardian resulted from the mistake, inadvertence, surprise or excusable neglect of the claimant.

Advisory Committee Comment

Section 247 amends ORS 126.540 to grant finality to the discharge of a guardian, with a provision to protect persons who fail to object to the final account by reason of mistake, inadvertence, surprise or excusable neglect. The wording is that used in ORS 18.160.

Part 2. Transactions Without Oregon Guardianship

Section 248. Section 249 of this Act is added to and made a part of ORS 126.006 to 126.565.

Section 249. (Money or tangible chattels to or for minor) (1) Any person under a duty to pay or deliver money or tangible chattels to a minor may perform that duty, in amounts not exceeding $5,000 in the aggregate, by paying or delivering the money or chattels to:

(a) The minor, if he is 18 years of age or older.

(b) A parent or other relative of the minor with whom the minor resides; or

(c) A guardian of the person for the minor.

(2) This section does not apply if the person making the payment or delivery has actual knowledge that a guardian of the estate for the minor has been appointed or that proceedings for the appointment of a guardian of the estate for the minor are pending.

(3) A person, other than the minor, receiving delivery of tangible chattels under subsection (1) of this section may sell them for cash without order of court.

(4) Moneys received by a person, other than a minor, under subsection (1) or (3) of this section may be applied by that person to the support and education of the minor, excluding any compensation or other payments to himself except by way of reimbursement for out-of-pocket expenses for goods and services furnished by third persons which were necessary for the support and education of the minor. Any money and any unsold chattels in excess of sums required for the support and education of the minor shall be preserved for the future support and education of the minor and any balance not so used shall be turned over to the minor when he arrives at the age of majority as provided in ORS 109.510 or 109.520.

(5) Persons owing money or property to minors who pay or deliver it pursuant to paragraph (b) or (c) of subsection (1) of this section shall not be responsible for the proper application thereof.

Advisory Committee Comment

Section 249 has been adapted from section 5-103, Uniform Probate Code, but differs significantly in two respects. The Uniform Probate Code section would permit payment or delivery in the manner authorized in amounts not exceeding $5,000 per annum, whereas section 249 imposes a limitation of $5,000 in the aggregate. Section 249, in addition to permitting payment or delivery directly to a minor who has attained the age of 18 years, authorizes payment or delivery to a parent or other relative of the minor and to a guardian of the person for the minor. The Uniform Probate Code section varies from this in that it refers to a parent or grandparent, and has a further provision which authorizes payment to a financial institution in a federally insured account in the sole name of the minor without any retained power of withdrawal.

In so far as amounts are concerned, the Uniform Probate Code section seems unduly broad. It appears to permit an accumulation of a very large sum in the hands of an individual who has no official authority to act as a representative for a minor, which would seem to go beyond the limits of reasonableness. Further, it would permit a person owing an obligation of payment to impound funds in a bank account for a minor without regard to whether the impounding is in best interests of the minor.

Section 250. ORS 126.555 is amended to read:

126.555. (Settling claims or receiving or selling property without guardianship) (1) Where it appears that a guardian of the estate for a person under legal disability for a reason or reasons other than minority has not been appointed, any court having probate jurisdiction, upon petition therefor and with such notice, or without notice, as the court may order, and without the appointment of a guardian of the estate for such person, may make an order authorizing a person designated in the order to:

(a) Settle any debt or other chose in action not exceeding $1,000 due to the person under legal disability and receive payment thereof;

(b) Receive property having a value not exceeding $1,000 of the person under legal disability; or

(c) Sell for cash with such notice, or without notice, as the court may order, any of the real or personal property having a value not exceeding $1,000 of the person under legal disability and receive the proceeds thereof.

(2) The person designated in the order of the court under subsection (1) of this section may give a release and discharge for any debt or other chose in action so settled and paid or for any property so received, or may execute such instruments as are appropriate to effect the conveyance or transfer of any real or personal property so sold for cash. He shall hold, invest or use all funds or other property so received as ordered by the court.

Advisory Committee Comment

Section 250 amends ORS 126.555 to make it inapplicable to persons under legal disability by reason of minority, since transactions involving minors are covered by section 249 of this draft.

Section 251. (When power of attorney not terminated by disability) (1) When a principal designates another his attorney in fact or agent by a power of attorney in writing and the writing contains no words which otherwise limit the period of time of its effectiveness, the powers of the attorney in fact or agent shall be exercisable by him on behalf of the principal notwithstanding later disability or incompetence of the principal at law.

(2) All acts done by the attorney in fact or agent pursuant to the power of attorney during any period of disability

or incompetence of the principal at law shall have the same effect and shall inure to the benefit of and bind the principal as if the principal were not disabled or incompetent.

(3) If a guardian of the estate or conservator of the estate is appointed thereafter for the principal, the attorney in fact or agent, during the continuance of that appointment, shall account to the guardian or conservator rather than to the principal. The guardian or conservator shall have the same power which the principal would have, but for his disability or incompetence, to revoke, suspend or terminate all or any part of the power of attorney.

Advisory Committee Comment

Section 251 has been adapted from section 5-301, Uniform Probate Code. It differs in that the Uniform Probate Code section would require that the power of attorney contain words to the effect that the power shall not terminate on disability of the principal. Section 251 would assume that the principal intended the power of attorney to have continuing effectiveness unless by its terms a contrary intent appears.

Section 5-301 is supplemented by section 5-302, Uniform Probate Code, which, according to the comment thereon, adopts the civil law rule that powers of attorney are not revoked on death or disability until the attorney in fact has actual knowledge of the death or disability. The committee does not propose adoption of section 5-302, preferring instead to rely upon the law of Oregon on the subject as it now exists.

Part 3. Conservatorships

Section 252. Sections 253 to 255 of this Act are added to and made a part of ORS 126.606 to 126.675.

Section 253. (Continuing business of ward) The court, by order, may authorize a 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. The 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.

Advisory Committee Comment

Section 253 would embody in the conservatorship statutes provision from the guardianship code authorizing the court to permit a conservator to continue the business of the ward. See ORS 126.255.

Section 254. (Gifts from ward's estate; expenditures for ward's relatives) (1) The court, by order, may authorize a 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.

(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.

(2) The 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.

Advisory Committee Comment

Section 254 would embody in the conservatorship statutes provision from the guardianship code authorizing the court to permit application of the estate of a ward to charitable gifts and to support of relatives. See ORS 126.295.

Section 255. (Accounting by conservator) (1) A conservator shall make and file in the conservatorship proceeding a written verified account of his administration at the times and of the kind required of a guardian of the estate by ORS 126.336.

(2) Before filing any account other than his final account, a conservator shall cause a copy of the account to be mailed or delivered to the ward. If the ward is incompetent, the conservator shall cause a copy of the account 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 the mailing or delivery shall be filed with the account.

(3) A conservator shall cause a copy of his final account to be served on the ward if living and competent; otherwise, on the guardian of the estate for the ward or the executor or administrator of the deceased ward's estate and on each person to whom copies of other accounts are required to be mailed or delivered as provided in subsection (1) of this section. Objections to the final account may be made within 30 days after the date of the service.

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 257 (page 259)

[(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

Advisory Committee Comment

Section 255 would include in the conservatorship statutes provision similar to that in the guardianship code covering the filing and distribution of copies of interim and final accounts.

Section 256. ORS 126.675 is amended to read:

126.675. (Orders of court in winding up conservatorship affairs; discharge of conservator; exoneration of surety; vacating order) (1) After the termination of a conservatorship, the court may make orders as provided in ORS 126.535. [, the conservator shall be discharged and the sureties on his bond exonerated and]

(2) The court, after hearing objections made pursuant to section 255 of this 1969 Act to the final account and upon settlement of the final account and determination that property of the ward has been delivered to the person lawfully entitled thereto, 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 notice thereof, vacate the order discharging the conservator to permit recovery against the conservator and the surety on his bond, or either of them, when it appears that the failure of the claimant to object to the final account of the conservator resulted from the mistake, inadvertence, surprise or excusable neglect of the claimant.

(3) A copy of the order discharging the conservator may be recorded as provided in ORS [126.535 to] 126.545.

Advisory Committee Comment

Section 256 amends ORS 126.675 to conform the provision

for discharge of a conservator and exoneration of the surety on his bond to the provision in the guardianship code pertaining to a guardian of the estate. See ORS 126.540, as amended by section 247 of this draft. Note the inclusion of the similar provision granting finality to the discharge of a conservator, and relieving from a failure to object resulting from mistake, inadvertence, surprise or excusable neglect as now provided in ORS 18.160.

ARTICLE X. MISCELLANEOUS PROVISIONS

Part 1. Miscellaneous Amendments

Section 257. 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.

Advisory Committee Comment

See the introductory comment to Part 2, Article I, of this draft, and the comment on section 8.

Section 258. 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, Coos, 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.

Section 257 (page 260)

(2)(cont'd.) 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.]

Renumber subsection (3) as subsection (2).

[(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)] (2) 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 259. 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 260. 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 261. 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 [representatives] representative 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 [representatives] representative 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.]

Advisory Committee Comment

Section 261 would amend ORS 12.190 to eliminate the words "and the cause of action survives" as indicated. The

portion of the ORS section beginning "the issuing of letters testamentary" also is deleted, since it is not considered necessary to extend the statute of limitations beyond the one year previously provided.

Section 262. 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.

(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 successors in interest of the transferor.

Advisory Committee Comment

Section 262 would amend ORS 13.080 as indicated. Chapter 620, Oregon Laws 1965, repealed the former ORS 121.010, which limited survival of actions, and amended ORS 121.020 (see section 164 of the proposed code) 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 committee is conforming these sections to ORS 121.020.

In the interest of clarity, the committee 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 ORS 12.190 and section 160 of the proposed code. Paragraph (b) adds the requirement that the action or suit 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 proposed code for the priority of payment of claims and other actions against the personal representative.

Subsection (3) is the present wording, 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 263. 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] circuit court, 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

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 263 (pages 264 and 265)

Delete all of section 263. ORS 21.313, proposed to be amended by section 263, will be listed in section 290 for proposed repeal.

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 264. 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 265. 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.

Advisory Committee Comment

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. See the comment on section 41 of the proposed code.

Section 266. 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)] (1) In Benton, Clatsop, Curry, Deschutes, Hood River, Lincoln, Linn, Polk, Umatilla, Wasco, Washington and Yamhill Counties.

[(b)] (2) 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 267. ORS 91.020 is amended to read:

91.020. (Tenancies classified) Tenancies are as follows: Tenancy at sufferance, tenancy at will, tenancy for years, tenancy from year to year, tenancy from month to month, [tenancy by curtesy,] tenancy by entirety and tenancy for life. The times and conditions of the holdings shall determine the nature and character of the tenancy.

Section 268. ORS 91.030 is amended to read:

91.030. (Tenancy by entirety or for life) A [tenancy by curtesy, a] tenancy by entirety and a tenancy for life

shall be such as now fixed and defined by the laws of the State of Oregon.

Section 269. ORS 93.190 is amended to read:

93.190. (Trustees or personal representatives as joint tenants; filling vacancies in office) (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] but 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 270. ORS 93.240 is amended to read:

93.240. (Rights to deferred instalments of purchase price where two or more persons join as sellers in contract of sale of real property) (1) Subject to the provisions contained in this section, whenever two or more persons join as sellers in the execution of a contract of sale of real property, unless a contrary purpose is expressed in the contract, the right to receive payment of deferred instalments of the purchase price shall be owned by them in the same proportions, and with the same incidents, as title to the real property was vested in them immediately preceding the execution of the contract of sale.

[(2) If immediately preceding the execution of any such contract one or more of the sellers held no estate in the real property covered thereby other than an inchoate estate of or right to dower or curtesy, then, unless a contrary purpose is expressed in the contract, the joinder of such party or parties shall be deemed to have been for the purpose of barring dower or curtesy only and, except to the extent specifically prescribed therein, such person or persons shall have no interest in or right to any portion of the unpaid balance of the purchase price of said real property.]

[(3)] (2) If immediately prior to the execution of a contract of sale of real property title to any interest in the property therein described was vested in the sellers or some of the sellers as tenants by the entirety or was otherwise subject to any right of survivorship, then, unless a

contrary purpose is expressed in the contract, the right to receive payment of deferred instalments of the purchase price of [such] the property shall likewise be subject to like rights of survivorship.

[(4) This section, being declaratory of existing law, applies to contracts of sale of real property heretofore executed as well as to those hereafter executed.]

(3) Nothing contained in this section shall be deemed to modify or amend the provisions of subsection (4) of ORS 118.010 relating to inheritance taxes payable by reason of succession by survivorship as provided by subsection [(3)] (2) of this section.

Section 271. ORS 93.420 is amended to read:

93.420. (Execution of deed where personal representative, guardian or conservator is unable or refuses to act) If any person is entitled to a deed from [an executor, administrator,] a personal representative, guardian or conservator who has died or resigned, has been discharged, disqualified or removed or refuses to execute it, the deed may be executed by the judge [authorizing the sale,] before whom the proceeding is pending or by his successor.

Advisory Committee Comment

ORS 93.420, a useful statutory provision, is amended by section 271 to cover the situation where the personal representative sells property without a court order.

Section 272. ORS 94.330 is amended to read:

94.330. (Registration of transfer or mortgage when interests are outstanding) No transfer or mortgage of any

estate or interest in registered land shall be registered until it is made to appear to the registrar that the land has not been sold for any tax or assessment upon which a deed has been given and the title is outstanding, or upon which a deed may thereafter be given [, and that the dower, right of dower, and estate of homestead, if any, have been released or extinguished or that the transfer or mortgage is intended to be subject thereto, in which case it shall be stated in the certificate of title].

Section 273. ORS 97.130 is amended to read:

97.130. (Right to control disposition of remains) The right to control the disposition of the remains of a decedent, unless other directions have been given by him, vests in his surviving spouse, his surviving children, his surviving parents and the person in the next degree of kindred to him, in the order named. If disposition of the remains has not been directed and authorized within 10 days after the date of the death of the decedent, the special administrator or the personal representative of the estate of the decedent may direct and authorize disposition of the remains.

Advisory Committee Comment

Section 273 would amend ORS 97.130 as indicated. The amendment would take care of a present and serious problem when directions and authority for disposition of the remains of deceased persons cannot be obtained from those now given such authority by the statute section. The authority added by the amendment would effectively meet this problem.

Section 274. ORS 116.115 is amended to read:

116.115. (Authority of personal representative when

Section 273 (page 270)

Section 273. ORS 97.130 is amended to read:

97.130. (Right to control disposition of remains) The right to control the disposition of the remains of a decedent, unless other directions have been given by him, vests in his surviving spouse, his surviving children, his surviving parents and the person in the next degree of kindred to him, in the order named. If disposition of the remains has not been directed and authorized within 10 days after the date of the death of the decedent, a public health officer, the special administrator or the personal representative of the estate of the decedent may direct and authorize disposition of the remains.

will includes gift of body for scientific and medical purposes; nonliability for actions) The authority of a person named [executor] personal representative of a will which includes a gift pursuant to ORS 97.132 extends to performing acts necessary to carrying out the gift although [the] letters testamentary have not been issued. A person named [executor] personal representative who carries out the gift of the testator before issuance of letters testamentary or under a will which is not admitted to probate shall not be liable to the surviving spouse or next of kin for performing acts necessary to carry out the gift of the testator.

Advisory Committee Comment

Section 274 amends ORS 116.115 as indicated. Since ORS 97.130, as amended, is a general section giving power to the personal representative to control disposition of the remains of the decedent, it would seem preferable that ORS 116.115 be placed to follow ORS 97.134. It should be noted that ORS 97.132 was section 1, chapter 674, Oregon Laws 1961; ORS 97.134 comprised section 2 and 3 of that chapter, and ORS 116.115 was section 4 of the same chapter. ORS 116.115 applies not only to wills which have been probated, but to unprobated instruments.

Section 275. ORS 105.050 is amended to read:

105.050. (Cotenant shall prove ouster) In an action [for the recovery of dower before admeasurement or] by a tenant in common of real property against a cotenant, the plaintiff shall show, in addition to the evidence of his right of possession, that the defendant either denied the plaintiff's right or did some act amounting to a denial.

Section 276. ORS 105.340 is amended to read:

105.340. (Provision for future rights or interests)

In all cases of sales in partition when it appears that [a married woman has an inchoate right of dower in any of the property sold, or that] any person has a vested or contingent future right or estate [therein] in any of the property sold, the court shall ascertain and settle the proportional value of the [inchoate,] contingent or vested right or estate according to the principles of law applicable to annuities and survivorship, and shall direct such proportion of the proceeds of sale to be invested, secured or paid over in such manner as to protect the rights and interests of the parties.

Section 277. ORS 107.100 is amended to read:

107.100. (Provisions of decree of divorce or annulment) (1) Whenever a marriage is declared void or dissolved, the court has power further to decree as follows:

(a) For the future care and custody of the minor children of the marriage as it may deem just and proper. In determining custody the court shall consider the best interests of the child and the past conduct and demonstrated moral standards of each of the parties. No preference in custody shall be given to the mother over the father for the sole reason that she is the mother.

(b) For the recovery from the party not allowed the care and custody of such children, such amount of money, in gross or in instalments, or both, as may be just and proper for such party to contribute toward the nurture and education of such children.

(c) For the recovery from the party at fault or, under

unusual circumstances in the discretion of the court, from the party not at fault, such amount of money, in gross or in instalments, or both, as may be just and proper for such party to contribute to the maintenance of the other; provided that in case recovery from the party not at fault is allowed, the decree must contain special findings of the facts constituting the unusual circumstances; provided, further, that the court may approve, ratify and decree voluntary property settlement agreements that provide for contribution by the prevailing party to the maintenance and support of the party in fault. In case a divorce is granted under the provisions of subsection (7) of ORS 107.030, the court may require the prevailing party to contribute to the support and maintenance of the mentally ill party to such extent and in such manner as the court may determine to be just and equitable.

(d) For the delivery to one party of such party's personal property in the possession or control of the other at the time of giving the decree.

(e) For the appointment of one or more trustees to collect, receive, expend, manage or invest, in such manner as the court directs, any sum of money decreed for the maintenance of a party or the nurture and education of minor children committed to such party's care and custody.

(f) To change the name of the wife.

(g) A judgment against one party in favor of the other for any sums of money found to be then remaining unpaid upon any enforceable order or orders theretofore duly made and entered in the proceedings pursuant to any of the provisions

of ORS 107.090, and for any such further sums as additional attorney fees or additional costs and expenses of suit or defense as the court finds reasonably and necessarily incurred by such party; or, in the absence of any such order or orders pendente lite, a like judgment for such amount of money as the court finds was reasonably necessary to enable such party to prosecute or defend the suit, as the case may be.

[(h) For the extinguishment and barring of dower and curtesy.]

(2) If an appeal is taken from a decree declaring a marriage void or dissolved or from any part of a decree rendered in pursuance of the provisions of ORS 107.010 to 107.100, the court making such decree shall provide for the temporary support of the minor children of the parties thereto, and may provide for the temporary support of the party found not to be at fault. The order may be modified at any time by the court making the decree appealed from, shall provide that the support money be paid in monthly instalments, and shall further provide that it is to be in effect only during the pendency of the appeal to the Supreme Court. No appeal to the Supreme Court lies from any such temporary order.

(3) If an appeal is taken from the decree or other appealable order in a suit for dissolution or annulment of the marriage contract, and the Supreme Court awards costs and disbursements to the prevailing party, it may also award to that party, as part of the costs, such additional sum of

money as it may adjudge reasonable as an attorney fee on the appeal.

(4) Whenever a marriage is declared void or dissolved, the court shall make such division or other disposition between the parties of the real or personal property, or both, of either or both of the parties as may be just and proper in all the circumstances, in addition to any further relief decreed as provided for in subsection (1), (2) or (3) of this section.

(5) If, as a result of a suit for the dissolution or annulment of a marriage, the parties to such suit become owners of an undivided interest in any real or personal property, or both, either party may maintain supplemental proceedings by filing a petition in such suit for the partition of such real or personal property, or both, within two years from the entry of said decree, showing among other things that the original parties to such decree and their joint or several creditors having a lien upon any such real or personal property, if any there be, constitute the sole and only necessary parties to such supplemental proceedings. The procedure in the supplemental proceedings shall be, as far as applicable, the procedure provided for in ORS 105.205 to 105.405, for the partition of real property, and the court granting such decree and the judges thereof shall have in the first instance and retain jurisdiction in equity for such purpose of partition as provided for in this subsection.

Section 278. 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, are extinguished and barred.]

Section 279. ORS 109.041 is amended to read:

109.041. (Effect of decree of adoption) (1) The effect of a decree of adoption [heretofore or hereafter granted by a court of this state] shall be that the relationship, rights and obligations between an adopted person [and his descendants] and

(a) His adoptive parents, [their descendants and kindred,] and

(b) His natural parents, [their descendants and kindred]

shall be the same to all legal intents and purposes after the entry of such decree as if the adopted person had been born in lawful wedlock to his adoptive parents and had not been born to his natural parents.

(2) Where a person has been [or shall be] adopted [in this state] by his stepparent, this section shall leave unchanged the relationship, rights and obligations between such adopted person [and his descendants] and his natural parent, who is the spouse of the person who adopted him [and the descendants and kindred of such natural parent].

(3) This section does not affect intestate succession upon the death of natural or adoptive parents or adopted children.

Advisory Committee Comment

Section 279 would amend ORS 109.041 to eliminate the limitation thereof to adoptions granted by the courts of Oregon. The committee has been unable to find any legislative reason why the very general provisions of ORS 109.041 are limited to decrees of adoption granted by Oregon courts only, while ORS 111.212 applies the laws of descent and distribution to adoptions irrespective of whether the adoption was granted in Oregon. ORS 109.050, the general statute on the relation of adopted child to adopting parents, is not limited to adoption decrees granted by an Oregon court. Rather than perpetuate this seemingly artificial distinction between laws of descent and distribution affecting adopted children and all other relationships between the adopted child and his descendants, as limited in ORS 109.041, it would seem advisable to eliminate the distinction and make ORS 109.041 effective irrespective of where the adoption was granted.

It will be noted that ORS 109.041 has been further amended to restrict its operation to relationships other than the rights of intestate succession, since legislation covering rights of intestate succession belong properly in the probate code, as embodied in sections 30 to 32 of the proposed code.

Section 280. 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 281. 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 post office, directed to such parent at this 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 282. ORS 178.080 is amended to read:

178.080. (Collection of fines, penalties and forfeitures) (1) The State Treasurer, in his discretion, may

appoint a collector to collect the amounts of fines, penalties[,] and forfeitures [and escheats] due or owing the State of Oregon, and, in connection therewith, to make examinations of the dockets of all courts other than of the Supreme Court. The collector may examine all public records for gift tax and inheritance tax determinations and evasions.

(2) The cost of all examinations, investigations and searches, and of all traveling and other expenses in connection therewith, are to be apportioned among the departments principally concerned therewith, pursuant to agreements made between the State Treasurer and the departments; but the entire cost so apportioned, exclusive of expenses involved in litigated cases, shall not average more than $300 per month for the state fiscal year.

(3) The State Treasurer may institute legal proceedings in the name of the State of Oregon, upon his relation or otherwise without joinder of any other party, to effect collection of any fine, penalty[,] or forfeiture [or escheat] due the state and may charge the net cost of the proceedings to the department in whose behalf suit or action was instituted.

(4) All judicial, municipal and county officers shall cooperate with the State Treasurer with respect to the collections, searches and investigations and shall furnish the State Treasurer with any information contained in any of the records under their respective custodies relating thereto.

(5) The State Police Department shall cooperate in the investigation of fines, penalties and forfeitures.

[(6) All county clerks, upon request, shall furnish the State Treasurer with the titles of estates of deceased persons which have remained open for more than three years and in which no heirs, or only parties whose right to inherit the proceeds thereof is being contested, have appeared to claim the estates.]

Section 283. 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 284. 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 285. 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 286. 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] section 127 of this 1969 Act, 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 287. 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

Preliminary Draft
Proposed Oregon Probate Code
Advisory Committee Changes
December 6, 1968

Section 288 (pages 285 and 286)

Delete all of subsection (1).

Renumber subsections (2), (3) and (4) as subsections (1), (2) and (3), respectively.

[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] section 127 of this 1969 Act, and upon such other terms and conditions as the court may prescribe.

Part 2. Application of Act and Repeals

Section 288. (Application of Act) Except as specifically provided otherwise in this Act, on the effective date of this Act:

(1) This Act applies to wills executed thereon or thereafter and proceedings concerning decedents dying thereon or thereafter. Wills executed before the effective date shall be governed by the law then in effect, except that such wills shall be considered lawfully executed if the application of section 41 of this Act would make them so.

(2) The procedure prescribed by this Act applies to any proceedings commenced thereon or thereafter regardless of the time of the death of the decedent, and also as to any further procedure in proceedings then pending except to the extent that in the opinion of the court the former procedure should be made applicable in a particular case in the interest of justice or because of infeasibility of application of the procedure prescribed by this Act.

(3) A personal representative, guardian or conservator holding an appointment on that date shall continue to hold the appointment, but shall have only the powers conferred and

be subject to the duties imposed by this Act with respect to any act occurring or done thereon or thereafter, other than acts pursuant to powers or duties validly conferred or imposed by a will executed before the effective date.

(4) An act done before the effective date in any proceeding and any accrued right shall not be impaired by this Act. When a right is acquired, extinguished or barred upon the expiration of a prescribed period of time which has commenced to run by the provisions of any statute before the effective date, those provisions shall remain in force with respect to that right.

Comment

Section 288 has not been approved or considered by the Advisory Committee. It was added to the draft immediately preceding publication because of an apparent need for provisions of the kind contained therein. For comparable sections, see section 2, Iowa Probate Code; sections 11.99.010 and 11.99.020, Washington Probate Code; section 2, Model Probate Code, and section 1-102, Uniform Probate Code.

The section is intended to be illustrative of the kinds of provisions on the application of the proposed code that may be made. For example, unlike the Uniform Probate Code section referred to above, subsection (1) would make the proposed code inapplicable to wills executed before the effective date thereof. Not only would the Uniform Probate Code be applicable to wills previously executed, but provision is made therein that rules of construction provided in the Uniform Code apply to instruments previously executed unless there is clear indication of a contrary intent. In the case of the proposed code, subsection (1) presents the issue of whether the proposed code should apply to wills previously executed. Note, also, that the subsection would recognize the validity of wills executed previously if that execution would be valid under section 41 of the proposed code, such as holographic wills valid where executed.

Section 289. (Status of headings, comments and tables) The article, part and section headings or captions, the comments and the tables used in this bill are provided only for

the purposes of explaining and convenience in locating provisions of this bill. They do not become part of the statutory law of this state. They do not necessarily express any legislative intent in the enactment of this bill.

Section 290. (Repeals) ORS 3.140, 3.180, 3.340, 5.040, 5.050, 5.070, 5.100, 93.170, 105.065, 109.345, 109.370, 111.010, 111.020, 111.030, 111.040, 111.050, 111.060, 111.070, 111.110, 111.120, 111.130, 111.140, 111.150, 111.160, 111.170, 111.210, 111.212, 111.231, 112.050, 113.010, 113.020, 113.030, 113.040, 113.050, 113.060, 113.070, 113.080, 113.110, 113.120, 113.130, 113.140, 113.150, 113.160, 113.210, 113.220, 113.230, 113.240, 113.250, 113.260, 113.270, 113.280, 113.290, 113.410, 113.420, 113.430, 113.440, 113.450, 113.510, 113.520, 113.530 113.540, 113.610, 113.620, 113.630, 113.640, 113.650, 113.660, 113.670, 113.680, 113.690, 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, 115.010, 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, 115.990, 116.005, 116.010, 116.015, 116.020, 116.025, 116.105, 116.110, 116.120, 116.125, 116.130, 116.135, 116.140, 116.145, 116.150, 116.155, 116.160, 116.165, 116.170, 116.175, 116.180, 116.186, 116.190, 116.195, 116.305, 116.310, 116.315, 116.320, 116.325, 116.330,

116.335, 116.340, 116.405, 116.410, 116.415, 116.420, 116.425, 116.430, 116.435, 116.440, 116.445, 116.450, 116.455, 116.460, 116.465, 116.505, 116.510, 116.515, 116.520, 116.525, 116.530, 116.535, 116.540, 116.545, 116.550, 116.555, 116.560, 116.565, 116.570, 116.575, 116.580, 116.585, 116.590, 116.595, 116.705, 116.710, 116.715, 116.720, 116.725, 116.730, 116.735, 116.740, 116.745, 116.750, 116.755, 116.760, 116.765, 116.770, 116.775, 116.780, 116.785, 116.790, 116.795, 116.800, 116.805, 116.811, 116.815, 116.820, 116.825, 116.830, 116.840, 116.850, 116.860, 116.870, 116.880, 116.890, 116.900, 116.990, 117.010, 117.020, 117.030, 117.110, 117.120, 117.130, 117.140, 117.150, 117.160, 117.170, 117.180, 117.310, 117.315, 117.320, 117.330, 117.340, 117.350, 117.361, 117.370, 117.380, 117.390, 117.510, 117.520, 117.530, 117.540, 117.550, 117.560, 117.610, 117.612, 117.615, 117.620, 117.630, 117.640, 117.650, 117.660, 117.670, 117.680, 117.690, 117.710, 118.420, 118.480, 118.500, 118.610, 118.620, 118.630, 118.650, 118.670, 118.680, 118.690, 120.010, 120.020, 120.030, 120.040, 120.050, 120.060, 120.070, 120.080, 120.090, 120.100, 120.110, 120.120, 120.140, 120.150, 120.310, 120.320, 120.330, 120.340, 120.350, 120.360, 120.370, 120.380, 120.390, 120.400, 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, 121.330, 121.340, 121.350, 121.360, 121.370, 126.011, 126.176, 126.300, 126.446, 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, 127.350, 427.085 and 722.385 are repealed.

Comment

Section 290 would repeal a large percentage of the statute sections found in the present probate code (ORS chapters 111 to 121), as well as a number of existing statute sections located elsewhere in Oregon Revised Statutes.

In summary, sections of the present probate code are disposed of as follows:

ORS chapter 111 (Descent and Distribution): All sections repealed.

ORS chapter 112 (Uniform Simultaneous Death Act): ORS 112.050 repealed. All other sections amended.

ORS chapter 113 (Dower and Curtesy; Election Against Will): ORS 113.090 unaffected. All other sections repealed.

ORS chapter 114 (Wills): All sections repealed.

ORS chapter 115 (Initiation of Probate or Administration): All sections repealed.

ORS chapter 116 (Administration of Estates): ORS 116.115 and 116.835 amended. All other sections repealed.

ORS chapter 117 (Settlement and Distribution): All sections repealed.

ORS chapter 118 (Inheritance Tax): ORS 118.010, 118.230, 118.280, 118.300, 118.350, 118.640, 118.660 and 118.700 amended. ORS 118.420, 118.480, 118.500, 118.610, 118.620, 118.630, 118.650, 118.670, 118.680 and 118.690 repealed. All other sections unaffected.

ORS chapter 119 (Gift Tax): All sections unaffected.

ORS chapter 120 (Escheat; Estates of Persons Presumed to be Dead): ORS 120.230 unaffected. ORS 120.130, 120.210 and 120.220 amended. All other sections repealed.

ORS chapter 121 (Actions and Suits Affecting Decedents' Estates and Administration): ORS 121.020 and 121.090 amended. All other sections repealed.

Section 291. (Effective date) This Act takes effect on July 1, 1970.

Comment

Section 291 has not been approved by the Advisory Committee. It was added to the draft immediately preceding

publication because of an apparent need for a special effective date provision.

Assuming the proposed code is enacted at the 1969 regular session of the Oregon Legislative Assembly, the section would make it effective on July 1, 1970. Absent any special effective date provision, the enacted code would take effect 90 days after adjournment of the legislative session. It appears desirable, for at least two reasons, to postpone the effective date of the enacted code. First, a period of time during which persons affected may become familiar with the provisions of the enacted code seems in order. Second, the shift of probate jurisdiction to the circuit court, the provision for probate commissioners and other matters may have budgetary and other fiscal ramifications that may require some leadtime for planning, and July 1, 1970, coincides with the beginning of a fiscal year for budgetary purposes.

TABLE SHOWING DISPOSITION OF EXISTING STATUTE SECTIONS

Column (1) lists every section of Oregon Revised Statutes that is included within or repealed by the preliminary draft of a proposed Oregon probate code. Column (2) indicates whether the ORS section listed is amended (A), repealed (R) or not affected (NA). Column (3) indicates, in the case of an amended ORS section, the section of the draft that accomplishes the amendment; and, in the case of a repealed ORS section, the section of the draft that contains subject matter comparable to that found in the repealed ORS section.

(1)	(2)	(3)
3.101	A	257
3.130	A	258
3.140	R	5, 6
3.180	R	2
3.340	R	5, 6
5.040	R	5
5.050	R	-
5.070	R	-
5.080	A	259
5.100	R	-
7.230	A	260
12.190	A	261
13.080	A	262
21.313	A	263
23.260	A	264
41.520	A	265
46.092	A	266
91.020	A	267
91.030	A	268
93.170	R	-
93.190	A	269
93.240	A	270
93.420	A	271
94.330	A	272
97.130	A	273
105.050	A	275
105.065	R	-
105.340	A	276
107.100	A	277
107.280	A	278
109.041	A	279
109.326	A	280
109.330	A	281
109.345	R	-
109.370	R	-
111.010	R	21, 22
111.020	R	16 to 20, 115
111.030	R	16 to 20, 115

(1)	(2)	(3)
111.040	R	24
111.050	R	-
111.060	R	59 to 69
111.070	R	-
111.110	R	27
111.120	R	27
111.130	R	-
111.140	R	28
111.150	R	27
111.160	R	27
111.170	R	29
111.210	R	30
111.212	R	30
111.231	R	25
112.010	A	70
112.020	A	71
112.030	A	72
112.040	A	74
112.050	R	-
112.060	A	75
112.070	A	76
112.080	A	77
113.010	R	-
113.020	R	-
113.030	R	108
113.040	R	111
113.050	R	108

(1)	(2)	(3)
113.060	R	111
113.070	R	99
113.080	R	-
113.090	NA	88
113.110	R	-
113.120	R	-
113.130	R	-
113.140	R	-
113.150	R	-
113.160	R	-
113.210	R	-
113.220	R	-
113.230	R	-
113.240	R	-
113.250	R	-
113.260	R	-
113.270	R	-
113.280	R	-
113.290	R	-
113.410	R	-
113.420	R	-
113.430	R	-
113.440	R	-
113.450	R	-
113.510	R	-
113.520	R	-
113.530	R	-

(1)	(2)	(3)
113.540	R	-
113.610	R	-
113.620	R	-
113.630	R	-
113.640	R	-
113.650	R	-
113.660	R	-
113.670	R	-
113.680	R	-
113.690	R	-
114.010	R	1(32)
114.020	R	38
114.030	R	39
114.040	R	39
114.050	R	39, 41
114.060	R	41
114.070	R	42
114.110	R	44
114.120	R	45
114.130	R	46, 47
114.140	R	48
114.150	R	49, 161
114.210	R	-
114.220	R	50
114.230	R	49, 51, 52
114.240	R	55
114.250	R	56

(1)	(2)	(3)
114.260	R	-
114.270	R	-
114.310	R	40
114.320	R	40
114.330	R	40
114.340	R	40
114.410	R	58
114.420	R	58
114.430	R	58
114.440	R	58
115.010	R	9
115.020	R	84
115.110	R	57
115.120	R	84
115.130	R	57
115.140	R	81, 82
115.150	R	-
115.160	R	13, 85
115.170	R	87
115.180	R	85, 98
115.190	R	88, 92
115.200	R	95
115.210	R	92
115.220	R	120
115.310	R	81, 88, 120
115.320	R	88
115.330	R	83

(1)	(2)	(3)
115.340	R	95
115.350	R	92
115.410	R	89
115.420	R	89
115.430	R	90, 91
115.440	R	90
115.450	R	91
115.460	R	91
115.470	R	93
115.480	R	93
115.490	R	93
115.500	R	94, 95
115.510	R	94, 95
115.520	R	95
115.990	R	57
116.005	R	99, 102
116.010	R	104
116.015	R	100, 105
116.020	R	104, 107
116.025	R	-
116.105	R	116, 118
116.110	R	127(4)
116.115	A	274
116.120	R	128
116.125	R	127(14)
116.130	R	127(15)
116.135	R	127(15)

(1)	(2)	(3)
116.140	R	161 to 163
116.145	R	163
116.150	R	163
116.155	R	162
116.160	R	163
116.165	R	162
116.170	R	127(20)
116.175	R	127(20)
116.180	R	127(22)
116.186	R	189
116.190	R	187
116.195	R	186, 187
116.305	R	139
116.310	R	139
116.315	R	139
116.320	R	139
116.325	R	-
116.330	R	140
116.335	R	140
116.340	R	140
116.405	R	122
116.410	R	122
116.415	R	123
116.420	R	124
116.425	R	124
116.430	R	-
116.435	R	124

(1)	(2)	(3)
116.440	R	125
116.445	R	126
116.450	R	-
116.455	R	-
116.460	R	-
116.465	R	-
116.505	R	121
116.510	R	141, 147, 148
116.515	R	142, 144
116.520	R	153
116.525	R	154, 155
116.530	R	154, 156
116.535	R	156
116.540	R	155, 156
116.545	R	155, 156
116.550	R	156
116.555	R	159
116.560	R	156
116.565	R	146
116.570	R	146
116.575	R	154
116.580	R	150, 157
116.585	R	150, 157
116.590	R	106
116.595	R	106
116.705	R	129
116.710	R	129
116.715	R	129
116.720	R	129, 179
116.725	R	129
116.730	R	129, 179
116.735	R	129, 179
116.740	R	129
116.745	R	129
116.750	R	129
116.755	R	129
116.760	R	129
116.765	R	129
116.770	R	129
116.775	R	129
116.780	R	129
116.785	R	127(16), 129
116.790	R	127(16), 129
116.795	R	127(16), 129
116.800	R	127(16), 129
116.805	R	129
116.811	R	129
116.815	R	129
116.802	R	129, 135
116.825	R	129
116.830	R	129
116.835	A	132
116.840	R	129
116.850	R	129

(1)	(2)	(3)
116.860	R	129
116.870	R	129
116.880	R	129
116.890	R	129
116.900	R	129
116.990	R	-
117.010	R	174
117.020	R	-
117.030	R	151, 152
117.110	R	146, 151, 152
117.120	R	146, 152
117.130	R	146
117.140	R	152
117.150	R	127(1)
117.160	R	152
117.170	R	145, 147, 148
117.180	R	-
117.310	R	185
117.315	R	249
117.320	R	115, 116
117.330	R	179
117.340	R	179
117.350	R	168
117.361	R	168 to 170
117.370	R	169
117.380	R	171
117.390	R	171

(1)	(2)	(3)
117.510	R	6
117.520	R	6
117.530	R	6
117.540	R	6
117.550	R	6
117.560	R	6
117.610	R	174
117.612	R	175
117.615	R	175
117.620	R	176
117.630	R	177, 178
117.640	R	172, 173
117.650	R	172, 173
117.660	R	182, 183
117.670	R	183
117.680	R	183
117.690	R	-
117.710	R	188
118.010	A	209
118.230	A	210
118.280	A	211
118.300	A	212
118.350	A	213
118.420	R	84, 124, 217
118.480	R	-
118.500	R	-
118.610	R	122

(1)	(2)	(3)
118.620	R	122
118.630	R	124
118.640	A	214
118.650	R	124
118.660	A	215
118.670	R	217
118.680	R	217
118.690	R	217
118.700	A	218
120.010	R	20
120.020	R	-
120.030	R	-
120.040	R	-
120.050	R	-
120.060	R	-
120.070	R	-
120.080	R	-
120.090	R	-
120.100	R	-
120.110	R	-
120.120	R	-
120.130	A	33
120.140	R	-
120.150	R	-
120.210	A	34
120.220	A	35
120.230	NA	36

(1)	(2)	(3)
120.310	R	199, 200
120.320	R	199
120.330	R	199
120.340	R	202
120.350	R	202
120.360	R	204
120.370	R	206
120.380	R	205, 206
120.390	R	207
120.400	R	208
121.020	A	164
121.030	R	-
121.040	R	-
121.050	R	-
121.060	R	-
121.070	R	-
121.080	R	-
121.090	A	166
121.100	R	-
121.210	R	-
121.220	R	164
121.230	R	-
121.240	R	-
121.250	R	-
121.260	R	-
121.270	R	-

(1)	(2)	(3)
121.280	R	-
121.290	R	-
121.300	R	-
121.310	R	-
121.320	R	-
121.330	R	-
121.340	R	-
121.350	R	-
121.360	R	-
121.370	R	-
126.006	A	219
126.011	R	-
126.106	A	220
126.111	A	221
126.126	A	222
126.131	A	223
126.146	A	224
126.151	A	225
126.166	A	226
126.176	R	228
126.186	A	229
126.230	A	230
126.245	A	231
126.265	A	232
126.300	R	112
126.338	A	233
126.406	A	234
126.411	A	235
126.416	A	236
126.426	A	237
126.431	A	238
126.436	A	239
126.441	A	241
126.446	R	-
126.456	A	241
126.461	A	242
126.471	A	243
126.476	A	244
126.490	A	245
126.495	A	246
126.540	A	247
126.555	A	250
126.675	A	256
127.010	R	222
127.020	R	223, 224
127.030	R	225
127.040	R	-
127.050	R	-
127.060	R	-
127.070	R	-
127.080	R	-
127.090	R	-
127.100	R	235, 237, 238
127.110	R	-

(1)	(2)	(3)
127.120	R	-
127.130	R	-
127.140	R	-
127.150	R	-
127.160	R	-
127.170	R	-
127.180	R	-
127.190	R	-
127.310	R	222 to 224
127.320	R	-
127.330	R	-
127.340	R	-
127.350	R	-
178.080	A	282
179.650	A	283
179.670	A	284
419.488	A	285
427.085	R	-
697.165	A	286
697.695	A	287
722.385	R	-

TABLE SHOWING SOURCE

FROM EXISTING STATUTE SECTIONS

OF PRELIMINARY DRAFT SECTIONS

Column (1) lists every section of the preliminary draft of a proposed Oregon probate code. Column (2) indicates whether the draft section is new (N), an amendment of an existing section of Oregon Revised Statutes (A) or an existing ORS section not affected by the draft (NA). Column (3) indicates, in the case of a new section derived from or containing subject matter comparable to that found in an existing ORS section, the ORS section; and, in the case of an amendment of an existing ORS section, the ORS section.

(1)	(2)	(3)
1 (1-31)		-
(32)	N	114.010
2	N	3.130, 3.180, 46.092
3	N	-
4	N	-
5	N	3.140, 3.340, 5.040
6	N	3.140, 3.340, 117.510 to 117.560
7	N	-
8	N	-
9	N	115.010
10	N	-
11	N	-
12	N	-
13	N	43.110, 115.160
14	N	-
15	N	-
16	N	111.020, 111.030
17	N	111.020, 111.030
18	N	111.020, 111.030
19	N	111.020, 111.030
20	N	111.020, 111.030, 120.010
21	N	111.010(4)
22	N	111.010(5)
23	N	-
24	N	111.040
25	N	111.231
26	N	-
27	N	111.110, 111.120, 111.150, 111.160
28	N	111.140
29	N	111.170
30	N	111.210, 111.212
31	N	-
32	N	-

(1)	(2)	(3)
33	A	120.130
34	A	120.210
35	A	120.220
36	NA	120.230
37	N	178.080(6)
38	N	114.020
39	N	114.030 to 114.050
40	N	114.310 to 114.340
41	N	114.050, 114.060
42	N	114.070
43	N	-
44	N	114.110
45	N	114.120
46	N	114.130
47	N	114.130
48	N	114.140
49	N	114.150, 114.230(3)
50	N	114.220
51	N	114.230(1)
52	N	114.230(2)
53	N	-
54	N	-
55	N	114.240
56	N	114.250
57	N	115.110, 115.130, 115.990
58	N	114.410 to 114.440
59	N	111.060
60	N	111.060
61	N	111.060
62	N	111.060
63	N	111.060
64	N	111.060
65	N	111.060
66	N	111.060
67	N	111.060
68	N	111.060
69	N	111.060
70	A	112.010
71	A	112.020
72	A	112.030
73	N	-
74	A	112.040
75	A	112.060
76	A	112.070
77	A	112.080
78	N	-
79	N	-
80	NA	113.090
81	N	115.140, 115.310
82	N	115.140
83	N	115.330
84	N	115.020, 115.120, 118.420

(1)	(2)	(3)
85	N	115.160, 115.180(2)
86	N	-
87	N	115.170
88	N	115.190, 115.310, 115.320
89	N	115.410, 115.420
90	N	115.430, 115.440
91	N	115.430(4), 115.450, 115.460
92	N	115.190, 115.210, 115.350
93	N	115.470 to 115.490
94	N	115.500(1), 115.510
95	N	115.200, 115.340, 115.500 to 115.520
96	N	-
97	N	-
98	N	115.180
99	N	113.070, 116.005
100	N	116.015
101	N	-
102	N	116.005
103	N	-
104	N	116.010, 116.020
105	N	116.015
106	N	116.590, 116.595
107	N	116.020
108	N	113.030, 113.050
109	N	-
110	N	107.280
111	N	113.040, 113.060
112	N	126.300
113	N	-
114	N	-
115	N	111.020, 111.030, 117.320
116	N	116.105, 117.320
117	N	-
118	N	116.105
119	N	-
120	N	115.220, 115.310(2)
121	N	116.505
122	N	116.405, 116.410, 118.610, 118.620
123	N	116.415
124	N	116.420, 116.425, 116.435, 118.420, 118.630, 118.650
125	N	116.440
126	N	116.445
127		
(1)	N	97.130, 117.150
(2,3)	N	-
(4)	N	116.110
(5-13)	N	-
(14)	N	116.125
(15)	N	116.130, 116.135
(16)	N	116.785 to 116.800
(17-19)	N	-
(20)	N	116.170, 116.175
(21)	N	-
(22)	N	116.180
(23-25)	N	-
128	N	116.120

(1)	(2)	(3)
129	N	116.705 to 116.830, 116.840 to 116.900
130	N	-
131	N	-
132	A	116.835
133	N	-
134	N	-
135	N	116.820
136	N	-
137	N	-
138	N	-
139	N	116.305 to 116.320
140	N	116.330 to 116.340
141	N	116.510
142	N	116.515
143	N	-
144	N	116.515
145	N	117.170
146	N	116.565, 116.570, 117.110(5), 117.120, 117.130
147	N	116.510, 117.170
148	N	116.510, 117.170
149	N	-
150	N	116.580, 116.585
151	N	117.030, 117.110
152	N	117.030, 117.110, 117.120, 117.140, 117.160
153	N	116.520
154	N	116.525, 116.530, 116.575
155	N	116.525, 116.540, 116.545
156	N	116.530 to 116.550, 116.560
157	N	116.580, 116.585
158	N	-
159	N	116.555
160	N	-
161	N	114.150, 116.140
162	N	116.140, 116.155, 116.165
163	N	116.140 to 116.150, 116.160
164	A	121.020
165	N	-
166	A	121.090
167	N	-
168	N	117.350, 117.361(1)(2)
169	N	117.361(3), 117.370
170	N	117.361(4)
171	N	117.380, 117.390
172	N	117.640, 117.650
173	N	117.640, 117.650
174	N	117.010, 117.610
175	N	117.612, 117.615
176	N	117.620

(1)	(2)	(3)
177	N	117.630
178	N	117.630
179	N	116.720, 116.730, 116.735, 117.330, 117.340
180	N	-
181	N	-
182	N	117.660
183	N	117.660 to 117.680
184	N	-
185	N	117.310
186	N	116.195
187	N	116.190, 116.195
188	N	117.710
189	N	116.186
190	N	-
191	N	-
192	N	-
193	N	-
194	N	-
195	N	-
196	N	-
197	N	-
198	N	-
199	N	120.310 to 120.330
200	N	120.310
201	N	-
202	N	120.340, 120.350
203	N	-
204	N	120.360
205	N	120.380
206	N	120.370, 120.380
207	N	120.390
208	N	120.400
209	A	118.010
210	A	118.230
211	A	118.280
212	A	118.300
213	A	118.350
214	A	118.640
215	A	118.660
216	N	-
217	N	118.420, 118.670 to 118.690
218	A	118.700
219	A	126.006
220	A	126.106
221	A	126.111
222	A	126.126
223	A	126.131
224	A	126.146
225	A	126.151
226	A	126.166
227	N	-
228	N	126.176

(1)	(2)	(3)
229	A	126.186
230	A	126.230
231	A	126.245
232	A	126.265
233	A	126.338
234	A	126.406
235	A	126.411
236	A	126.416
237	A	126.426
238	A	126.431
239	A	126.436
240	A	126.441
241	A	126.456
242	A	126.461
243	A	126.471
244	A	126.476
245	A	126.490
246	A	126.495
247	A	126.540
248	N	-
249	N	117.315, 126.555
250	A	126.555
251	N	-
252	N	-
253	N	-
254	N	-
255	N	-
256	A	126.675
257	A	3.101
258	A	3.130
259	A	5.080
260	A	7.230
261	A	12.190
262	A	13.080
263	A	21.313
264	A	23.260
265	A	41.520
266	A	46.092
267	A	91.020
268	A	91.030
269	A	93.190
270	A	93.240
271	A	93.420
272	A	94.330
273	A	97.130
274	A	116.115
275	A	105.050
276	A	105.340
277	A	107.100
278	A	107.280
279	A	109.041
280	A	109.326
281	A	109.330
282	A	178.080

(1)	(2)	(3)
283	A	179.650
284	A	179.670
285	A	419.488
286	A	697.165
287	A	697.695

(1)	(2)	(3)
288	N	-
289	N	-
290	N	-
291	N	-