

ADVISORY COMMITTEE  
Probate Law Revision  
Twenty-first  
~~Twentieth~~ Meeting  
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Dates) 1:30 p.m., Friday, January 14, 1966  
and: and  
Times) 9 a.m., Saturday, January 15, 1966  
Place: Judge Dickson's courtroom  
244 Multnomah County Courthouse  
Portland

Suggested Agenda

1. Pretermitted children (sections 18 and 19, draft of proposed chapter on wills). See ORS 114.250 and 114.260.  
  
Redraft of sections 18 and 19 (Zollinger and Braun).  
  
Research report on remedy and procedure whereby pretermitted children obtain their shares (Frohnmayr and Riddlesbarger).
2. Deposit of wills with county clerk (sections 28 to 31, draft of proposed chapter on wills). See ORS 114.410 to 114.440.  
  
Reports by members on consultation with county clerks on present use of procedure under ORS 114.410 to 114.440.
3. Advancements and retainer.  
  
Report by Frohnmayr (dated December 10, 1965). Copies of this report were distributed to members before the December meeting.
4. Initiation of probate or administration (ORS chapter 115).  
  
Report by Gilley and Krause on revision of ORS chapter 115.

Note: One and one-half day joint meetings of the advisory and Bar committees are scheduled through August 1966 for the third Saturday of each month, all day, and the preceding Friday afternoon.

ADVISORY COMMITTEE  
Probate Law Revision

Twenty-first Meeting, January 14 and 15, 1966  
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The twenty-first meeting of the advisory committee (a joint meeting with the Committee on Probate Law and Procedure, Oregon State Bar) was convened at 1:30 p.m., Friday, January 14, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

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

The following members of the Bar committee were present: Bettis (arrived 3 p.m.), Gilley, Braun, Copenhaver, Hornecker, Krause, Rhoten, Richardson, Thalhofer and Warden. Boivin, Field, Lovett, Luoma and Tassock were absent.

Also present was Robert W. Lundy, Chief Deputy Legislative Counsel.

Pretermitted Heirs

Frohnmayer report (remedies of pretermitted heirs).  
Frohnmayer referred to and commented upon his report on remedies for enforcement of rights of pretermitted heirs in Oregon, which had been distributed to members of both committees prior to the meeting. [Note: A copy of this report constitutes Appendix A to these minutes.] He pointed out that the pertinent wording of the Oregon pretermitted heir statute (ORS 114.250) was "and the same shall be assigned to them, and all the other heirs, devisees and legatees shall refund their proportional part." He indicated that appropriate remedies of a pretermitted heir did not appear to include a will contest, citing authority for the proposition that a pretermitted heir was a petitioner for distribution and not a proper contestant of a will. He commented that pretermitted heir statutes were generally of the Massachusetts type, under which parol evidence was admissible to show that omission of an heir was intended by a testator, or the Missouri type, under which such parol evidence was not admissible, and noted that the Oregon statute was of the Missouri type. Frohnmayer suggested that the requirement of the Oregon statute as to refunding by heirs, devisees and legatees raised difficult questions involving possible differences in the treatment of real and

personal property and appropriateness of the time at which the remedy of pretermitted heirs should be asserted.

At Zollinger's suggestion, further consideration of Frohnmayer's report and the detailed problems involved in remedies of pretermitted heirs was postponed pending discussion and action on the wording of a proposed pretermitted heir statute.

Zollinger and Braun report (proposed statute). Zollinger referred to and commented upon his report, prepared in collaboration with Braun and distributed to members of both committees at the meeting, on a proposed pretermitted heir statute. [Note: A copy of this report constitutes Appendix B to these minutes.] He noted that the report did not set forth the pertinent provision of the 1963 Iowa Probate Code (section 267), which reads as follows:

"When a testator fails to provide in his will for any of his children born to or adopted by him after the making of his last will, such child, whether born before or after the testator's death, shall receive a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate, unless it appears from the will that such omission was intentional."

Zollinger stated that he and Braun were agreed that the pretermitted heir statute should not include descendants of deceased children of the testator because the effect of such inclusion was likely in most cases to go too far in defeating the expressed purpose of the testator, but he recognized that whether public policy required such inclusion was a question for the committees to decide.

Zollinger suggested the possibility of making no provision at all for pretermitted heirs in the proposed revised Oregon probate code. Allison expressed the view that some provision for pretermitted heirs should be made, suggesting that omission might be difficult to justify when the proposed revised code was before the Oregon legislature for approval. Krause moved, seconded by Thalhoffer, that a pretermitted heir statute be included in the proposed revised code. Motion carried.

Riddlesbarger commented that in his opinion the primary aim of the pretermitted heir statute was to carry out the probable intention of a testator, rather than to afford protection to a testator's children. Dickson agreed, indicating that protection of a testator's children should be accomplished in some other fashion.

Riddlesbarger referred to a draft of a proposed pre-termitted heir statute submitted for consideration by a committee of the Wisconsin Bar Association in February 1964, commenting that this draft contained a number of rules designed to implement the probable intention of a testator. The Wisconsin draft reads as follows:

"Sec. 7 UNINTENTIONAL FAILURE TO PROVIDE FOR ISSUE  
OF TESTATOR

"(1) Children born or adopted after making of the will.  
If a testator fails to provide in his will for any child born or adopted after the making of the will, such child is entitled to receive a share in the estate of the testator equal in value to the share which the child would have received if the testator had died intestate, unless

"(a) it appears from the will or evidence outside the will that such omission was intentional,

"(b) the testator intentionally eliminated all of his children known to be living at the time of execution of the will from any share under the will, or

"(c) the testator provided for the subsequently born or adopted child by a transfer or transfers outside the will, and the intent that such transfer or transfers be in lieu of a testamentary gift is either shown by statements of the testator or inferred from the amount of the transfers and other circumstances.

"If a child entitled to a share under this section dies before the testator, and such child leaves issue who survive the testator, the issue who represent such child are entitled to his share.

"(2) Living issue omitted by mistake. If it is established by clear and convincing evidence that a testator has by mistake or accident failed to provide in his will for any child living at the time of making of the will, or for the issue of a deceased child, such child or issue of a deceased child is entitled to receive a share in the estate of the testator equal in value to the share which he or they would have received if the testator had died intestate.

"(3) Time for presenting demand for relief. A demand for relief under this section must be presented to the

court in writing not later than (a) six months after allowance of the will, or (b) the final judgment, whichever first occurs.

"(4) From what estate share is to be taken. Except as subsection (5) provides otherwise, the court shall in its final judgment assign the share provided by this section:

"(a) from any intestate property first;

"(b) the balance from each of the devisees or legatees under the will in proportion to the value of the estate each would have received under the will as written, unless the obvious intention of the testator in relation to some specific devise or bequest or other provision in the will would thereby be defeated, in which case the court in its discretion may adopt a different apportionment and may exempt a specific devise or bequest or other provision.

"(5) Discretionary power of court to assign different share. If in any case under subsections (1) or (2) the court determines that the intestate share is a larger amount than the testator would have wanted to provide for the omitted child or issue of a deceased child, because it exceeds the value of a provision for another child or for issue of a deceased child under the will, or that assignment of the intestate share would unduly disrupt the testamentary scheme, the court may in its final judgment make such provision for the omitted child or issue out of the estate as it deems would best accord with the probable intent of the testator, such as assignment, outright or in trust, of any amount less than the intestate share but approximating the value of the interest of other issue, or modification of the provisions of a testamentary trust for other issue to include the omitted child or issue."

Zollinger suggested that the application of the pre-termitted heir statute should be limited to children born or adopted after execution of the will. He expressed the view that a person competent to make a will was competent to know the natural objects of his bounty, and commented that as to children born or adopted before execution of the will the testator's intention probably had been expressed therein, even if only by omission. Riddlesbarger expressed opposition to Zollinger's suggestion, remarking that the testator's intention was the crucial factor and that in many cases it might be established that the omission of children born or

adopted before execution of the will was unintentional. Zollinger moved, seconded by Allison, that application of the statute be limited to children born or adopted after execution of the will. Motion failed both committees by a separate vote of each.

The committees discussed briefly the inclusion of descendants of deceased children of a testator as pretermitted heirs. Zollinger and Braun expressed opposition to such inclusion. Frohnmayer, Thalhofer and Riddlesbarger indicated they favored such inclusion. Thalhofer suggested that a testator might be inclined to forget descendants of deceased children more often than living children. Riddlesbarger commented that descendants of deceased children should be included if it could be shown that their omission or the omission of the children by the testator was the result of mistake.

Zollinger revised proposed statute. Riddlesbarger suggested that the pretermitted heir statute contain one provision for children born or adopted after execution of the will on an automatic basis and another provision for all living children and descendants of all deceased children on the basis of proof of unintentional, mistaken or accidental omission. Zollinger proposed the following to carry out Riddlesbarger's suggestion:

"If any person makes his last will and dies, survived by a child born or adopted after the execution of his will, not provided for by his will and not a member of a class referred to therein, such child shall inherit and receive such share of the estate of the testator as would have been inherited by or distributed to him if the testator had died intestate.

"If the testator shall be survived by a child not named or provided for by his will and not a member of a class referred to therein or by a descendant of a deceased child when neither the deceased child nor his surviving descendant has been named or provided for by his will or is a member of a class referred to therein, such child or descendant of a deceased child shall inherit and receive such a share of the estate of the testator as would have been inherited by and distributed to him if the testator had died intestate if it shall appear and be found in a proceeding brought pursuant to ORS \_\_\_\_\_ that the omission of such child or descendant was inadvertent."

Zollinger pointed out that the second paragraph of the revised proposed statute was applicable to children born or

adopted before execution of the will and to descendants of any children who predeceased the testator either before or after execution of the will.

Butler commented that the proposed revised statute appeared to favor children born or adopted after execution of the will, and questioned the desirability of such favoritism. Rhoten suggested that if Riddlesbarger's idea of proof of unintentional omission were adopted, such proof should be required in the case of children born or adopted after execution of the will, as well as in the case of other children and their descendants.

Allison expressed the view that if there was to be an establishment of intention or lack of intention by a testator it would have to be as to persons about whom the testator could have had an intention at the time of execution of the will, and questioned whether the testator could have an intention as to persons not then in existence. Zollinger remarked, and Gilley agreed, that a testator could make express provision for children born or adopted after execution of the will.

Riddlesbarger referred to the words "not provided for" in the first paragraph of the proposed revised statute, and questioned whether an express disinheritance of a child was a provision for such child. Allison suggested, and Zollinger agreed, that the wording "not mentioned or provided for" should be used.

In response to a question by Dickson, Zollinger expressed the view that the proceeding for establishment of unintentional omission should be brought in a court of general jurisdiction. He proposed that the heirs and beneficiaries of the testator, so far as known or disclosed in the probate proceeding, should be made defendants in the proceeding for establishment of unintentional omission. He commented that the proceeding was essentially one in equity for determination of the fact of error or inadvertence, and suggested that a declaratory judgment proceeding be used. In response to a question by Rhoten, Zollinger indicated that by "heirs and beneficiaries" he intended to include all persons who would be entitled to a share of the testator's estate under the laws of descent and distribution and under the will. Zollinger also expressed his opinion that the claimant under the pretermitted heir statute should have the burden of proving unintentional omission.

Allison stated that he foresaw considerable difficulty in establishing the state of mind of a testator in a proceeding for determination of unintentional omission. He suggested that the committees endeavor to cover all pretermitted heirs

on an automatic basis and abandon the idea of a proceeding for establishment of unintentional omission.

Riddlesbarger expressed objection to the word "inadvertent" in the second paragraph of the proposed revised statute. Richardson suggested substitution of "unintentional" for "inadvertent." Butler questioned whether "unintentional" had a meaning adequately expressing the nature of the omission as contemplated by the committees. Lundy remarked that omission of a child whom the testator believe dead might not constitute an unintentional omission, but rather a mistake. Riddlesbarger suggested use of "result of mistake" or "result of accident." Butler proposed use of the phrase "that it was the testator's intention to name or provide for or include as a member of the class and that the omission was the result of mistake."

Gilley remarked that whatever the nature of the pretermitted heir statute or the scope of the rules as to omission therein, there probably would be instances in which testators' wishes would not be anticipated or satisfied, and that the aim of the statute was to reduce the number of such instances to a practical minimum. In response to a question by Riddlesbarger, Dickson commented that he seldom encountered pretermitted heir problems; that in most cases in his experience testators' intentions were clear and the matters settled with little difficulty.

Present Oregon statute (ORS 114.250). Richardson referred to the present Oregon pretermitted heir statute (ORS 114.250), and suggested, and Jaureguy agreed, that perhaps it would be advisable for the committees to retain the basic approach of this statute, on which a body of case law had been developed, with some improvement of wording and addition of a better provision on the remedy of pretermitted heirs.

Riddlesbarger moved, seconded by Rhoten, that the approach of the present Oregon statute be adopted as a basic concept for a pretermitted heir provision, with improvements to be made therein. Motion carried. In response to questions by Zollinger, Butler expressed his opinion that adoption of the motion meant approval by the committees of the Missouri rule excluding extrinsic evidence on intention of testators as to omission, and of the proposition that the fact of omission established the right of pretermitted heirs.

Dickson assigned to Allison and Richardson the task of preparing a revised proposed pretermitted heir statute for consideration by the committees at the meeting the following day.

Remedy of pretermitted heirs. For the guidance of Allison and Richardson in preparing a revised proposed pretermitted heir statute, the committees discussed several aspects of the remedy to be afforded pretermitted heirs.

Zollinger noted that his and Braun's report proposed that the share of a pretermitted heir be a portion of the net estate, including both real and personal property, and that, if not distributed to him in the probate proceeding, it be recovered ratably from other distributees. Krause suggested that the pretermitted heir's share come first from any intestate property, then from the residuary estate and then from specific bequests, in order to give maximum effect to the expressed intention of the testator.

Gilley pointed out that the pertinent provision of the 1963 Iowa Probate Code (section 267) gave to a pretermitted child "a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate." Zollinger expressed the view that the quoted portion of the Iowa provision was less than satisfactory, and that, for example, it was not clear under the Iowa provision whether a pretermitted child would receive a share of the real property.

Rhoten expressed agreement with Zollinger's position that a pretermitted heir should receive a portion of all the net estate, whether intestate property, residuary estate or specific bequests. Riddlesbarger moved, seconded by Butler, that the committees adopt Zollinger's position. Motion carried.

Braun referred to that part of her and Zollinger's report dealing with the period in which a pretermitted heir should be required to make his claim, and suggested that the claim be made during the probate period. Zollinger agreed that the claim should be made during probate, commenting that in most instances the existence of the pretermitted heir would be known during this period and the executor could make distribution accordingly. He suggested that the period for making a claim be limited to three years, or perhaps six years, after the death of the testator.

Riddlesbarger suggested that the period for pretermitted heir claims begin at the time of allowance of the will. Zollinger expressed approval of Riddlesbarger's suggestion. Dickson indicated that he preferred the death of the testator as the starting point for the period.

Thalhofer commented that if the pretermitted heir claim period were limited to the probate period, an executor might know of the existence of a pretermitted heir, but fail to

disclose that knowledge and thus foreclose the pretermitted heir's claim.

Krause moved, seconded by Thalhoffer, that the pretermitted heir claim period be limited to three years from the death of the testator. Motion failed.

Butler suggested that if the period for pretermitted heir claims were to be stated in terms of a specific number of years, the period in any event should extend to the end of the probate period. Gilley proposed that the period be limited to the period of administration of the estate, ending with the order of final distribution, and Rhoten and Allison expressed agreement with this proposal. Dickson and Gilley suggested that the filing or hearing on the final account might be used as the termination point of the period. Rhoten commented that in some instances settlements are made after the filing of the final account. Gilley moved, seconded by Rhoten, that the period for pretermitted heir claims be limited to six months after the date of the order admitting the will to probate, as in the case of will contests (see ORS 115.180). Motion carried.

In response to a question by Richardson, Zollinger suggested that the claim of a pretermitted heir be determined in a court of general jurisdiction. Allison suggested that such claims be submitted by petition in the probate court and then, if objections to the claims were made, recourse be had to a court of general jurisdiction. He remarked that in many cases the fact of pretermismission would be admitted and the matter settled satisfactorily without recourse to a court proceeding for determination of the validity of the claim.

#### Probate Jurisdiction

Frohnmayr referred to that part of his report on remedies of pretermitted heirs which commented on deficiencies of the present limited jurisdiction of the probate court in Oregon, and suggested that the committees should consider broadening this jurisdiction. In response to a question by Riddlesbarger, Dickson indicated that the subject of probate jurisdiction had not been assigned to anyone for study and report. Frohnmayr suggested appointment of a subcommittee to work on the matter. It was pointed out that the matter of probate jurisdiction was the subject of studies in progress or to be undertaken by the Bar Committee on Judicial Council.

After further brief discussion, Dickson appointed a subcommittee, consisting of Thalhoffer (chairman), Copenhaver, Field, Gooding and Warden, to study and report on probate jurisdiction.

### Deposit of Wills with County Clerk

Thalhofer, indicating that he would be unable to attend the meeting the following day, reported on the practice on depositing wills with the county clerk under ORS 114.410 to 114.440 in Deschutes County. He stated that 98 wills had been deposited since 1947, 48 wills were on deposit at the present time and the most recent deposit was on December 8, 1965. He commented that an index to deposited wills was maintained, and that when a deposited will was delivered, the person receiving it signed the envelope in which the deposited will was kept and the signed envelope retained by the clerk as evidence of the delivery. He indicated that the usual practice was for persons to inquire about wills on deposit; that lists of deposited wills were not published but that information on such wills was given on request. He remarked that he had been informed that little difficulty was encountered in the procedure. In response to a question by Krause, Thalhofer stated that a \$1 charge was made for deposit of a will.

### Small Estates

Bettis indicated that Representative Keith D. Skelton had contacted John H. Holloway, Secretary of the Oregon State Bar, inquiring about the status of proposed legislation on summary proceedings for administration of small estates of decedents, and that Holloway, in turn, had asked Bettis about this matter. Dickson noted that the small estates bill introduced at the 1965 session of the Oregon legislature (i.e., House Bill 1614) had died in the House Judiciary Committee. He reported that Lisbakken, William C. Martin and Duncan L. McKay were working on proposed small estates legislation for the American Bar Association in connection with the current Model Probate Code project. He expressed his belief that the committees probably would not reach the point of considering small estates legislation until the end of their work on the Oregon probate revision project. Zollinger commented that a bill on the subject probably would not be ready in time for introduction at the 1967 session of the Oregon legislature. Bettis stated he would report these matters to Holloway.

The meeting was recessed at 5:15 p.m.

The meeting was reconvened at 9 a.m., Saturday, January 15, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were

present: Dickson, Zollinger, Allison, Butler, Carson, Frohnmayer, Jaureguy, Lisbakken, Mapp and Riddlesbarger.

The following members of the Bar committee were present: Bettis, Gilley, Braun, Copenhaver, Hornecker, Krause, Rhoten, Richardson and Warden.

Also present was Lundy.

Deposit of Wills with County Clerk (continued)

Dickson reported on the deposit of wills with the county clerk under ORS 114.410 to 114.440 in Multnomah County, noting that 1,339 wills had been deposited since June 19, 1945, 430 of these had been withdrawn and 909 were on deposit as of January 14, 1966, the most recent deposit being on January 14. He indicated that the county clerk complied with the statute by enclosing a deposited will in a sealed envelope, giving a receipt to the testator and retaining a copy of the receipt as a record. He pointed out that deposited wills were filed numerically according to deposit, and that an alphabetical index thereto was maintained. He commented that lists of wills on deposit were never supplied to anyone; that a deposited will was released only upon proper identification and proof of the testator's death, but that a will was released to the testator if he wished to withdraw it. Krause remarked that concern had been expressed to him as to the workload imposed on the county clerk's office in Multnomah County by the will deposit procedure, to the number of wills of deceased testators still on deposit and to the small charge made for the service (i.e., \$1, as provided in ORS 114.410). In response to a question by Jaureguy, Dickson indicated that no attempt was made to check deposited wills when intestate estate proceedings were initiated.

Dickson read aloud a letter from Gooding reporting on the deposit of wills with the county clerk in Union County. The pertinent portion of this letter is as follows:

"Regarding ORS 114.410 to 114.440, apparently enacted in 1945, the Clerk of Union County states that 18 wills have been filed, 15 are presently on file, with the oldest being February 15, 1950, and the newest being September 24, 1964, and our County having a population of approximately 18,000.

"Our Clerk conforms to ORS 114.410 and 114.420. The depositor usually names the executor and an attorney on the endorsement, and the endorsement is issued accordingly. The Clerk also conforms to ORS 114.430.

"Respecting ORS 114.440, she has never had an

occasion to have a public opening. Her notice requirement would be a death certificate, and she would deliver the will and death certificate to the Probate Judge. She doesn't feel that she has authority to go any further in the matter.

"She also advised me that she had the will of a person, now deceased, and I am the executor of the latter's estate. Prior to death and the drafting of a new will, decedent had told me that the will was filed with the Clerk, decedent having worked at the Clerk's office for a long period of time, but I have ignored it. The next time I go to the Courthouse, I shall make this a 'living law' by receiving the will.

"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."

Riddlesbarger reported on the deposit of wills with the county clerk in Lane County as follows:

"No record is kept which would enable one to determine the number of wills currently in effect filed by living persons. To date, 276 such wills have been filed. No record is kept, however, of the number of withdrawals. The Clerk did say that the number of filings has increased markedly during the last few years.

"There has never been a public opening of such a will to date.

"The list of wills will not be supplied to anyone. The office will tell an inquirer whether or not a particular will is on file. The Clerk is of the opinion that no authority exists to give anyone such a list of wills.

"No action would be taken merely upon newspaper or other informal notice of the death of the testator. Proof of the identity of the person requesting delivery of the will is required before delivery of the will to the person named on the envelope as being entitled to receive it. The Clerk agreed that to protect the will it might be desirable to duplicate it before sending it to any person or to any court,

but no occasion to consider the matter has ever arisen because, as indicated above, there has been no public opening of any will.

"Enclosed is the only form in use in Lane County. It is the envelope in which the will is sealed upon receipt of it.

"The Clerk had no other suggestions to make but was emphatic in the opinion that the system is a good one."

Hornecker, reporting on the deposit of wills with the county clerk in Jackson County, stated that 234 wills were on deposit at the present time, of which approximately 100 had been deposited within the last four years, and that the first one had been deposited in 1945. He indicated that an index, setting forth the name of the testator, the date of deposit, the deposit number, from whom received and to whom delivered, was maintained. He noted that before a deposited will was delivered, the recipient was required to sign the envelope in which the will was kept, and that the clerk retained the envelope. He remarked that one law office in Medford had adopted the practice of suggesting to its clients that wills be deposited with the clerk, and suggested that this might account for some of the recent increase in the number of deposits.

Braun reported on the deposit of wills with the county clerk in Clackamas County, noting that 109 wills had been so deposited and 12 withdrawn. She indicated that anyone was permitted to withdraw a will on signing a receipt therefor, and commented that this procedure appeared to provide little protection.

Frohnmayr expressed concern that wills might be kept on deposit for long periods of time, and suggested that county clerks should not be required to act as custodians of them indefinitely. Allison commented that as to will deposits county clerks were somewhat in competition with those who render a safe deposit box service. He expressed the view that wills were more likely to be found if placed in safe deposit boxes than if deposited with county clerks. Butler noted that a large number of wills were on file in the trust department of his bank, remarked that any custodian of wills is faced with the problem of follow-up and explained the follow-up procedures employed by his bank.

Dickson expressed the view that ORS 114.410 to 114.440 should be repealed. Carson stated he would not argue strongly against such repeal, but indicated that, despite its deficiencies, the procedure of depositing wills with county clerks had some merit. Butler commented, and

Dickson agreed, that notwithstanding abandonment of the procedure for deposit of wills with county clerks the authority to accept wills not for probate (i.e., under ORS 115.110) should be retained, and that the county clerk's office was the logical place for deposit of such wills not for probate.

Riddlesbarger moved, seconded by Gilley, that ORS 114.410 to 114.440 be repealed. Motion carried unanimously.

Riddlesbarger remarked that, with the repeal of ORS 114.410 to 114.440, there would be need for some provision on the disposition of wills deposited with county clerks at the time of such repeal. Allison suggested that county clerks might be directed to continue the handling of wills on deposit with them in the same manner as under the statutes before repeal thereof. Dickson suggested that an affirmative duty be imposed on county clerks to return wills to depositors still living. Zollinger expressed the view that deposited wills need not be kept forever, and that county clerks should be permitted to destroy wills after a period of perhaps 40 years had elapsed and the clerks had been unable during this period to return wills to testators or other designated persons. In response to a question by Riddlesbarger, Dickson indicated he saw no need for return of the deposit fee since service had already been performed. Krause suggested that the period of time should begin on the effective date of the repeal of the statutes, rather than on the date of deposit of each will.

Frohnmayr proposed, and it was agreed, that Lundy should draft a provision on the disposition of wills deposited with county clerks at the time of repeal of ORS 114.410 to 114.440, including the requirement that clerks employ all reasonable effort to return such wills to the testators or persons designated to receive them and the authority of clerks to destroy wills after 40 years from the effective date of the repeal of the statutes if proper recipients were not found within that period. In response to a question by Bettis, Dickson stated that this provision did not apply to wills not for probate in the custody of county clerks.

#### Pretermitted Heirs (continued)

Allison noted that at the meeting the previous day he and Richardson had been assigned the task of preparing a revised proposed pretermitted heir statute for consideration by the committees. He summarized the various proposals that had been discussed the previous day and the reaction of the committees thereto. He pointed out the matters on which the committees had appeared to be in agreement, and stated that

he and Richardson had prepared and were submitting a revised proposed statute incorporating these matters, as follows:

"If a testator dies survived by a child or by a descendant of a deceased child and neither the child nor the deceased child or his surviving descendant has been named or provided for by the testator's will and is not a member of a class named or provided for therein, such testator, so far as regards such surviving child or descendant, shall be deemed to die intestate, and such surviving child or descendant of the deceased child upon compliance with this section shall inherit and receive such a share of the estate as would have been inherited by and distributed to him if the testator had died intestate. If the pretermitted heir is not named in the petition for probate of the will, notice of claim of the pretermitted heir must be given by a petition for allowance of such claim filed in the probate proceeding not later than six months after the date of entry of the order admitting the will to probate, with citation to the executor and all persons named in the petition for probate of the will. Any such party aggrieved by an order allowing or disallowing the claim entered pursuant to such petition may have the matter tried in the circuit court as provided in ORS chapter 28 by commencing a proceeding therein within 30 days of the entry of the order in the probate proceedings."

Richardson suggested that the first part of the first sentence of his and Allison's revised proposed statute would be improved by rewording it to read "if a testator dies survived by a child or by a descendant of a deceased child and the child or the deceased child and his surviving descendant have not been named or provided for etc." Carson commented that it should be made clear when a descendant of a deceased child was to be considered a pretermitted heir. In response to a question by Carson, Allison stated that it was his understanding that if, for example, a testator's will specified that he left nothing to his sons and one son predeceased the testator, the descendants of the deceased son would not take as pretermitted heirs because their ancestor was named. Lundy suggested that one way to make the meaning more clear might be to describe pretermisison of a child and descendants of a deceased child in separate sentences. Zollinger commented that Lundy's suggestion contemplated an approach similar to that employed in Zollinger's revised proposed statute considered the previous day.

Zollinger questioned the meaning of "with citation to

the executor and all persons named in the petition for probate of the will" in the second sentence of the Allison and Richardson revised proposed statute. Allison commented that the purpose of the citation was to give notice of the claim of a pretermitted heir. In response to a question by Allison, Zollinger expressed the view that it was necessary to spell out the citation procedure, as well as the procedure for objections to a pretermitted heir claim and the action to be taken by the claimant in the event of such objections.

Braun remarked that the provision for pretermitted heir claims in the Allison and Richardson revised proposed statute appeared to contemplate only the situation in which a pretermitted heir was not named in the petition for probate of the will, and expressed the view that devisees and legatees should be permitted to object to claims of pretermitted heirs who were named in such petition. Zollinger indicated his belief that devisees and legatees would be permitted to object, in the declaratory judgment proceeding, if pretermitted heirs were so named. He commented that the notice to devisees and legatees (see ORS 115.220) should include designation of any pretermitted heirs.

In response to a question by Lundy, Allison stated that if a pretermitted heir was named in the petition for probate, he would not have to file a separate claim. Allison called attention to the present requirement that a petition for probate contain identification of all heirs (see ORS 115.020).

Braun asked whether some provision should be made as how the portion of the estate to be received by a pretermitted heir was to be obtained, as, for example, ratably from other distributions. Zollinger and Allison commented that they understood that the share of a pretermitted heir was to come ratably first from intestate property and then from devises and bequests.

Frohnmayr expressed the view that the determination as to claims of pretermitted heirs should be made in the probate court, and not in a separate declaratory judgment proceeding. He suggested that the matter of such determination be postponed pending the study and report on probate jurisdiction by the subcommittee appointed the previous day.

Zollinger noted that the matter of determining pretermitted heir claims was similar to the general matter of determining heirship (see ORS 117.510 to 117.560). He commented that the present statutes on determination of heirship were poor ones for accomplishment of their intended purpose and in many respects unnecessary, and suggested that

the committees should consider repeal of these statutes. Dickson remarked that further consideration of determining pretermitted heir claims might be postponed pending consideration of both probate jurisdiction and general heirship determination proceedings.

Zollinger proposed that Lundy proceed to draft a proposed pretermitted heir statute, endeavoring to include therein those matters on which the committees appeared to be in agreement and to pinpoint those matters on which there still appeared to be uncertainty. Lundy indicated his willingness to undertake such an assignment. He also stated that the procedure suggested as to drafting a proposed pretermitted heir statute was in line with the procedure he contemplated following generally in regard to drafting the proposed new probate code. He commented that, first, he planned to develop and submit for consideration by the committees a proposed outline or arrangement of provisions to constitute the new code, and then, following tentative approval thereof by the committees, commence drafting those parts of the new code on which the committees had made decisions. He stated that such drafts would be submitted to the committees for consideration, and that thus the committees would have a second chance to review wording on matters previously considered and tentatively acted upon. He pointed out that in the process of preparing such drafts and reviewing them, questions not previously considered would probably arise.

#### Heirship Determination

Dickson suggested, and it was agreed, that a subcommittee be appointed to study and report at the March meeting of the committees on the matter of proceedings for the determination of heirship, both generally and as to pretermitted heirs. Dickson proceeded to appoint such a subcommittee, consisting of Riddlesbarger (chairman), Braun, Gilley, Mapp and Zollinger. Dickson suggested that Riddlesbarger maintain contact with Thalhoffer, chairman of the probate jurisdiction subcommittee, on matters of mutual concern of the two subcommittees. Riddlesbarger asked Lundy to draft a proposed pretermitted heir statute for consideration by the heirship determination subcommittee.

#### Initiation of Probate or Administration

The committees began consideration of a draft of proposed legislation relating to initiation of probate or administration and primarily encompassing the matters covered by ORS 115.010 to 115.350, which had been prepared by Gilley, with assistance by Krause and Hornecker, and

distributed in the form of a report to all members of both committees before the meeting. In response to a question by Frohnmayer, Gilley indicated that in preparing the draft he had consulted the pertinent provisions of probate codes of other states, as well as those of the Oregon probate code.

Pleadings and mode of procedure (section 1). Gilley noted that section 1 of the draft was derived from ORS 115.110, with certain minor changes that he pointed out and explained.

Riddlesbarger referred to that part of section 1 specifying that the mode of procedure was "in the nature of a suit in equity except as otherwise provided by statute," and questioned whether there should be any exception to this mode of procedure. In response to a question by Riddlesbarger, Dickson commented that contested claims against estates of decedents often were tried as actions at law.

Zollinger suggested, and Frohnmayer and Gilley agreed, that the requirement in section 1 that petitions, reports and accounts "be verified by at least one of the persons making the same" might be deleted. Zollinger commented that there appeared to be tendency to eliminate requirement of oaths and acknowledgements, as illustrated by the almost complete absence thereof in the Uniform Commercial Code. Rhoten and Bettis indicated they favored retention of the verification requirement.

Rhoten suggested, and Frohnmayer agreed, that it might be specified that the verification be in the same manner as pleadings are verified. Gilley commented that such a specification would permit an agent or attorney to make the verification in some instances, and that this would be desirable. Dickson cited instances in which he believed it would be wise and appropriate for an attorney to make the verification. Jaureguy suggested that the authority of an agent or attorney to verify should be specified in section 1, rather than rely on the general reference to the law on verification of pleadings to accomplish this authority. [Note: See ORS 16.070.]

Gilley moved, seconded by Allison, that the committees approve section 1 with two modifications as follows: (1) Revision of the third sentence to read "all petitions, reports and accounts shall be verified as pleadings are verified"; and (2) deletion of "verified" in paragraph b, since the third sentence makes this word redundant. Dickson offered an amendment to the motion, which was accepted, that the third sentence of section 1 be revised to read "all petitions, reports and accounts shall be verified by at least one of the persons making the same or his agent or

attorney." Gilley pointed out that under the wording proposed by the amendment to the motion there would be a different rule on verification by an agent or attorney than in the case of pleadings. Amended motion carried.

Contents of petition (section 2). Gilley indicated that section 2 of the draft, which specified the contents of a petition for probate of a will or appointment of an administrator, was derived from pertinent provisions of the Oregon (see ORS 115.020), Iowa and Washington probate codes and from proposals by him and Krause.

Allison suggested that the petition should state the ages of the deceased and his heirs. Gilley commented that the statement that the deceased had testamentary capacity at the time of execution of the will, required by paragraph f of section 2, was an indication that the deceased was of proper age. Frohnmayer suggested inclusion of the deceased's Social Security number, and Dickson remarked that this number would be needed sooner or later in the probate proceeding. Gilley remarked that "wage earner Social Security account number" appeared to be the proper terminology, and referred to this wording used in ORS 107.450, relating to complaints in domestic relations suits. Dickson pointed out that all persons do not have Social Security numbers and that some have a different kind of identification number required by the federal government. He commented that the petition should state the Social Security number or other federally required identification number of the deceased. Rhoten expressed the view that in some instances it would be difficult to obtain Social Security numbers and some of the other items of information that section 2 would require to be stated in the petition. Gilley suggested that certain items of information be required to be stated "so far as known to the petitioner."

Butler noted that the present Oregon statute (i.e., ORS 115.020) required that the petition state the ages of heirs. Dickson suggested that the relationship of heirs to the deceased should be stated.

It was apparently agreed that paragraphs b and c of section 2 should be revised to read as follows:

"b. The name, age, domicile and date of death of the decedent and, if known, his wage earner Social Security number or Treasurer's identification number.

"c. So far as known, the names, relationships to the decedent, ages and last known addresses of his heirs."

Butler and Riddlesbarger suggested, and Allison and Gilley agreed, that the statement as to the qualification to act of a nominated executor or administrator required by paragraph e of section 2 be affirmative; i.e., "that he is qualified to act." It was apparently agreed that paragraph e should be revised to read as follows:

"e. The name and address of the person nominated as executor by the will or nominated as administrator by the petition and that he is qualified to act."

In response to a question by Zollinger, Dickson expressed the view, with which Gilley agreed, that paragraph f of section 2 should be deleted. Dickson remarked that the age factor of a deceased's testamentary capacity was covered by the age statement required by the revised wording of paragraph b. Gilley commented that testamentary capacity was established in the process of proving the will and that allegation of such capacity was not necessary in the petition. Rhoten suggested that the phrase "and facts necessary to admit the will, if any, to probate" might be added to paragraph d. Carson, indicating that he opposed allegation of testamentary capacity in the petition, commented that a petitioner with the will in his possession was obligated to offer it for probate, that the petitioner might not know whether the deceased had testamentary capacity or might not be willing to admit such capacity and that such capacity was determined from other evidence. It was apparently agreed that paragraph f should be deleted.

Allison suggested that paragraph g of section 2 be revised by inserting "personal" before "property" and deleting "which might be readily convertible into money," and, in response to a question by Butler, noted that "personal property" was the basis for the bond of a personal representative (see ORS 115.430). Zollinger proposed fuller use of the personal representative's bond statute, including "the probable value of the annual rents and profits of and from the real property of the estate." Hornecker commented that his and Krause's draft of a revised personal representative's bond statute would propose looking to the income of all property, rather than only real property. Carson suggested revision of paragraph g to read: "The estimated value of the property belonging to the decedent." Rhoten suggested addition of "and sufficient information concerning the value of the property to enable the court to fix the bond, if any" to the revision suggested by Carson. It was apparently agreed that paragraph g should be revised to read as follows:

"g. The estimated value of the property belong to the decedent and sufficient information concerning the value of the property to enable the court to fix the bond, if any."

Carson expressed his belief that paragraph h of section 2 was unnecessary, and suggested that it be deleted. After further brief discussion, it was apparently agreed that paragraph h should be deleted.

Gilley moved, seconded by Butler, that section 2, with revision as apparently agreed upon, be approved by the committees. Motion carried. Jaureguy indicated that he had voted in opposition to the motion on the grounds that too much new wording was used in revised section 2, that present wording had been in existence for many years and had acquired a well-understood meaning and that use of new wording implied new meaning. Carson stated that he was in agreement with Jaureguy in principle, but expressed the view that this principle was not violated by revised section 2. Frohnmayer commented that he did not share Jaureguy's view, and that he believed it to be the duty of the advisory committee to up-date old wording in order to make the meaning of the probate statutes clearer.

Persons entitled to petition for proof of a will or for administrator (section 3). Gilley referred to section 3 of the draft, relating to persons entitled to petition for proof of a will or for administrator, and commented briefly thereon.

Dickson, Frohnmayer, Mapp and Zollinger expressed the view that "personal representative" should be substituted for "administrator" in the section heading of section 3. It was also suggested that "probate" and "probated" should be substituted for "proof" and "proved" in the section heading and in paragraph a.

Dickson, referring to paragraph b of section 3, expressed the view that the court should have more discretion as to whom administration was granted. Riddlesbarger suggested that the phrase "be granted to a creditor of the estate" in paragraph b (2) be revised to read "be granted to any suitable person, including a creditor," and that paragraph b (3) be deleted. Zollinger commented, and Dickson agreed, that the persons listed in paragraph b should not have a right to appointment, but rather that the list should constitute an order of preference, with authority in the court to appoint a suitable person subject to such preferences. Gilley noted that appointment as a matter of right had existed for many years, and expressed the view that there was merit in this approach. Frohnmayer suggested that a vote be taken on whether appointment of designated persons should be a matter of right unless a person was unsuitable. By a separate vote of each committee, the advisory committee opposed the proposition and the Bar committee favored it.

Zollinger suggested that the order of preference among persons desiring to act as administrator should be, first, the surviving spouse, then the surviving child or children and then the next of kin, with authority in the court to consider the ability of any of those persons to discharge the duties of administrator. Allison suggested that nominees of persons listed in the order of preference be included therein.

Butler expressed the view that it was not clear that paragraph b of section 3 applied only to appointment of administrators. He remarked that paragraph a appeared to relate only to petitions for probate of a will and not to appointment of executors, and that paragraph b appeared to relate to administration of an estate, whether by an executor or administrator. Zollinger commented that he agreed with Butler, and that the order of preference in paragraph b should apply to persons desiring to act as personal representative. Allison stated that the distinction between persons entitled to petition and persons to be preferred in the appointment of personal representative should be clearer.

Riddlesbarger commented that a court should follow the order of preference unless it found a person unsuitable either on the court's own initiative or on other objection to the appointment. In response to a question by Krause, Dickson expressed the view that the wording "any qualified person whom the court finds suitable may serve as an executor or administrator" was satisfactory, but remarked that the court should not have to make a negative finding as to suitability. Dickson further stated that, while the court should be allowed some discretion in appointment of personal representatives to screen out unsuitable candidates, some protection should be provided against a judge appointing his relatives or friends.

Dickson suggested, and it was agreed, that Gilley and Krause should prepare a redraft of paragraphs a and b of section 3, endeavoring to incorporate therein the views apparently approved by the committees, and submit it to the committees for consideration.

The meeting was recessed at 12:30 p.m.

The meeting was reconvened at 1:30 p.m. All members of the advisory committee, except Gooding and Husband, were present. The following members of the Bar committee were present: Bettis, Gilley, Braun, Copenhaver, Hornecker, Krause, Rhoten, Richardson and Warden. Also present was Lundy.

Persons entitled to petition for proof of a will or for administrator (section 3). Gilley announced that, during the recess, he and Krause had prepared a redraft of paragraphs a and b of section 3 of the draft, as follows:

"a. Any executor, devisee or legatee named in any will, or any other person interested in the estate, including any creditor, may petition the court to have the will probated or an administrator appointed.

"b. The court shall appoint as personal representative a qualified person or persons whom the court considers suitable, giving preference to:

"(1) The executor named in the will;

"(2) The surviving spouse of the decedent;

"(3) The nearest of kin of the decedent.

"(4) A person who renounces his priority of appointment as personal representative or who is not qualified to act, may nominate in writing a qualified person as personal representative and such nominee shall have the same priority of appointment as the person making the nomination, but no person under the age of 18 years or of unsound mind shall have such right of nomination."

Gilley noted that the redraft did not specifically refer to children of the decedent in the order of preference because "nearest of kin" included such children. Butler and Allison suggested that the fact that an order of preference was being prescribed would be clearer if the phrase "giving preference in the following order" was used. Gilley indicated that, under the redraft, the court would not be required to make a finding of unsuitability in its order of appointment of a personal representative. Zollinger suggested that "whom the court finds to be suitable" be substituted for "whom the court considers suitable." In response to a question by Mapp on the need for both "qualified" and "suitable," Gilley and Lundy pointed out that "qualified" referred to the statutory qualifications of personal representatives, while "suitable" was a broader term intended to give the court a wider range of discretion in the appointment of personal representatives.

The committees discussed at some length the matter of nominees of persons in the order of preference for appointment as personal representative. Zollinger suggested, and Dickson agreed, that the prohibition against nomination by persons under 18 years of age or of unsound mind should

be deleted. Dickson commented that the age of the person making a nomination was a factor that the court would consider in any event. Krause expressed the view, in which Butler concurred, that there was no need to make provision for nominees, since in appropriate cases the court would not have to adhere to the order of preference in appointing a personal representative. Gilley and Dickson indicated that they favored a provision for nominees. Zollinger noted that if no provision were made for nominees and if, for example, a surviving spouse did not wish to act as personal representative but did wish to nominate a bank to so act, the court probably would have to give preference to children of the decedent over the bank. Dickson suggested that provision for nominees might be made by revising the phrase preceding the listed order of preference to read "giving preference to the following persons in the following order or their respective nominees."

Riddlesbarger asked about protection against the practice of a probate judge appointing one of his relatives as a personal representative on a finding that the relative was suitable. Braun suggested that the court might be required to make a finding that no preferred persons or their nominees were suitable before proceeding to appoint someone else. Dickson commented that if provision were made for nominees, a probate judge would find it extremely difficult to ignore all preferences and appoint one of his relatives.

Gilley moved, seconded by Butler, that the committees approve the following separate section on appointment of personal representatives:

"The court shall appoint as personal representative a qualified person or persons whom the court finds to be suitable, giving preference to the following persons in the following order or their respective nominees:

"(1) The executor named in the will;

"(2) The surviving spouse of the decedent;

"(3) The nearest of kin of the decedent or the respective nominees of any of them." Motion

carried unanimously.

Gilley referred to paragraph c of section 3, relating to service of a copy of a petition for appointment of an administrator upon the State Land Board if the petition does not set forth the name of an heir of the decedent, and commented that this paragraph should be a separate section. Zollinger questioned the interest of the Land Board in the matter

of appointment of an administrator. Butler commented that because of the possibility of escheat in the case of an intestate estate and no heirs, the Land Board would have an interest and probably should have a voice in the appointment of an administrator, although it should not be placed in a position to control such appointment. Gilley pointed out that paragraph c essentially was a notice provision, with no specific mention of authority of the Land Board to propose appointment of an administrator or object to any appointment otherwise proposed. Gilley suggested, and Frohnmayer and Zollinger agreed, that notice to the Land Board should be given at the same time and in the same manner as notice to heirs, legatees and devisees under section 10 of the draft (see ORS 115.220). Riddlesbarger expressed the view that the Land Board should receive notice before appointment of an administrator. Rhoten remarked that the Land Board should not receive notice until after such appointment.

Krause moved, seconded by Bettis, that consideration of paragraph c of section 3 be postponed until section 10 was before the committees for consideration. Motion carried.

Venue (section 4). Gilley referred to section 4 of the draft, relating to venue for proof of a will and intestate administration, noting that it was derived from ORS 115.140, but was drafted with the aim of simplifying this present statute on venue and with its most significant innovation being to eliminate reference to real property.

Dickson suggested deletion of the phrase "at or immediately before his death" in paragraph a of section 4, commenting that the phrase, being expressed in the form of alternatives, was likely to engender confusion.

Riddlesbarger referred to the pertinent provision of the 1965 Washington Probate Code (section 11.16.050), and remarked that the wording of this provision (i.e., "deceased was a resident or had his place of abode") might be preferable to the wording of paragraph a of section 4 (i.e., decedent was domiciled"). He suggested that residence or place of abode might be easier to determine than domicile. Gilley noted that the venue provision of the 1963 Iowa Probate Code (section 12) used "residents."

Zollinger questioned the meaning and effect of the word "situs" in paragraph b of section 4, and in response to a question by Gilley, commented that substitution of "is located" for "has its situs" might be an improvement.

Zollinger asked whether there should be any order of preference of venue as to nonresident decedents based on kinds of property -- for example, where a decedent owned tangible assets in one county and was owed debts by persons in another county. He also suggested that situs or location be determined either at the death of the decedent or immediately before, but not in the alternative.

Butler suggested that the place where a nonresident decedent owed debts might be a proper consideration in determining venue. He remarked that, for example, if a nonresident decedent had creditors in one county and substantial assets located in another county, and if proper venue were in the county in which the assets were located, the creditors might not learn of the probate proceeding.

Allison proposed consideration of the place where a nonresident decedent died in this state or the place therein where the greater part of his assets were located as factors for determination of proper venue. He commented that nonresidents often have businesses or relatives in Oregon, and that their death in the state would probably often occur where those businesses or relatives were located.

Frohnmayr suggested that section 4 be revised to read as follows:

"Probate of a will shall be had and the administration of the estate of an intestate shall be granted in the county where:

"a. If the decedent was domiciled in this state, then in the county of the decedent's domicile or other place of abode at his death.

"b. If the decedent was not domiciled in this state at his death, then in the county where the decedent died or where any of his assets are situated."

Rhoten expressed the view that "resident or" should be inserted after "place" in paragraph a of Frohnmayr's suggested revision of section 4. Carson commented that including "resident" invited problems and that use only of "abode" was preferable. Gilley expressed his opinion that only domicile should be used. Lundy pointed out that many statutes use residence and not domicile -- for example, provisions of the guardianship statutes (see ORS 126.106 and 126.111). Jaureguy commented that revised paragraph a implied a distinction between domicile and place of abode, and it was pointed out that there was such a distinction.

Examples of persons having domiciles in one county and places of abode in another were given. Frohnmayer explained that revised paragraph a provided for venue in the county of domicile or of place of abode in the alternative.

Frohnmayer moved, seconded by Riddlesbarger, that paragraph a of his suggested revision of section 4 be approved. Motion carried.

At this point (3 p.m.) Riddlesbarger left the meeting.

Frohnmayer moved, and the motion apparently was seconded, that paragraph b of his suggested revision of section 4 be approved. Motion carried.

Zollinger suggested, and Dickson agreed, that there should be added to section 4 a provision to the effect that if a court in a county of proper venue assumed jurisdiction of a decedent's estate, no court in another county should assume such jurisdiction. Gilley referred to a pertinent provision of the 1963 Iowa Probate Code (section 14), which reads: "When a case is originally within the jurisdiction of the courts of two or more counties, the one which first takes cognizance thereof by the commencement of the proceedings shall retain the same throughout." Zollinger remarked that the Iowa provision did not specify that jurisdiction of the first court was exclusive. Allison referred to a pertinent provision of the 1965 Washington Probate Code (section 11.16.060).

At this point (3:20 p.m.) Frohnmayer and Warden left the meeting.

Gilley called attention to ORS 126.116, relating to proceedings for the appointment of a guardian commenced in more than one county, and commented that a portion of this statute might serve as an appropriate model for a provision to be added to section 4, as follows:

"If proceedings are commenced in more than one county, they shall be stayed except in the county where first commenced until final determination of venue in the county where first commenced. If proper venue is finally determined to be in another county, the court shall cause a transcript of the proceedings and all original papers filed therein, all certified by the clerk of the court, to be sent to the clerk of the court of the proper county."

Gilley moved, seconded by Zollinger, that his suggested provision be approved and added to section 4. Motion carried unanimously.

Establishing foreign wills (section 5). Gilley referred to section 5 of the draft, relating to establishing foreign wills, noting that it was based upon ORS 115.160.

Gilley suggested, and Zollinger agreed, that the double certification (i.e., certificates by the court clerk and the chief judge or presiding magistrate) specified in paragraph a of section 5 was unnecessary, and that a single certification would be sufficient.

Dickson questioned the meaning of the reference to copies of the "probate" of wills probated in other states or foreign countries in paragraph a of section 5. He expressed the view that the nature of the materials constituting such "probate" should be spelled out. Allison remarked that it would be desirable to obtain copies of the foreign petition, order admitting the will to probate and, possibly, testimony of subscribing witnesses to the will. In response to a question by Gilley, Dickson and Allison commented that the foreign petition often contained information not disclosed by the foreign order or otherwise. Gilley pointed out that submission of the foreign materials did not dispense with the Oregon petition, and that the Oregon petition would contain much of the information disclosed by the foreign materials.

That part of paragraph a of section 5 specifying that the foreign probated wills be "recorded" and "admitted in evidence" in the same manner as wills executed and proved in this state was discussed. Gilley suggested that such foreign probated wills be filed and admitted "upon petition." Dickson commented that paragraph a should contain some provision recognizing the possibility of Oregon contest of the foreign probated will. Butler suggested that the matter of contest of foreign probate wills might be provided for in section 7 of the draft, relating to contests of wills. Allison expressed the view that the foreign probated will should be "presented for probate," rather than "admitted." Zollinger and Dickson remarked that, in their opinion, "admitted" was the proper term as to foreign probated wills. Dickson indicated that the admission of such wills was in common form, but with the right to contest preserved.

Zollinger suggested that paragraph a of section 5 be revised to read as follows:

"a. Upon petition, if a will so executed as to qualify it for probate in this state is probated in any other state or territory of the United States or in any foreign country, copies of such will and of the order of probate thereof, certified by the clerk of the court in which such will was probated, with the seal of the

court affixed thereto, if it has a seal, shall be filed and the will admitted to probate with the same effect as though it were executed and proved in this state."

Carson asked whether that part of Zollinger's suggested revision of paragraph a of section 5 referring to "a will so executed as to qualify it for probate in this state" did not open up the matter of proving the will as if it were a local will, and commented that if such were the case there would be no giving of credence to the foreign order and thus no need for such order being submitted. Allison pointed out that admission of wills that do not meet Oregon requirements, such as holographic wills or wills with only one witness, upon the order of admission of a foreign court would constitute a change in present Oregon law, and referred to the requirement of ORS 114.060 that wills of nonresidents devising real property in Oregon be executed according to the laws of this state. Gilley suggested that the matter might be resolved by approving paragraph a as set forth in his draft and some revision of ORS 114.060.

Gilley moved, seconded by Zollinger, that paragraph a as set forth in his draft be approved. Motion carried.

Dickson referred to the previous discussion and action by the committees on ORS 114.060. [Note: See Minutes, Probate Advisory Committee, 11/19,20/65, page 5, and Riddlesbarger wills draft, Appendix A, Minutes, Probate Advisory Committee, 12/17,18/65, page 1, section 2.] Dickson noted that repeal of ORS 114.060 had been approved, with a savings provision for wills executed prior to the repeal. Zollinger suggested that the committees reconsider their action on ORS 114.060, and approve retention of this statute revised so as to make a foreign will executed according to the laws of the country, state or territory of which the testator was a resident effective as to both real and personal property in Oregon. Allison proposed the following revision of ORS 114.060: "Any person not an inhabitant of, but owning property in this state may devise or bequeath such property by will executed according to the laws of this state or of the country, state or territory in which the will is executed." Carson commented that "domiciled" should be substituted for "an inhabitant" in Allison's proposed revision. Butler indicated that limiting the application of the revised version of ORS 114.060 to nonresidents constituted a discrimination against Oregon residents who make wills outside the state. Dickson suggested that Butler's objection would be resolved if provision were made that any will executed in accordance with the place where it was executed was valid in Oregon in all cases.

Mapp referred to section 50 of the Model Probate Code, and suggested, and Butler, Dickson and Zollinger agreed, that it might be appropriate to substitute that section for ORS 114.060. Section 50 reads: "A will executed outside this state in a manner prescribed by this [Code], or a written will executed outside this state in a manner prescribed by the law of the place of its execution or by the law of the testator's domicile at the time of its execution, shall have the same force and effect in this state as if executed in this state in compliance with the provisions this [Code]." In response to a question by Dickson, Lisbakken indicated that section 50 of the Model Probate Code was substantially similar to the pertinent part of section 2 of Riddlesbarger's wills draft.

Dickson stated that it appeared to be the sense of the meeting that the committees reverse their previous action repealing ORS 114.060, and approve revision of that statute along the lines of section 50 of the Model Probate Code. He requested that Mapp and Riddlesbarger prepare such a revision of ORS 114.060 and submit it for consideration at a future meeting.

Zollinger referred to paragraph b of section 5, and suggested that the application of the paragraph be extended to the situation in which the will is foreign probated but a record of such probate is not available. Gilley suggested, and Zollinger agreed, that the first sentence of paragraph b might be revised to read: "If any will is filed or recorded in any other state or territory of the United States or in any foreign country, a copy of the will, certified as provided in subsection a of this section may be filed in any court of this state which has jurisdiction of the estate of the testator." Butler questioned the wording "certified as provided in subsection 'a'", and suggested that "certified by the clerk of the court" or "certified by the official custodian" be substituted therefor. Mapp commented that the wording used should be sufficiently broad and flexible to encompass various kinds of foreign procedure.

Zollinger suggested, and Dickson agreed, that Mapp and Riddlesbarger be requested to prepare a revision of section 5 along the lines apparently agreed upon by the committees and submit it for consideration at a future meeting.

#### Next Meeting of Committees

The next joint meeting of the committees was scheduled for Friday, February 18, 1966, at 1:30 p.m., and the following Saturday, February 19, in Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

Dickson indicated that the principal items on the agenda for the February meeting would be inheritance by non-resident aliens (report by subcommittee), advancements and retainer (Frohnmayr's report) and continuation of consideration of Gilley's draft of proposed legislation relating to initiation of probate or administration, starting with section 6 thereof.

The meeting was adjourned at 5:00 p. m.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting,  
January 14 & 15, 1966)

The following report on remedies for enforcement of rights of pretermitted heirs in Oregon was prepared by Mr. Frohnmayer and distributed to members of the advisory and Bar committees prior to the January 14 meeting:

January 3, 1966

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

From: Otto J. Frohnmayer

Gentlemen:

Pursuant to the directions of our chairman, I have prepared and enclosed for each of you a memorandum dealing with the remedies of a pretermitted child in Oregon. I have enlarged on my assignment by suggesting some revisions and actions which should be taken by our committees.

I hope you will find the enclosed memorandum clear and helpful.

Sincerely yours,

/s/ Otto J. Frohnmayer  
OTTO J. FROHNMAYER

OJF:gh

Enclosure

MEMORANDUM FOR PROBATE REVISION COMMITTEE

REMEDIES FOR ENFORCEMENT OF RIGHTS OF  
A PRETERMITTED HEIR IN OREGON

No Oregon case has been found which rules on the precise methods by which a pretermitted heir may enforce his rights. However, by reference to the Missouri cases arising under a statute which provided the model for the Oregon statute, conclusions may be reached as to how these rights may be established and enforced. It seems desirable to draft code provisions making more explicit what these remedies should be.

The present statutory provisions are as follows:

- (1) ORS 114.250 Pretermitted Heirs to Have Portion of Estate. If any person makes his will and dies, leaving a child or children, or, in case of their death, descendants of such child or children, not named or provided for in such will, although born after the making of such will or the death of the testator, every such testator, so far as regards such child or children or their descendants, not provided for, shall be deemed to die intestate; and such child or children, or their descendants, shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate; and the same shall be assigned to them, and all the other heirs, devisees and legatees shall refund their proportional part.
- (2) ORS 117.510 - 117.560. These provisions deal with the determination of heirship, including petition, hearing, trial of issues, conclusiveness of the decree and reopening of proceedings. Presumably these sections are available to a pretermitted heir.

Whatever the appropriate remedies may be, they do not seem to include a will contest. See e.g. Torregano's Estate, 54 Cal 2d 234, 352 P 2d 505, 88 ALR 2d 597, at 612:

In holding that the appellant was not included in the class of those who were to be given one dollar should they contest the will, the court held as follows:

"This is so for the obvious reason that the appellant is not a contestant. She is a petitioner for distribution, claiming to be a pretermitted heir, and such a person has never been held to be a contestant."

Pretermismission statutes are generally of the Massachusetts type or the Missouri type. I Jaureguy and Love, Oregon Probate Law and Practice, section 391 at page 375. Oregon's statute is of the Missouri type. The difference between the statutes is that in the Massachusetts type parol evidence is admissible to show that the omission of an heir was intentional

while in the Missouri type parol evidence is not admissible.

The Oregon Supreme Court has explicitly stated that since our statute of wills is an exact copy of the Missouri statute, the court will look principally to the decisions of that state to ascertain its judicial construction. Gerrish v. Gerrish, 8 Or 351, 353 (1880).

In Missouri it has been held that the pretermitted heir has no remedy by way of objecting to or attacking the probate of the will or the will itself. In Cox v. Cox, 101 Mo. 168, 13 SW 1055 (1890), the court observed as follows:

"The probate of the will does not render its provision effective, or render one or any of its provisions valid. If any such provisions are in violation of law, the law will not carry them into effect. Nevertheless, the testator made them. They are his will, and on probate whether they are or not, is the only question to be decided. And in this case the establishment of the instrument as the will of the testator in no way impairs the rights of the plaintiff as heir at law. If he has been pretermitted therein, as he claims, he can enter, defend his possession, or bring his action of ejectment, as the case may be, whenever he chooses. The probate of the will does not stand in his way on that issue. But, in the very nature of things, that issue cannot be tried in a proceeding designed by the law to ascertain the single fact whether a certain paper is or is not in the will of the deceased." (italics added)

In Story v. Story, 188 Mo. 110, 86 SW 225 (1905) the Missouri court made specific mention of the proper means by which the pretermitted heir should assert his rights:

"...our statutes make full provision for protecting the rights of a pretermitted heir. As to such heir the testator dies intestate. ...His rights may be given him by partition, ejectment, distribution, or other appropriate remedy, without striking the will down, except pro tanto. We do not hold that the omission from a will of the names of those heirs who are the natural objects of a testator's bounty may not be shown on an issue of a testamentary incapacity, or lack of disposing memory, or undue influence, or fraud. All we hold is that such fact, standing alone, is not ground for setting a will aside, and is not a material, traversable issue in this case."

The holding of these cases namely, that the pretermitted child takes independently of the will and has no remedy by way of attacking the will itself or its probate was followed in Goff v. Goff, 352 Mo. 809, 179 SW 2d 707, 152 ALR 717 (1944). In Jaureguy & Love, op. cit. supra at 377 the authors remark as follows:

"It will be noticed from the wording of the statute that the failure to comply with its requirements does not affect the admissibility of the will to probate, and the claims of the pretermitted children are not asserted in will contest proceedings."

In the Oregon cases in which the rights of pretermitted heirs have been asserted, the most common procedure has been a suit to quiet title. See, e.g. Gerrish v. Gerrish, 8 Or 351 (1880), Roots v. Knox, 107 Or 96, 213 P. 1013 (1923), and Towne v. Cottrell, 236 Or 151, 387 P 2d 576 (1963). In Barnstable v. U. S. National Bank, 232 Or 36, 374 P 2d 386 (1962) the remedy sought was a declaratory judgment that plaintiff was a pretermitted child of the testator, or in the alternative for specific performance of an alleged oral contract not to disinherit the plaintiff.

In the Missouri cases cited, the courts suggested that among the appropriate remedies were the following: partition, ejectment, distributing, and, in Hill v. Martin, 28 Mo. 78 (1859) a bill for contribution rather than a proceeding for partition.

The annotation to be found in 123 ALR 1073, 1084 to 1093 contains a detailed discussion as to the remedies resorted to by various courts, including contribution, independent proceedings in equity, writs of entry or ejectment and partition proceedings. This annotation should be consulted for further reference.

The Oregon pretermission statute, ORS 114.250, specifically refers to the duty of all the other heirs, devisees and legatees to refund their proportional part. This raises difficult questions, not only as to possible differences in the treatment of real and personal property, but also as to the appropriateness of the time at which the remedy should be asserted. If the various remedies are not exclusive, there remains the possibility that title to property might be subject to collateral attack even after the final order of the probate court has been entered. This is especially true because of the limited jurisdiction of the probate court in Oregon, particularly with regard to the title of real property.

ORS 117.560 (2) provides that any claimant, upon showing good cause, who has not had actual notice of the proceedings for determination of heirship, may be allowed to answer and set up his rights within three years after the entry of the decree. This provision applies both to real property and to personal property which have already been distributed. Thus restitution may be compelled from other claimants or defendants even after the decree of distribution. Some cases from other jurisdictions have held that if a pretermitted child claims a part of the personal property, as distinguished from real property, he is bound to apply to the the probate court in which the account of administration would have to be settled, since he could only claim by virtue of a decree of that court. See, Gage v. Gage, 29 N H 533 (1854) and State ex rel Citizens Bank v. Allen, 296 Mo. 636, 247 SW 411 (1922).

If the above reasoning were held to apply in Oregon, real and personal property would perhaps unnecessarily be treated differently. The issue is further complicated by the present provision that the pretermitted heir is to be treated as an intestate. Under Oregon law real property is held to vest in the intestate takers at the death of the intestate, so that perhaps only adverse possession would constitute a defense against a pretermitted heir who might be claiming many years later.

One of the anomalous problems in Oregon with regard to the remedies available to a pretermitted heir is the differing treatment accorded to real and personal property. Jaureguy and Love, supra, volume 1 at page 377 comments as follows:

"While the order of distribution in the probate court would doubtless normally preclude later assertion of rights with respect to personalty, it seems clear that it has no effect upon the rights of such children or other descendants with respect to real property. In fact, it has been held that a sale of real property by an executor, pursuant to powers granted in the will, is void as to such pretermitted children." Citing Northrop v. Marquam, 16 Or 173, 187-188, 18p 449, 457; and Worley v. Taylor, 21 Or 589, 595-596, 28 P 903, 905.

This difference in treatment seems to be directly related to the limited jurisdiction of the probate court which precludes it from determining who succeeds to the

Page 6  
Probate Advisory Committee  
Minutes, 1/14,15/66  
Appendix A

decedent's interest in real property. See the treatment of this problem in Jaureguy and Love, Supra, section 512 at 527-531.

Insofar as the committee wishes to treat real and personal property identically, it should address itself to the problem of probate court jurisdiction as it relates to a pretermitted heir. There would seem to be no reason for holding that on the one hand the decree of distribution of personal property is final after three years (ORS 117.560 (2) ) while on the other hand permitting a pretermitted heir to come in much later with a suit to quiet title or ejectment action regarding the real property of the decedent.

OTTO J. FROHNMAYER

APPENDIX B

(Minutes, Probate Advisory Committee Meeting,  
January 14 & 15, 1966)

The following report on a proposed pretermitted heir statute was prepared by Mr. Zollinger, with the concurrence of Mrs. Braun, and distributed to members of the advisory and Bar committees at the January 14 meeting:

PRETERMITTED CHILDREN

ORS 114.250:

"Pretermitted heirs to have portion of estate. If any person makes his will and dies, leaving a child or children, or in case of their death, descendants of such child or children, not named or provided for in such will, although born after the making of such will or the death of the testator, every such testator, so far as regards such child or children or their descendants, not provided for, shall be deemed to die intestate; and such child or children, or their descendants, shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate; and the same shall be assigned to them, and all the other heirs, devisees and legatees shall refund their proportional part."

ORS 114.260:

"Effect of advancement to pretermitted heir. If the child or children, or their descendants, referred to in ORS 114.250, has had an equal proportion of the testator's estate bestowed on them in the testator's lifetime by way of advancement, they shall take nothing by virtue of the provisions of ORS 114.250."

RCW 11.12.090:

"Intestacy as to pretermitted children. If any person make his last will and die leaving a child or children or descendants of such child or children not named or provided for in such will, although born after the making of such will or the death of the testator, every such testator, as to such child or children not named or provided for, shall be deemed to die intestate, and such child or children or their descendants shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate, and the same shall be assigned to them, and all the other heirs, devisees and legatees shall refund their proportional part."

PROPOSED FOR CONSIDERATION:

If any person makes his last will and dies, survived by a child, not named or provided for by his will, and not a member of a class referred to therein, including a child born or adopted after the making of the will, such child shall inherit and receive such share of the estate of the testator as would have been inherited by and distributed to him if the testator had died intestate. The share of the pretermitted child in property available for distribution by the executor shall be distributed to him by the executor if his existence is known to the executor and, if not distributed to him, may be recovered from the person to whom such share was distributed or, if there is more than one such person, ratably from the persons to whom distribution was made, including specific, demonstrative, pecuniary and residuary legatees. The interest by descent in real property of which the testator died seized, if not disclosed in the probate proceedings or otherwise established of record, may be established by suit against the devisee or devisees of such real property or his or their successor in interest, without distinction between specific and residuary devisees.

COMMENTS:

1. It is by no means clear that failure to name or provide for a child should be attributed to forgetfulness or oversight. On the contrary, a person competent to make a will is competent to identify the natural objects of his bounty. It may be more sensible to provide for pretermitted children only if born after the execution of the will and if no provision is made in the will indicating a purpose not to provide for such children, thus:

If any person makes his last will and dies, survived by a child born or adopted after the execution of his will, not provided for by his will and not a member of a class referred to therein, such child shall inherit, etc.

2. Mrs. Braun has reconsidered her suggestion that the statute should include a provision for the descendants of a deceased child, when neither the deceased child nor his surviving descendants is named or provided for or a member of a class to which reference is made in the will. Others may desire to include such a provision, although the subcommittee (Braun and Zollinger) reject it. We have some abandoned language available for this purpose.

3. We propose no provision concerning advancements to pretermitted heirs. ORS 114.260 should be repealed and Sec. 19 of the Riddlesbarger draft should be deleted. The provision that the pretermitted child shall inherit and receive such share of the estate of the testator as would have been inherited by and distributed to him if the testator died intestate would necessarily take into account advancements made to him. Advancements to legatees and devisees, if conforming to the requirements of ORS 111.120 would also be taken into account.

4. When the fact that the testator is survived by a child for whom no provision is made is known to the petitioner for the admission of the will to probate or to the executor, the interest of the pretermitted child will appear of record and need not be established by any other proceeding. He may receive distribution with distribution to legatees and his interest in real property will be established by the probate record. In the situation which may arise when the pretermitted child is not known to exist, he should be entitled to recover what should have been distributed to him from those to whom it was distributed and he should be able to establish his interest in the real estate.

5. The question will arise concerning the effect of the taking upon specific, demonstrative, pecuniary and residuary legatees and specific and residuary devisees. We have resolved this issue by concluding that each beneficiary of the will should take his proportionate share of the contribution to make the pretermitted child whole. The committee may conclude that all of the share of the pretermitted child should be taken from the residuary beneficiary. We suggest that the real and personal property of the estate should be treated alike.

6. It is the feeling of the subcommittee that a reasonably short period of limitations should be established, but we have omitted this from our draft of statute. If the committee shares this feeling, we suggest that there be added substantially the following sentence:

"No action to recover real or personal property pursuant to this section shall be brought more than \_\_\_\_\_ years after the death of the testator."

Mrs. Braun suggests that perhaps the pretermitted child should be required to establish his interest during probate. If this view is accepted, the last two sentences of the foregoing proposal should be deleted and there should be

Page 4  
Probate Advisory Committee  
Minutes, 1/14,15/66  
Appendix B

substituted a provision to the effect that if the pretermitted child shall not appear and establish his interest in the proceedings for administration upon his estate, no action thereafter be brought for the recovery of any share to which he might otherwise have been entitled.

CLIFFORD E. ZOLLINGER

REPORT  
January 10, 1966

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

From: Robert W. Gilley

Subject: Rough Draft on Initiation of Probate or Administration.

One of the matters scheduled for consideration by the Advisory and Bar Committees at the meeting to be held January 14 and 15, 1966, is revision of ORS chapter 115, relating to initiation of probate or administration and executors and administrators generally.

This report contains a rough draft of a suggested revision of the first part of ORS chapter 115 (i.e., ORS 115.010 to 115.350), relating to initiation of probate or administration.

#### INITIATION OF PROBATE OR ADMINISTRATION

##### Section 1. Pleadings and Mode of Procedure

No particular pleadings or forms thereof are required in the exercise of jurisdiction of probate courts, and the mode of procedure in the exercise of such jurisdiction is in the nature of a suit in equity except as otherwise provided by statute. The proceedings must 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 the same. The court exercises its powers by means of:

- a. A citation to a party.
- b. A verified petition of a party in interest.
- c. A subpoena to a witness.
- d. Orders and decrees.
- e. An execution or warrant to enforce its orders and decrees.

NOTE: This is ORS 115.010 with two minor deletions.

Section 2. Contents of Petition

A petition for probate of a will or for the appointment of an administrator shall state:

- a. The facts relied upon to give the petitioner the right to petition.
- b. The name, domicile and date of death of the deceased.
- c. The names and last known addresses of his heirs, so far as known.
- d. The facts relied upon to give the court jurisdiction and to establish venue.
- e. That the person nominated as executor by the will or nominated as administrator by the petition is not disqualified to act as such, and the name and address of the nominee.
- f. That the deceased had testamentary capacity at the time of the execution of the will.
- g. Unless bond is waived by the will, the estimated value of the property belonging to the deceased, which might be readily convertible into money.
- h. That no other petition for the probate of the will or for the appointment of administrator is believed to have been filed in this state.

Section 3. Persons Entitled to Petition for Proof of a Will or for Administrator

- a. Any executor, devisee or legatee named in any will, or any other person interested in the estate, including any creditor, may petition the court to have the will proved.

b. Administration shall be granted upon the petition of any person interested in the estate as follows:

(1) To the surviving spouse, or next of kin in the order of their degree of relationship, or if of equal degree, then in the discretion of the court.

(2) If the surviving spouse, next of kin or the person nominated by them shall be unsuitable or disqualified, or shall neglect for 20 days after the death of the intestate to petition for administration (or to request that administration be granted to some other person) the same may in the court's discretion, be granted to a creditor of the estate.

(3) If the persons named in the paragraph (2) above do not make such application within 30 days from the death, administration may be granted to such person as the court may deem proper.

(4) A person who renounces his right to appointment as administrator or who is not qualified to act, may nominate in writing a qualified person as administrator and such nominee shall have the same priority of right to appointment as the person making the nomination, but no person under the age of 18 years or of unsound mind shall have such right of nomination.

c. If the petition for appointment of administrator does not set forth the name of an heir of the decedent, the petitioner shall immediately serve upon the State Land Board a copy of the petition, and no order appointing an administrator shall be granted until after proof of service has been filed with the clerk of the court.

**NOTE:** This is ORS 115.120 with the addition of the reference to creditors and the deletion of some language considered redundant, combined with ORS 115.310, as modified.

**Section 4. Venue**

Proof of a will shall be taken and administration of the estate of an intestate shall be granted in the county where:

- a. The decedent was domiciled at or immediately before his death.
- b. Any part of his estate has its situs at the time of his death or at the time of the filing of the petition, if the decedent was not domiciled in the state at or immediately before his death.

**NOTE:** This is intended to simplify ORS 115.140. Its most significant innovation is to eliminate reference to real property and restricts venue of an inhabitant to the county of domicile. The thought is that there is less chance of confusion if an inhabitant's estate can have only one proper venue, also that his creditors have a better chance of being notified of the death.

**Section 5. Establishing Foreign Wills**

- a. If a will is probated in any other state or territory of the United States or in any foreign country, copies of such will and of the probate thereof, certified by the clerk of the court in which such will was probated, with the seal of the court affixed thereto, if there is a seal, together with 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, shall be recorded in the same manner as wills executed and proved in this state, and shall be admitted in evidence in the same manner and with like effect.

b. If any will is filed or recorded in any other state or territory of the United States or in any foreign country without probate thereof and probate of the will is not required by the law of the place where it is filed or recorded, a copy of the will, certified as provided in subsection "a" of this section may be filed in any court of this state which has jurisdiction of the estate of the testator. The will may be proved by affidavit, deposition or testimony in open court as wills filed for probate in this state.

NOTE: This modifies ORS 115.160 principally by not requiring a deposition to prove a will which has not been admitted to probate elsewhere.

#### Section 6. Testimony of Attesting Witnesses

a. Upon the hearing of a petition for the probate of a will ex parte and before contest is filed, an affidavit of an attesting witness may be used in lieu of the personal presence of the witness testifying in open court. Such 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 the use of the photographic or photostatic copy. The affidavit so made shall be received in court and have the same force and effect as to the matters contained therein as if such testimony were given in open court.

b. However, upon motion of any person interested in the estate, filed within 30 days after the order admitting the will to probate is made, or in the discretion of the court within that time, the court may require that the witness making the affidavit be produced before the

court for further examination, or if the witness is outside the reach of a subpoena, the court may prescribe that the deposition of such witness may be taken, and after the order is obtained the deposition may then be taken, after notice to the proponent or his attorney, in the manner provided in this state for the taking of depositions.

c. However, in case of contest of a will or the probate thereof in solemn form, the proof of any or all material or relevant facts shall not be made by affidavit, but in the same manner as such questions of fact are proved in a suit in equity.

d. If the evidence of none of the attesting witnesses, by affidavit, by deposition, or in open court, is available, the court may accept in lieu thereof evidence that the signatures of the testator and at least one of the attesting witnesses on the will are genuine.

NOTE: This is based on ORS 115.170 but eliminates the requirement that attesting witness be outside the reach of a subpoena before his affidavit may be used and also adds, as subsection "d", an explicit authorization for proof of genuineness of signatures.

#### Section 7. Contest of Will

When a will has been admitted to probate, any person interested may, at any time within six months after the date of the entry in the court journal of the order of court admitting such will to probate, contest probate or the validity of such will.

NOTE: This is the same as ORS 115.180 with the deletion of extension of time for contest to six months beyond the removal of disability of a person entitled to contest and of the provision preserving the right to contest a will made in accordance with the laws of the jurisdiction where executed. The former omission is subject to some difference of opinion,

but it is suggested that more disruption and therefore more injustice, could result from extending the period of contest for perhaps many years, than from cutting off the rights of one under disability. It is recognized also that there could be a constitutional question involved here. The latter deletion appears to the writer to be of matter which is completely unnecessary.

#### Section 8. Letters Testamentary

a. When a will is proved, letters testamentary shall be issued to the persons therein named as executors, or coexecutors or to such of them as give notice of their acceptance of the trust and are qualified. If all the persons therein named decline to accept, or are disqualified, letters of administration with the will annexed shall be issued to the person to whom the administration would have been granted if there had been no will.

b. When a bank or trust company is named in a will as executor or coexecutor, and such company is converted as provided by law, or is consolidated with another bank or trust company or sells its trust and fiduciary business or its trust department to another bank or trust company, pursuant to any law permitting such conversion, consolidation or sale, letters of administration with the will annexed shall be issued to such converted, consolidated or purchasing company if it is otherwise qualified.

NOTE: This is ORS 115.190 without any change.

#### Section 9. Issuance of Letters of Administration Where Will Declared Inoperative

If after a will has been proved and letters testamentary or of administration with the will annexed have been issued thereon, such will

is set aside, declared void or inoperative, such letters shall be  
revoked, and letters of administration issued.

NOTE: This is ORS 115.200 without any change.

Form of Letters Testamentary

Letters testamentary may be in the following forms:

STATE OF OREGON            )  
                                  ) ss.  
County of \_\_\_\_\_)

TO ALL PERSONS TO WHOM THESE PRESENTS SHALL COME, GREETING:  
KNOW YE, That the Will of \_\_\_\_\_, Deceased, has  
been duly proved in the probate court for the county aforesaid, and  
that \_\_\_\_\_, who \_\_\_\_\_ named Execut  
therein, ha\_\_ been duly appointed such Execut \_\_\_\_\_ by the court  
aforesaid; this, therefore, authorizes said \_\_\_\_\_ to  
administer the estate of said decedent, according to law.

IN TESTIMONY WHEREOF, I, \_\_\_\_\_, Clerk  
of the court, have hereunto subscribed my name and affixed the seal  
of said court, this \_\_\_\_\_ day of \_\_\_\_\_, A.D. 19\_\_\_\_\_.

(Seal)

A.B. Clerk of the Court

NOTE: This is ORS 115.210 without any change.

Form of Letters of Administration

a. Letters of administration may be in the following forms:

STATE OF OREGON            )  
                                  ) ss.  
County of \_\_\_\_\_)

TO ALL PERSONS TO WHOM THESE PRESENTS SHALL COME, GREETING:

KNOW YE, That is appearing to the court that \_\_\_\_\_ has died intestate, leaving at the time of h\_\_ death, property in this state, and that the probate court for the county aforesaid has duly appointed \_\_\_\_\_ administrat\_\_\_\_\_ of the estate of said decedent; this, therefore, authorizes said \_\_\_\_\_ to administer the estate of said decedent, according to law.

IN TESTIMONY WHEREOF, etc., (the same as in letters testamentary).

b. Letters to an administrator of the partnership with the will annexed, or to a special administrator, may be issued according to the foregoing forms, with such variations as may be proper in the particular case.

NOTE: This is ORS 115.350 without any change.

Section 10. Copy of Will and of Order to Heirs, Legatees and Devisees

Upon the entry of an order admitting any will to probate, the appointed representative shall forthwith cause a copy of the decedant's will and a copy of the order to be mailed to each heir, legatee and devisee named therein at his last-known address. Proof of such mailing shall be made by affidavit and filed at or before the hearing of the final account.

NOTE: This is ORS 115.220 with the addition of a requirement that a copy of the order admitting be sent with the will and that the copies be sent to heirs as well as legatees and devisees. These insertions were made at the suggestion of another committee member so that they may be discussed.

GENERAL NOTE: ORS 115.110 and 115.130, having reference to the custody and production of wills have been omitted from this draft, they having been covered in another draft. All reference to nuncupative wills has also been deleted to be consistent with prior recommendations.

### Section 11. Appointment of Special Administrator

When for any reason there is a delay in issuing letters testamentary or of administration, and the property of the deceased is in danger of being lost, injured or depreciated, the court may appoint a special administrator to take charge of the estate. He shall qualify in like manner, and have the powers and perform the duties of an administrator generally, except that he is not authorized to pay the debts of, or otherwise discharge any obligation against, the deceased. Upon the issuing of letters testamentary or of administration, the powers of such special administrator shall cease.

NOTE: This is ORS 115.330 without change.

### Section 12. Proceedings When Will Found after Administration Granted

If, after administration has been granted upon an estate, a will of the deceased is found and proven, the letters of administration shall be revoked and letters testamentary or of administration with the will annexed shall be issued.

NOTE: This is ORS 115.340 without change.

Section 13. Publication of Notice by Executor or Administrator

Every executor and administrator shall, immediately after his appointment, publish a notice thereof, in a newspaper published in the county, if there is one, otherwise in such paper as is designated by the court, in two issues of the newspaper published not more than a week apart. The notice shall require all claimants against the estate to present their claims with proper vouchers within six months of the date of the notice to the executor or administrator at a place within the state specified in the notice. A copy of the notice as published with proof of publication as required herein, shall be filed with the clerk not later than the time of filing the final account.

NOTE: This is substantially ORS 116.505, principal change being the length of time of publication and the elimination of the requirement that the designated place of presenting claims be within the county.