

**ADVISORY COMMITTEE
Probate Law Revision**

Twenty-ninth Meeting

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

**Dates) 1:30 p.m., Friday, October 14, 1966
and: and
Times) 9:00 a.m., Saturday, October 15, 1966.
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland**

Suggested Agenda

- 1. Approval of minutes of August meeting.**
- 2. Reports on miscellaneous matters.**
- 3. Independent administration.**

Reports by members of subcommittee (Allison, Lisbakken, Mapp and Zollinger) on second tentative draft, 5/18/66, "Part X. Independent Administration," of proposed Uniform or Model Probate Code, with suggestions for revision and possible inclusion thereof in proposed revised Oregon probate code.

- 4. 1966 New York probate codes.**

Report by subcommittee (Lisbakken and Mapp) on revised probate codes recently enacted in New York, and provisions thereof worthy of consideration for inclusion in proposed revised Oregon probate code.

- 5. Inventory and appraisal.**

Report and draft by subcommittee (Butler and Carson), encompassing ORS 116.405 to 116.465 and pertinent provisions of the inheritance tax statutes (i.e., ORS 118.610 to 118.700).

- 6. Foreign personal representatives; ancillary administration.**

Consideration of first tentative draft, 4/28/66, of part of proposed Uniform or Model Probate Code entitled "Foreign Personal Representatives: Ancillary Administration." Discussion to be led by Mapp and Riddlesbarger.

- 7. Possession and control of property (ORS 116.105).**

Report by Richardson on income disposition.

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Consideration of such matters as : (1) Who should make repairs and otherwise protect property against loss or damage;
(2) who is entitled to income from property during administration;
(3) whether personal representative has duty to take possession and produce income.

8. Sale or lease of estate property.

Report and draft by Zollinger on ORS 115.705 to 116.900.

Also, recommendation by Zollinger on disposition of ORS 116.990, which provides a criminal penalty for unauthorized administration of the personal estate of a decedent.

9. Next meeting.

ADVISORY COMMITTEE
Probate Law Revision

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

Minutes

The twenty-ninth meeting of the advisory committee (a joint meeting with the Committee on Probate Law and Procedure, Oregon State Bar) was convened at 1:30 p.m., Friday, October 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, Gooding, Husband, Jaureguy, Lisbakken, Mapp and Riddlesbarger. Carson was absent.

The following members of the Bar committee with terms expiring in 1966 were present: Richardson and Warden.

The membership of the Bar committee had recently been revised and tentatively appointed for the 1966-67 term of office were:

Robert W. Gilley	Lilliam Meyers
Donald G. Krause	John D. Mosser
Paul R. Biggs	Walter H. Pendergrass
Patricia Braun	A. E. Piazza
Kenneth Kraemer	David C. Silven
Charles M. Lovett	Judge Joseph J. Thalhofer
Duncan L. McKay	William R. Thomas
C. Laird McKenna	

The following members of the 1966-67 Bar committee were present: Gilley (arrived 4:30 p.m.), Braun, Lovett, McKenna, Meyers, Pendergrass, Piazza, Thalhofer and Thomas. Krause, Biggs, Kraemer, McKay, Mosser and Silven were absent.

Also present were Robert W. Lundy, Chief Deputy Legislative Counsel, and James Sorte who had recently been appointed to the Legislative Counsel staff to assist with the probate law revision.

Miscellaneous Matters

Introduction of new members. The new members of the Bar committee were presented and Lundy introduced Mr. James Sorte who had recently been appointed to the staff of Legislative Counsel to assist with the probate law revision.

Probable Date of Completion of Probate Law Revision and Future Procedures. Dickson called attention to recently published articles criticizing probate procedures throughout the United States and made particular reference to "The Mess in Our Probate Courts" appearing in the October 1966 issue of the Reader's Digest. Husband pointed out that the article was not entirely accurate and that the attorney's fee for a \$25,000 estate in Oregon would be \$800 less than that described in the magazine.

Dickson suggested, in view of the increase of adverse publicity, the committees consider accelerating the probate law revision with the expectation of completing it in time for introduction at the 1967 session of the legislature. Riddlesbarger pointed out that it would be unrealistic to anticipate that the probate revision would be adopted by the legislature without first selling it to lawyers throughout the state and that the time remaining before the legislative session was too short to accomplish this task. Allison suggested that the revision might be completed in time for introduction before the end of the legislative session and this would allow legislators and attorneys an opportunity to study the proposal in the interim preceding the 1969 session. Husband expressed agreement with Riddlesbarger's view and commented that the committees would be doing well to complete the project in 1968. Zollinger agreed there was not the slightest possibility the revision could be completed in time for introduction at the 1967 session. He pointed out that the initial consideration of the proposed probate code might be accomplished by the end of 1966 after which it would take substantial time, probably a year, to go over the first draft. By the middle of 1968, he said, the committees should have the proposed probate code in print and ready to present to local Bar associations and other interested groups.

Allison called attention to the explanatory notes following code sections in recently completed probate code revisions in other states and suggested the Oregon code should also have appended to each section or each group of sections a comment explaining the reason the committees considered the changes made to be appropriate. Zollinger agreed with Allison's suggestion and noted that the comments could be prepared by the draftsman which added a further reason for extending the date of completion of the probate code revision.

Frohnmayr indicated that sections of the probate code which the committees had reviewed and approved were not being made available in rough draft form and urged that a Legislative Counsel staff member be made available to devote his entire time to the probate project. Zollinger pointed out that the committees originally contemplated completion of their initial study before receiving a first draft and had been proceeding on that premise. Husband questioned the advisability of adopting a different plan, and Frohnmayr agreed that the basic plan should not be changed, but urged that some of the committee's deliberations be returned in written form at an early date so that members of the subcommittees who had done the original work on particular sections could be reviewing the drafts.

After further discussion, Frohnmayr moved, seconded by Zollinger, that the chairman appear before the Law Improvement Committee, explain the problem, and urge that the probate committees be provided with the full time services of an attorney capable of drafting the revised probate code.

Zollinger commented that he would be in favor of arranging for a much larger share of Lundy's time and letting some other person on the Legislative Counsel staff take over the duties Lundy was expected to perform for the legislature. Mapp suggested it might be possible to hire someone who had worked on probate revision in another state. Frohnmayr agreed that there were probably men in Wisconsin, Iowa or Michigan who would be available to come to Oregon. Dickson expressed the view that it would probably not be necessary to hire outside help but, in view of the time and talent donated to this project at no cost to the State of Oregon, the committees were entitled to Lundy's undivided attention until the probate project was completed.

After further discussion, it was decided that the chairman should appear before the Legislative Counsel Committee rather than the Law Improvement Committee. Vote was then taken on Frohnmayr's motion which was modified to include the appearance of a subcommittee with the chairman. Motion carried unanimously.

Richardson asked about the possibility of obtaining assistance from a foundation and was told by Lundy that it was difficult to interest foundations in granting money to a state-supported group. Lundy added that it was easier to find the money than to find a competent bill draftsman.

Lundy noted that a new Legislative Counsel Committee would be appointed when the legislature convened and there

was no meeting of this committee scheduled in the near future whereas the Law Improvement Committee had a meeting scheduled for November 10, 1966. Dickson appointed Zollinger, Allison and Frohnmayer to appear with him in Salem before either or both the Law Improvement Committee and the Legislative Counsel Committee with final arrangements to be made by Lundy.

Proposed 1966 Wisconsin Probate Code. Lundy said that he had received a copy of the proposed 1966 Wisconsin Probate Code and had requested copies in sufficient number to distribute to all members of the advisory and bar committees.

Zollinger read and presented a brief explanation of a few of the provisions contained in the proposed 1966 Wisconsin Probate Code covering the following subjects: Section 856.25 relating to the bonding of a personal representative; section 857.01 relating to title to all property in the personal representative; chapter 861 relating to provision for family rights; section 861.31 relating to allowance to family during administration; and section 867.01 having to do with summary procedures for small estates.

Minutes of August Meeting

There being no objection, Dickson ordered that reading of the minutes of the last meeting (August 19 and 20, 1966) be dispensed with and that they be approved as submitted.

Abatement and Continuance of Actions and Suits

Jaureguay asked the committees to reconsider the action taken at the previous meeting with respect to abatement and continuance of actions and suits. [Note: See Minutes, Probate Advisory Committee, 8/19, 20/66, page 6.] He pointed out that the Oregon Supreme Court had held that an abatement was the destruction of a suit and that the action was thus quashed and ended. Since the action was destroyed by an abatement, he was of the opinion that language different from that adopted at the previous meeting would be more appropriate and proposed the following:

"(1) No suit or action shall abate by the disability of a party. In any such case the party disabled shall appear by his guardian. If he has no guardian or if the guardian has been disqualified or refuses to act, the court shall appoint a guardian ad litem for him.

"(2) No suit or action shall abate by the death of a party. In any such case the suit or action shall appear by or against the personal representative of the decedent."

Zollinger pointed out that the conclusion reached by the committees at the August 1966 meeting was that they intended the action should abate unless there was a substitution within a year. After further discussion, Frohnmayer moved, seconded by Mapp, that the committees adhere to the action taken on page 6 of the August 1966 minutes. Motion carried.

Independent Administration

Allison distributed to members copies of his report relating to independent administration. [Note: A copy of Allison's report constitutes Appendix A to these minutes.]

Allison indicated that his report had been prepared in accordance with the discussion of the Washington nonintervention will statute at the previous meeting. [Note: See Minutes, Probate Advisory Committee, 8/19, 20/66, pages 2 to 4.] He explained various provisions of his report in some detail and noted that the court would be given authority to require a bond in all cases if it appeared proper. The theory of the procedure, Allison said, was that the personal representative would conduct the administration of the estate without the necessity of going to the court for orders during the course of the administration. He commented that the creditors would present their claims to the personal representative who would pay them if they appeared to be proper. When the personal representative had completed his administration of the estate, he would be required to file an application for a decree of distribution and at the same time would file a full, complete accounting of his proceedings in all matters. The court would then, if it found everything in order, issue a decree of distribution and the estate would be closed. Allison further explained that if any kind of a contest developed, the estate would be brought immediately into formal probate proceedings. He pointed out that the Act did not deal with inheritance tax problems and if it were adopted by the committees, he suggested the committees discuss the Act with the appropriate people in the Inheritance Tax Division of the State Treasurer's office.

Dickson expressed the view that the procedure as outlined by Allison would not be an improvement over either the existing system or the proposed probate code and said he could see no reason for changing from a proven method to one about which they knew nothing.

There was a discussion of various methods used by laymen to avoid probate and Mapp indicated that the committees should try to discourage methods of avoiding probate by adopting a simple system which would bring everyone into the

central probate system and provide creditors an opportunity to force formal probate administration should it become necessary.

Zollinger indicated that the procedure on sale, particularly of real property, was somewhat burdensome and observed that the sale of property during probate might be the principle problem with which the committees should concern themselves. He proposed that adoption of section 867.01, proposed 1966 Wisconsin Probate Code, might dispel much of the basis for the criticism of probate. Dickson agreed that the Wisconsin proposal, coupled with the other streamlined provisions of the probate code adopted by the committees, would solve most of the problems.

Allison suggested that further consideration of an independent administration statute be postponed until completion of the initial review of the probate code at which time the committees would be in a better position to know whether or not adoption of the proposal would be desirable. The committees agreed and Dickson asked that independent administration be placed on the agenda for further consideration at the time the initial study of the code was completed.

Riddlesbarger requested that the matter of joint accounts also be considered at that time and added that a spouse who elected to take her statutory rights could wholly defeat the testator's intent. Frohnmayer commented that creditors should probably be permitted access to the funds.

Possession and Control of Property (ORS 116.105)

Item 7 of the Suggested Agenda was the next item considered. Mr. Richardson introduced Mr. Jack McMurchie, Portland attorney, who discussed who is entitled to income from property during administration and problems with income allocation. Detailed minutes of this discussion are being prepared for all members of the advisory and bar committees, and will be sent to the members at a later date.

Meeting recessed at 5:00 p.m.

The following are detailed minutes of the report of Mr. Jack McMurchie at the October 14, 15, 1966, meeting of the Advisory Committee on Probate Law Revision at a joint meeting with the Bar Committee on Probate Law and Procedure.

Refer to page 6 of the minutes Possession and Control of Property (ORS 116.105).

Possession and Control of Property (ORS 116.105)

DICKSON: If you will permit me to vary from our agenda, we will go to item 7. Richardson has to leave.

RICHARDSON: Oregon is not unique in this respect in that it has very little law on the subject. It is a matter of practice rather than recorded decisions. Introduced Jack McMurchie, Portland attorney.

McMURCHIE: Cam asked me to appear here today to report some views that our office has come up with in the last year or so as a result of an estate we are handling which has some significant income allocation problems.

The Oregon Supreme Court has spoken very little on this subject. Also in Oregon the court has held that the Uniform Principal and Income Act does not apply to estates and as a result we have the situation now that pretty much whatever is brought before the court as a suggested method of allocating income earned during administration is adopted and approved by the court in the final account if the matter is even raised in the final account. Perhaps at that point any beneficiary other than a trustee doesn't have to concern themselves with whether the allocation was proper or not. I don't intend, in making my presentation here today, to go back and review the general rules with respect to what types of bequests are entitled to income and what aren't, unless you wish me to do so.

DICKSON: I think it would be beneficial and desirable.

McMURCHIE: Everything I say is "the general rule" or "the Restatement of Trusts" rule and is not necessarily the rule in Oregon.

The recipient of a specific devise or bequest or a bequest of an annuity is entitled to the income earned by the property bequeathed during the period of administration. This assumes, of course, that you have a residue out of which you can pay expenses of administration and taxes.

The next category is a general legacy. A general legacy is usually pecuniary in nature. You can have a general legacy which is in the nature of a specific legacy such as a gift of a number of shares of stock which you don't own at the time of your death. However, even then the legacy would be in the nature of a pecuniary legacy during the period of administration. For one reason or

another, the rule has grown up over the years that an outright pecuniary bequest is not entitled to share in the income earned during administration except in the event that the legacy is not satisfied within the "common law period of administration," whatever that is in Oregon. There is some feeling that if you have not satisfied a pecuniary legacy within one year after the date of death, the legatee is entitled to interest at the going rate on the bequest from that date until such time as it is paid. This is consistent with the common law except we don't know what the common law period of administration is in Oregon.

Contrary to the situation where an outright pecuniary legacy is entitled to no income, courts have generally held that a pecuniary legacy in trust is entitled to participate in the income earned during the period of administration. The amount of the income is another problem, but the general rule is that it is entitled to its proportionate share of the income. The question is whether you must make periodic adjustments in the ratio of the fixed value bequest to the entire estate -- whether you must make periodic adjustments so that the general legacy in trust actually gets a proportionate share of the income earned by the estate. This is a problem that is not covered in Oregon -- that is whether or not this general rule and the distinction between an outright bequest and a bequest in trust is the law in Oregon or should be the law in Oregon.

Residue. The present rule and the Restatement rule is that gifts of the entire residue or a portion of the residue in trust and a portion outright all are entitled to share pro rata in the income.

With respect to the so-called pre-residuary legacies, I don't believe there is any significant problem that needs to be resolved except in the limited situations where people are using pecuniary marital deduction bequests or a pre-residuary marital bequest or pecuniary or net estate type bequests where you don't give a fractional share of the residual estate. This area is not covered by the Uniform Principal and Income Act revision and I think probably needs to be covered because a pecuniary gift intended to take advantage of the marital deduction is certainly to be distinguished from a pecuniary bequest of \$10,000 or \$25,000 to a person other than the testator's spouse. I think that the pre-residuary marital deduction, whether it be pecuniary or not, should receive a pro rata share of the income.

To go back to the problem of the allocation of income to the pre-residuary legatees. Where a general legacy of \$250,000 is given to A and the residue to B with a provision that all of the taxes and expenses be paid out of the residue, the problem is whether you start out by taking the inventory values of the gross estate and \$250,000 over that inventory value times the income is what the recipient gets throughout the period of administration, or whether you try to determine what will be the net residue available for actual distribution and make an allocation of income on the basis of \$250,000 over that net. These two methods are called the gross share or the net share methods.

The so-called gross share rule, where you allocate on the basis of inventory values, without adjustment, is the easiest method. It is not the most equitable because of the fact that the recipient of the general legacy is not actually getting his share of the total income after the taxes and expenses are paid. Of course, the net share rule has the disadvantage of being more difficult and also has inequities.

The answer to the problem, which is suggested by the revision to the Uniform Principal and Income Act, is to require periodic adjustments in the ratio of the value of general legacy to the entire estate at each time when you make at least a major expenditure. These adjustments would be made when you paid such things as inheritance taxes, attorneys' fees, executor's commission, federal estate tax. Unfortunately, this method is more difficult to deal with and I don't think that any of the major trust departments in the city are even trying to do it. If they aren't, it may be too much to ask of a personal executor.

The same problem arises much more often and with much more case authority when you are concerned with the allocation of income among residuary legatees and there is a provision in the will for payment of these expenses or taxes out of a particular share of the residue only. What do you do in these instances? Do you apply the gross share, the net share or the periodic adjustment rule? The same problem occurs in the area of charitable bequests where you have a charitable bequest which is out of the residue, but is not going to bear a portion of the taxes.

In each of these areas, the solution proposed by the revised Principal and Income Act is the periodic adjustment rule. This is far and away the most equitable rule and certainly when you get into estates where there are significant amounts of income, it can make a substantial difference whether a residuary legatee's share of the estate is going to be reduced at the end of 15 months by a substantial amount to pay federal estate taxes. At that time the executor should make an adjustment and establish a new ratio of the shares of the residue remaining and carry that ratio forth from that time, at all times using inventory values for this purpose.

One thing which I did not touch on and which is a problem that is more crucial in Oregon than in many jurisdictions is raised by a case which many of you may be familiar with, *In re Feecheley's Estate*, 179 Or 250. There the court held that income on assets which are expended and which will never become a part of the residue of the estate, is to be added to the residue and not distributed as income for the reason that the testator never really intended the income beneficiary to get the income earned on those assets. This is the English rule. It was then but no longer is the general rule. The court relied extensively on the fact that it was the general rule and the rule of the Restatement of Trusts which it no longer is. No one has taken this problem to the Supreme Court again so we are bound by that decision and to some extent, it affects the general question of whether or not you can make periodic adjustments. It does in effect adopt the net share rule.

I wanted to hand out to you a couple of pages from an article in Trusts and Estates which deals with this problem and which contains in it a quotation of Section 5 of the Revised Uniform Principal and Income Act which was adopted by the National Conference of Commissioners in 1962 but has never been considered by the Oregon State Bar Committee on Uniform Laws. It is, to my way of thinking, at least the first step in the solution to the problem. The only other way is if you draft your will with detailed instructions as to how income should be allocated. Unfortunately many attorneys today are not aware of the problems in this area and wills are drafted without these problems in mind.

The provision appears on the second page of what I gave you. It would either have to be adopted as a part of the Uniform Principal and Income Act or it would have to become a part of the general probate code. This provision still leaves it available to the testator's attorney to draw a will which will change the results of the Act. However, it does contain specific detail covering most of the problems I have just discussed and what will happen if there is no language in the will to cover the problem. It adopts the more equitable rule, the combination of the gross share and net share rule, requiring periodic adjustments. The Act also provides that income received by a trustee under this subsection should be treated as income of the trust. Subparagraph (b) you will note is contrary to the Keeheley rule.

My recommendation is that the revised Uniform Principal and Income Act makes a substantial step forward and I think it is the right step in solving this problem. I have only one suggested change and that is that some language should be inserted to make it clear that the legatee of a pecuniary bequest which is intended to take advantage of the marital deduction provisions of the Internal Revenue Code would also share in the income in the same way as a residuary legatee.

(Citation to the article distributed to committee members: October 1963 issue of Trusts and Estates, page 916; also see, 2 ALR 3d, p. 1061; III Scott on Trusts, Sec. 234.)

ZOLLINGER: Would it be of value to have some of this statutory provision incorporated in the probate code or is the proper place in the Principal and Income Act?

McMURCHIE: In the Uniform Principal and Income Act if we can get it there. If we cannot, this committee should work to be assured it will either get it there or in the probate code.

ZOLLINGER: With the change you suggest relating to pecuniary gifts to spouse it will no longer be a direct adoption of section 5 of the revised Act. There are some other revisions in the revised Act and it might be sensible to propose the substance for our present Principal and Income Act. If we are concerned only with the disposition of income in probate estates, there would be nothing improper about putting it in the probate code.

JAUREGUY: Don't you think it should be there?

ZOLLINGER: I would rather like to see it there myself.

McMURCHIE: If put in there, it would have to be revised to the extent that the last sentence about the trustee would not be appropriate.

ZOLLINGER: Yes, this language is not appropriate, but the substance may be. My final question is: Will you draft something for us?

DICKSON: We would be deeply grateful if you would prepare the appropriate Act embracing all your suggestions.

RICHARDSON: The conclusion Jack came to is the same conclusion that the American Bar Section of Probate Property came to after quite an extensive report.

McMURCHIE: I assume you just want that in a form that you could work on. I would not have to concern myself with the ramifications this might have on other sections of the revised Code.

DICKSON: We will take care of that.

ALLISON: . . . When putting that into probate language the reference to "times of distribution" should have a substitute phrase.

FRONMAYER: We do have in Oregon the Uniform Principal and Income Act.

McMURCHIE: Yes, but not the revision and the revision not only incorporated this section but made other substantial changes in such things as income on wasting assets and timber problems.

FRONMAYER: Do you think the legislature would buy this part of it?

McMURCHIE: I don't know that because I don't know the reason why this Act has not been brought up or discussed at least in the committee reports of the Committee on Uniform State Laws of the Oregon State Bar since the revision took place. I don't know whether they have missed it or don't see fit to adopt it.

FRONMAYER: This is a problem we are confronted with every day. I am wondering if we should try to do something about it in the 1967 session which we might approach through the Principal and Income Act. Not to amend it in any other respect; just in accordance with section 5.

ZOLLINGER: If it is paid to the trustee as income, he can determine pretty easily what to do, can't he?

McMURCHIE: He should be able to but he might still be faced with the problem of In re Feehely's estate.

DICKSON: If he will prepare this proposal for incorporation in the probate code, then we can, if we wish, offer it as an amendment to the Principal and Income Act.

ZOLLINGER: Let's put it in the probate code and keep it as clear as we can so it will not be a fearsome thing.

McMURCHIE: You would be willing to adopt the more complicated periodic adjustment approach than go to one of these other methods?

ZOLLINGER: I don't feel strongly on it. If it makes substantially greater difficulty, perhaps the less equitable course would be the better one to choose. I would think that once we had the rule laid down, it wouldn't be difficult to follow. Bert, would it be difficult to follow if we had the law laid down?

BUTLER: No, I don't think so.

LUNDY: Is there any other action you want to take on 116.105?

DICKSON: Let's postpone the whole thing until we have Mr. McMurchie's proposal and then take it up again.

ZOLLINGER: I should think we could put it on next month's agenda.

DICKSON: We will put this on the agenda for the November meeting as the first item of business.

Meeting recessed at 5:00 p.m.

The meeting was reconvened at 9:00 a.m., Saturday, October 15, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

All members of the advisory committee were present. The following members of the Bar committee were present: Gilley, Braun, Lovett, McKenna, Meyers, Piazza, Thalhofer and Thomas. Also present were Lundy and Sorte.

1966 New York Probate Codes

Mapp and Lisbakken had been appointed as a subcommittee to study the 1966 New York Probate Codes and report on provisions which the committees might be interested in incorporating into the Oregon probate revision.

Mapp reported that he and Lisbakken, working independently, had studied the 1966 New York Probate Codes and had reached the conclusion that it would be impossible to cover in one meeting all of the provisions which the committees might want to consider. He indicated that they would commit themselves to becoming familiar with the New York codes as well as appropriate portions of codes of other states and would be prepared to relate these code provisions to the committees' discussions.

Inventory and Appraisal

Butler and Carson had been appointed as a subcommittee to submit a draft relating to inventory and appraisal provisions (i.e., ORS 116.405 to 116.465) and pertinent provisions of the inheritance tax statutes (i.e., ORS 118.610 to 118.700). [Note: See Minutes, Probate Advisory Committee, 8/19, 20/66, pages 17 to 21.]

Carson explained that J. J. Ferder, State Inheritance Tax Supervisor, was not able to meet with Butler and him on the day they had planned and Carson had, therefore, met with Ferder and two members of his staff prior to the appointed day. Carson expressed the view that the suggestions Butler and he would propose to the committees were such that they would not anticipate objections from the Inheritance Tax Division except in minor respects. He said that he had written the memo relating to the inventory and appraisal statutes appearing in ORS chapter 118 while Butler had undertaken writing recommendations relating to the inventory and appraisal statutes in ORS chapter 116.

ORS chapter 116. Butler distributed to members copies of his report entitled "Inventory and Appraisal." [Note: A copy of Butler's report constitutes Appendix B to these minutes.]

Section 4. Butler explained that his report restated the law without noting deletions or revisions in existing law. He read his report and, having read section 4, was questioned by Husband concerning its meaning. He was told by Butler that no appraisal of any of the assets of an estate would be required unless the appraisal was required for inheritance tax, administration or distribution purposes or by order of the court and that the appraisement could be of specific assets or the estate as a whole. Butler also noted that the deletion of the appraisal requirement was borrowed from section 365 of the 1963 Iowa Probate Code.

Husband indicated that friends and neighbors frequently appraised property in his county without charge to the estate and appraisals caused few, if any, problems. Butler remarked that this was not true in Multnomah County where appraiser's fees and attorney's fees created many problems. He pointed out that the statute was permissive and that no appraisal was required unless it served a useful purpose.

Allison asked how the court could set an adequate bond when no values were listed in the inventory and was told by Carson that the court could follow present practice and the bond could be increased later if it appeared necessary.

Piazza suggested that it might be simpler to have a value assigned on the inventory when it was filed and the inventory could then be used as the work sheet for the State Treasurer's report. He observed that it would be of some value to have the assigned values in the file. Frohnmayer indicated that in difficult cases he would prefer not to be forced to bind the estate to a specific value until sufficient time had passed for determination of the fair value. Piazza pointed out that the discussion concerned property which did not require an appraisal.

Section 1. Zollinger suggested that section 1 of Butler's report be amended to provide that the inventory show the estimated value of each item of property. He proposed that if the exact value was ascertainable, it would be shown, while in the case of real estate, the value of which was not easily ascertainable, the estimated value would be shown and no one would be bound by that value. Carson asked Zollinger if he would agree to showing the personal representative's estimate and received an affirmative reply. Carson suggested the addition of the following sentence to section 1: "The inventory shall show the personal representative's estimate of the true cash values of the items included therein." Riddlesbarger questioned the use of "items" because it could require the listing of

every small item in a household. Zollinger suggested that a value should be set opposite each item or group of items as opposed to one total value. Carson then suggested the following:

"The inventory shall show the personal representative's estimates of the respective true cash values of the properties described in the inventory."

Zollinger moved, seconded by Allison, that section 1 of Butler's report be approved with the addition of the sentence suggested by Carson. Motion carried.

Lundy asked if "true cash values" meant something different than "value." Zollinger replied that it was meant to be a more precise term than the valuations included in the petitions, and Riddlesbarger suggested that "true cash value" might be included in the definitions section of the probate code. Dickson commented that the section should be broad enough to permit the personal representative to assign a value for each separate item or for a roomful of furniture. Zollinger suggested that further refinement of language be left to the draftsman.

Riddlesbarger inquired as to the meaning of "verified inventory" in section 1 and was told by Carson that "verified" to the subcommittee meant verified under oath by the personal representative. Riddlesbarger noted that since the values were estimated, the personal representative was merely verifying that it was a list of properties in the estate and the oath added nothing. After a brief discussion, Frohnmayer moved, seconded by Thalsofer, that section 1 be amended to omit the verification requirement on the inventory. Motion carried.

Allison called attention to the fact that the draft changed the time period from 30 days in existing law to 60 days. Butler pointed out that this was discussed at the previous meeting and the committees had decided 30 days was too short a time in many cases.

Section 2. Lovett noted that "appraisement" on the last line of section 2 of Butler's report should be "inventory" and Butler concurred. Butler moved, seconded by Zollinger, that section 2 be adopted with the revision suggested by Lovett. Motion carried.

Section 3. Husband pointed out that section 3 of Butler's report again referred to a "verified" inventory and suggested the verification requirement be deleted.

Allison commented that he understood there would be only a final account and inquired concerning the need for the last clause in section 3, "but the court may order which of the two methods the personal representative shall follow." Butler explained that this phrase was taken from the Guardianship Code (i.e., ORS 126.230 (2)). Zollinger remarked that many estates will necessarily continue for longer periods of time and asked if it was intended that there should be intervening accounts in those extended cases. Dickson expressed the view that there should be at least an annual accounting.

Zollinger moved, seconded by Riddlesbarger, that the final clause of section 3 of Butler's report be deleted. Motion carried.

Butler moved, seconded by Zollinger, that section 3 be adopted with the following revisions: Delete "verified" preceding "supplemental inventory"; place a period after "accounting" and delete the balance of the section. Motion carried.

Section 4. In reply to a question by Allison, Butler explained that the subcommittee contemplated that the personal representative could, on his own initiative, cause an appraisal to be made and that this might be done because of negotiations with the State Treasurer, and it would not be necessary to obtain an order of the court in such cases. Dickson suggested "or by order of the court" be deleted from section 4 of Butler's report. Butler agreed adding that it was included because it appeared in the 1963 Iowa Probate Code.

Carson said that the last sentence of section 4 was intended to show that the whole estate was not necessarily to be appraised, and that one appraiser might be appointed for one kind of asset and another appraiser for a different type of asset. This concept, he said, was based on Senate Bill 308, introduced at the 1965 legislature. Martin asked if the last sentence of section 4 meant that an appraiser had to be appointed unless the court by order declared such appointment unnecessary, and Zollinger said that this was the implication. Lundy noted that the House Judiciary Committee had added the following language to Senate Bill 308: "Different appraisers may be appointed to appraise different parts of the property."

There followed a lengthy discussion of the proper wording of section 4 after which Butler moved, seconded by Thalsofer, that section 4 be adopted to read:

"Section 4. Property belonging to the estate of a decedent need not be appraised unless the court requires an appraisal for inheritance tax purposes. The court may direct that specific property or any part of the property may be appraised by one or more appraisers appointed by the court. Different appraisers may be appointed to appraise different parts of the property." Motion carried.

Section 5. Riddlesbarger questioned the intent of "all which shall be paid by the personal representative as expenses of administration" in section 5 of Butler's report. He was told by Carson that this was an amendment to Senate Bill 308 made by the legislature and the subcommittee had adopted it. Gilley suggested "disbursements and" be deleted and Zollinger proposed "as may be approved by the court" rather than "fixed by the court." Martin asked if section 5 would take the place of the appraisal scale in the existing statute and, if so, suggested it would broaden the statute. Lundy commented that he had received correspondence from real estate appraisers who indicated the scale was in conflict with their code of ethics. He had, he said, received a letter from Oregon Chapter 14, American Institute of Real Estate Appraisers, in which they set forth the following four specific recommendations:

"1. That some form of qualification as evidenced by membership in a properly recognized professional organization or by examination or by demonstration, be a requirement of eligibility to appraise an estate or a portion of an estate and that appointment be made only for such portion of an estate for which proper qualification is so evidenced.

"2. That appraisal fees be agreed upon in advance (prior to assignment) and that they be based on the investigation and analysis necessary for a proper appraisal, rather than on the amount of value found. A procedure somewhat similar to that which is in current use by the State Highway Commission is suggested.

"3. That any appraiser for an estate or a portion of an estate should sign and attest to his opinion of value only on types of assets for which his qualifications are in evidence.

"4. That the over-all value of an estate be submitted to the court by the attorney conducting probate thereof, and that such be a composite of values found on various types of assets; each by persons qualified to appraise the specific types involved."

Dickson pointed out that the four recommendations assumed that only real property would be appraised and this was not a valid assumption. There followed a lengthy discussion concerning appraiser's fees with the following alternatives being presented and discussed:

- (1) The scale set forth in Senate Bill 308.
- (2) Section 21, 1963 Iowa Probate Code.
- (3) Establishment of schedules of appraiser's fees by court rule.
- (4) Maximum appraiser's fee of \$1 per thousand.
- (5) The State Highway Commission appraisal fee ranging from \$100 to \$200 per day.

Following the discussion, Butler moved, seconded by Carson, that section 5 be adopted to read:

"Section 5. Each appraiser shall be allowed such reasonable fees and necessary expenses as may be approved by the court."

Motion carried.

Section 6. Riddlesbarger suggested deletion of "Each article of" from section 6 of Butler's report in order that each individual item would not have to be appraised. He also questioned the necessity of "appointed by the court to make the appraisal" and was told by Butler that the phrase was intended to show that each appraiser signed only that portion of the appraisal in which he participated. There was further discussion of the second sentence of section 6 after which Butler moved, seconded by Carson, that section 6 be approved to read:

"Section 6. Property for which appraisement is required shall be appraised at its true cash value as of the date of the decedent's death. Each appraisement shall be in writing and shall be subscribed by the appraiser or appraisers making it."

Motion carried.

Section 7. Riddlesbarger suggested deletion of the words "of a will" from section 7 of Butler's report because there were no executors other than executors "of a will." Butler moved, seconded by Thalsofer, that section 7 be approved with the revision suggested by Riddlesbarger. Motion carried.

Jaureguy commented that the second sentence of section 7 was unnecessary. Butler remarked that the common law rule was to the contrary and the purpose of the second sentence was to make clear that the common law did not apply. Jaureguy stated that the inference was that if the executor did not accept administration of the estate, he would not be liable for it.

After further discussion, Thalsofer moved, seconded by Jaureguy, that section 7 be adopted to read:

"Section 7. The naming of any one as executor shall not operate to discharge that person from any claim which the testator had against him, and the claim shall be included in the inventory whether or not he accepts the administration of the estate."

Motion carried.

Section 8. Frohnmayer expressed the view that "The discharge or bequest" in section 8 of Butler's report was awkward phraseology. After Carson indicated that this was the language of the present statute and the subcommittee had attempted to make a minimum number of changes, Frohnmayer withdrew his objection. Martin questioned the meaning of "for the purposes of administration" in section 8 and was told by Zollinger that this phrase made the discharge or bequest in a will of a claim of the testator that of a specific legacy.

Butler moved, seconded by Carson, that section 8 be approved. Motion carried.

ORS 116.450 through 116.465. Butler moved, seconded by Carson, that ORS 116.450 through 116.465 be repealed. Motion carried.

ORS chapter 118. Carson distributed to members copies of his report entitled "ORS 118.610 to 118.700 (Inheritance tax statutes relating to inventory and appraisement.)" [Note: A copy of Carson's report constitutes Appendix C to these minutes.]

Carson explained that the subcommittee had attempted to make necessary corrections in ORS chapter 116 and delete repetitious matter in ORS chapter 118.

ORS 118.610. Carson moved, seconded by Butler, that ORS 118.610 be repealed.

Motion carried.

ORS 118.620. Carson moved, seconded by Butler, that ORS 118.620 be repealed. Motion carried.

ORS 118.630. Carson moved, seconded by Butler, that ORS 118.630 be repealed. Braun asked Carson if he would assume, after deletion of ORS 118.630, that the court could require an appraisal on motion of a creditor or an heir and received an affirmative reply. Motion carried.

ORS 118.640, section (1). Carson explained that House Bill 1480 introduced at the 1965 session of the legislature contained substantive changes which would be covered by the committees at the time they considered the inheritance tax features of ORS chapter 118. In the interest of saving time, he suggested that work at this meeting be confined to inventory and appraisement.

Carson moved, seconded by Butler, that consideration of ORS 118.640, section (1), be postponed until the committees considered the entire ORS chapter 118. Motion carried.

ORS 118.640, section (2). Carson moved, seconded by Butler, that the recommendation in his report with respect to ORS 118.640, section (2), be adopted. Motion carried.

ORS 118.640, section (3). Carson moved, seconded by Butler, that the recommendation in his report with respect to ORS 118.640, section (3), be adopted. Motion carried.

ORS 118.640, section (4). Carson moved, seconded by Butler, that the recommendation in his report with respect to ORS 118.640, section (4), be adopted. Motion carried.

ORS 118.650. Carson explained that ORS 118.650 contained a provision requiring notice of appraisement to the State Treasurer but that few people complied with the notice requirement. Carson moved, seconded by Thalsofer, that ORS 118.650 be repealed. Motion carried.

ORS 118.660, section (1). Butler pointed out that since appraisement would not be mandatory under the revisions adopted, reference to "appraisement and reappraisement" in section (1) of ORS 118.660 would be inappropriate. Thalsofer noted that this section contained the first reference to a court in this chapter and asked if it was to be assumed that the reference applied to a probate court. Carson replied

that until it became necessary to differentiate between courts in the appeal provisions, it could be assumed that the reference is to the probate court.

After further discussion, Carson moved, seconded by Butler, that section (1) of ORS 118.660 be adopted to read:

"(1) Every personal representative or trustee of any estate subject to an inheritance tax under the laws of this state, whether or not any such tax may be payable, before the court authorizes any payment or distribution to the legatees or to any parties entitled to a beneficial interest therein, shall deliver to the State Treasurer a copy of each inventory and each appraisement duly certified to be such by the clerk of the court, or by the personal representative or trustee personally or by his attorney of record, and shall file with the clerk proof of such delivery." Motion carried.

ORS 118.660, section (2). Carson moved, seconded by Thalhofer, that the recommendations of the subcommittee concerning amendment of section (2) of ORS 118.660 be adopted. Motion carried.

ORS 118.670. Carson moved, seconded by Butler, that consideration of ORS 118.670 be postponed until the committees' consideration of the entire ORS chapter 118 because the section did not relate strictly to inventory and appraisal. Motion carried.

The meeting was recessed at 12:45 p.m.

The meeting was reconvened at 2:00 p.m. All members of the advisory committee were present except Allison. The following members of the Bar committee were present: Gilley, Braun, Meyers, Piazza and Thalhofer. Also present were Lundy and Sorte.

Inventory and Appraisal (Continued)

ORS 118.680. Braun noted that ORS 118.680 also related to determination of tax. Carson moved, seconded by Butler, that consideration of ORS 118.680 be postponed pending consideration of the entire ORS chapter 118. Motion carried. Butler indicated that ORS 118.680 was no longer necessary. Zollinger questioned postponing consideration of the section and moved, seconded by Butler, that ORS 118.680 be repealed. Motion carried.

ORS 118.690. Riddlesbarger moved, seconded by Braun, that consideration of ORS 118.690 be postponed. Motion carried.

ORS 118.700. Zollinger indicated that ORS 118.700 provided that if the court found a tax determination erroneous, it could make a redetermination of the tax, and, under subsection (3) an appeal could be taken from the order redetermining the tax. Zollinger asked if an appeal might also be taken from the court's failure to redetermine in the event it found no error. Carson replied that if the court found no error, it in effect redetermined that the first determination was correct and there was, therefore, a redetermination inherent in the finding. Zollinger suggested that in Carson's proposed section (3), ORS 118.700, "from its order refusing redetermination" be inserted after "order of the probate court redetermining."

After further discussion Riddlesbarger moved, seconded by Braun, that further consideration of ORS 118.700 be deferred pending the committees' subsequent consideration of ORS chapter 118. Motion carried.

Frohmayer pointed out that section (3), ORS 118.700, as proposed by Carson in his report, referred three times to "other determinative order" and expressed the view that these three phrases should be deleted at the time ORS chapter 118 was considered. Carson explained that the section had been drafted to conform to similar statutes but added that he did not disagree with Frohmayer's suggestion.

Inheritance Tax (ORS chapter 118)

Miscellaneous matters. Lundy pointed out that the committees had previously decided that the probate court should be the circuit court in every county. In many instances, not only in ORS chapter 118 but throughout the probate code, he indicated that a question would arise, particularly in matters relating to appeals, when a procedure would depend upon whether or not the probate proceeding was in a county court or a circuit court. He asked whether the draftsman should consider and draft the proposed statutes on the assumption that the probate court would be the circuit court in every instance, in which case the appeals would be to the Supreme Court only, or whether alternative possibilities should be considered where some probate courts would be inferior to others.

Thalhofer suggested it would be consistent to assume probate was going to be in the circuit court and advocated that the proposed code be drafted accordingly. Dickson

commented that there might be a bill in the 1967 legislature eliminating the jurisdiction of county courts in probate proceedings and observed that it would be wise to refer to the "probate court" throughout the code with changes to be made at a later time if they were necessary.

Carson indicated that he had considered this problem when he prepared his report on ORS chapter 118. He suggested that time could be saved if the committees would outline the principles they wished to adopt and make less detailed effort to put those principles into final language, relying instead upon the draftsman to prepare the draft and make decisions as to particular wording, punctuation, etc. Riddlesbarger expressed agreement with Carson's suggestion and added that the proper time to edit was after the initial draft had been prepared. He felt the only advantage of going over the statute carefully in the first instance was to gain a deeper understanding of the problems involved. Dickson agreed that this was a material advantage.

Carson told the committees that during his meeting with Ferder he had asked Ferder to contact him if he had additional suggestions to make concerning amendment or repeal of the sections they had discussed. Carson said because he had not heard from Ferder he assumed that Ferder had nothing further to suggest. Carson said he had also informed Ferder that eventually the probate committees would consider the inheritance tax provisions of ORS chapter 118 and he had asked Ferder to submit suggestions for revision. Carson indicated that he and Ferder had also discussed the nonintervention type of will statute and, because Ferder remarked that he was not familiar with this type of procedure, Carson had forwarded a photocopy of the Washington statute to him.

Zollinger expressed the view that it would probably be more expedient to present the committees' recommendations to Ferder and invite his comment, rather than expect him to volunteer suggestions for change. He suggested that the subcommittee prepare a tentative draft and request Ferder's comments in advance of the committees' December meeting at which time the matter could be placed on the agenda.

Proposed revisions to ORS chapter 118. Braun remarked that she, as a member of the subcommittee on inheritance tax revision, planned to propose a change which would divorce the probate court completely from inheritance tax questions by requiring the personal representative to deal directly with the State Treasurer. Under this proposal Braun explained that all inheritance tax questions would be appealed to the tax court rather than to the probate court. Dickson

suggested that some research would be necessary to determine the number of additional judges which would be required to be added to the tax court if such a proposal were adopted. Frohnmayer expressed objection to the transfer of inheritance tax questions to the tax court. Braun indicated that the main argument for doing so would be that a state-wide body of law would be developed under uniform guidelines. She indicated that she would not urge that jurisdiction be removed from the probate court on inheritance tax questions, but would advocate that the personal representative deal directly with the State Treasurer in much the same way as federal estate tax matters were handled. Frohnmayer agreed that this would be a reasonable procedure providing appeals were to the probate court.

Braun observed that New York permitted the personal representative to use the federal estate tax return to be filed with the state inheritance tax division with necessary adjustments. Butler expressed disapproval of such a procedure and also noted that the tax court was not as accessible as the probate court.

Carson asked for a show of hands on the following proposition: Shall the initial determination of inheritance tax be made by the personal representative and the State Treasurer without reference to the probate court? Committee voted in favor of this proposition.

Carson then posed this proposition: In case of a controversy arising between the State Treasurer and the personal representative, shall that issue be resolved in the tax court? The committee voted unanimously to retain jurisdiction in the probate court.

In line with the discussion of suggested revisions to the inheritance tax chapter, Husband noted that no provision was made for deducting claims unless they were secured, and he considered it unfair that a \$10,000 promissory note could not be deducted, whereas a \$10,000 note for which property was mortgaged, or stock had been pledged, could be deducted. Carson commented that perhaps the reason a promissory note was not deductible was because it was not chargeable against a taxable asset. Zollinger suggested that the subcommittee might want to propose that if the claim were enforceable against the recipient of the nonprobated estate, it would be deductible; if it were not enforceable, it would not be deductible.

Butler outlined an area in the inheritance tax laws which had caused him concern and explained that for many

years a general power of appointment was taxable in the State of Oregon only if the power was exercised; if not exercised, it was not taxable. The State Treasurer had initiated a change in this policy, he said, and the result was a complete reversal from the treatment received under the federal estate tax law where the property subject to the general power under a marital deduction is not taxed in the first instance, but upon the survivor's death it is taxed. Under the Oregon law that property is presently being taxed in both instances, and Butler contended that this practice had developed in Oregon law without being given the attention it should have had. He advocated either a provision in the inheritance tax code for a marital deduction or reversion to the previous situation where it was the exercise of the power that was taxable and not its mere existence. Dickson asked Butler which of the alternatives he would prefer and Butler replied that he would favor reversion to the previous situation in this respect because it would not entail revision of the marital deduction provisions. Butler so moved, Riddlesbarger seconded and the motion carried.

Husband suggested that the collateral tax rate for recipients other than direct heirs was too high and Dickson expressed agreement. A question was also raised concerning the policy of termination of the relationship of a stepchild or a grandstepchild upon the death of the parent or grandparent. Gilley asked if it was within the purview of the committees to consider tax rates and Dickson commented that any time a deduction was changed, the amount of money received would be affected. Zollinger recommended, and others agreed, that the committees should not attempt to fix tax rates but it was proper to concern themselves with such matters as the one suggested by Butler and with questions of whether relationships were properly divided. Frohnmayer expressed the opposing view and Piazza agreed, adding that in order to avoid problems in the legislature, the committees should not interfere with anything that affected the amount of money collected.

Riddlesbarger moved, and the motion was seconded, that the committees refrain from consideration of the subject of inheritance or estate taxes except as an incident to preparing a probate code. Gilley asked Riddlesbarger if his motion would be construed to leave the committees free to consider the procedures of estate and inheritance tax determinations and received an affirmative reply. Dickson asked Riddlesbarger if adoption of his motion would mean that the committees would avoid consideration of everything that would affect the amounts collected and was told that this was not quite true. Riddlesbarger defined his motion to

mean that the committees would confine their efforts to revising the probate code, excluding from consideration state inheritance tax matters as such. Zollinger stated his understanding of the motion was that it was the purpose of the committees to consider the procedures for determination of inheritance and estate taxes but refrain from consideration of proposals to amend the substantive laws for the determination of the amount of the taxes payable. Zollinger further explained that the motion would allow the committees to consider the procedural questions relating to the procedures for determination but not to the substantive matters. Dickson commented that Zollinger's statement would preclude consideration of Husband's or Butler's propositions. Motion carried.

Riddlesbarger expressed the view that wherever the committees discovered problems such as those defined by Butler and Husband, they should be referred to the Law Improvement Committee. Dickson concurred.

Dickson added Lisbakken to the inheritance tax subcommittee to which Carson and Braun had previously been appointed and requested that the report of this subcommittee be placed on the agenda for the December meeting.

Foreign Personal Representatives; Ancillary Administration

Mapp and Riddlesbarger had been appointed as a subcommittee to report on foreign personal representatives and ancillary administration. Mapp referred to the first tentative draft, dated April 28, 1966, entitled "Foreign Personal Representatives: Ancillary Administrations" which, he explained, was a composite of provisions from the two uniform Acts, "Uniform Ancillary Administration of Estates Act" and "Uniform Powers of Foreign Representatives Act" drafted by the National Conference of Commissioners on Uniform State Laws, copies of which were mailed to all members of both committees in March 1966. The draft, Mapp stated, was the first draft of what would one day become a part of the uniform or model probate code.

Mapp read through the draft section by section and also read many of the applicable comments from the uniform Acts. Zollinger pointed out that the definitions would not cover, for example, the case of a man domiciled in California who died leaving property in Washington and Oregon when the personal representative was appointed in Washington and there was no ancillary administration. Lundy pointed out that the definitions would not cover foreign personal representatives appointed in foreign courts.

After Mapp had read section 5 of the draft, Butler commented that the committees had adopted provisions covering many of the conditions set forth in the draft under discussion. Lundy pointed out that revisions to ORS 116.186 had been approved. Zollinger read section 497, 1963 Iowa Probate Code, and suggested that it be incorporated in an appropriate place into the probate code. He expressed the opinion that the Iowa section referred to was good legislation but was not sufficient and that ancillary administration would also be needed. Frohnmayer expressed agreement and indicated that instead of combining the two uniform Acts, ancillary administration should be set forth separately.

There was a discussion of other provisions of the draft after which Zollinger asked if the committees considered it necessary to make a separate provision respecting ancillary administration. The committees unanimously agreed that it would be desirable to provide for ancillary administration.

Zollinger remarked that there were some difficult problems in administration of foreign estates where there was an ancillary administration. One of them was a pecuniary bequest; another, he said, the question of whether a creditor's claim had been filed in each jurisdiction and might have been paid twice. At the conclusion of administration, Zollinger observed that another question was whether distribution should be made to the domiciliary administrator or to the heirs. He suggested that the committees decide on the policy considerations of these and other matters and include those provisions in the proposed code without going into any more detail than necessary.

After further discussion, it was decided that the subcommittee would prepare a draft on ancillary administration for presentation to the committees at their November meeting. Frohnmayer suggested that they incorporate the decisions already adopted by the committee with respect to ORS 116.186 into their proposal.

Statutes Remaining to be Reviewed

Dickson requested Lundy to prepare a list of the remaining statutes not yet considered by the committees and stated that at the November meeting he would assign subcommittees to study these matters.

November Meeting of Committees

The following items were scheduled for consideration at the November meeting:

Possession and control of property on income disposition
(ORS 116.105)

Revisions on income disposition to be prepared and
submitted by Jack McMurchie

Ancillary administration

Draft by Mapp and Riddlesbarger

Sale or lease of estate property

Report and draft by Zollinger on ORS 116.705 to
116.900

Also, recommendation by Zollinger on disposition
of ORS 116.990, which provides a criminal penalty
for unauthorized administration of the personal
estate of a decedent.

December Meeting of Committees

Inheritance tax (ORS chapter 118)

Draft by Carson, Braun and Lisbakken

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

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, October 14, 15, 1966)

INDEPENDENT ADMINISTRATION
(Refer to Second Tentative Draft)

(submitted by Stanton W. Allison)

SECTION 1. (Definitions and Use of Terms.) When used in this Part, unless otherwise apparent from the context:

(1) "independent administrator" means any personal representative qualifying under the terms of this chapter.

(2) "independent administration" means the process whereby an independent administrator administers an estate as provided in this chapter.

(3) "full administration" means the process whereby a personal representative administers an estate under complete judicial supervision as provided in chapters _____ of this Code.

SECTION 2. (Independent Administration not Exclusive.) Independent administration shall be an alternative to full administration for settling estates. While an independent administration is pending, any person named as personal representative in the decedent's will or any heir, distributee, or creditor of the estate may petition the probate court for a full administration. The court thereupon shall terminate the independent administration and appoint a personal representative under the full administration to succeed to the responsibility of administering the decedent's estate.

SECTION 3. (Who May Make Application.) Any person named as personal representative in the decedent's will, or any heir, distributee, or creditor of the decedent, if otherwise qualified to act as a personal representative of the decedent, may make application for the independent administration of the estate and seek the appointment of himself or another person so qualified, as independent administrator.

SECTION 4. Same as Second Tentative Draft except on line 12, page 66, change "should" to "must", and delete "or its absence explained." On line 31, add "if any" after "relationship."

SECTION 5. (Time to File Application.) Same as Second Tentative Draft.

SECTION 6. (Time for Hearing; Notice.) Line 9, add after "general circulation," "published in the county where application is filed"

SECTION 7. (Court's Discretion in Appointment.) If, at the hearing, the Court is persuaded that the requirements of the Code have been met, he may appoint an independent administrator of the estate, and grant letters of independent administration to such independent administrator, provided that the Court may in his discretion appoint any qualified person, instead of the person whose appointment is sought in the application, if he considers such an appointment in the best interest of the estate. However, if the court finds that the estate is or may become insolvent, or that full administration is otherwise proper, he shall appoint a personal representative to administer the decedent's estate under full administration.

SECTION 8. Delete Section 8 of Second Tentative Draft.

SECTION 8. (Bond of Independent Administrator.) The court may provide that no bond need be filed by an independent administrator, but any person interested in the estate may, for good cause, request that a bond be filed, and the court shall require that such bond be filed if it finds that such good cause exists. The court may, however, require that a bond be filed in such amount as in his opinion would protect the estate, or that the amount of a bond be increased.

SECTION 9. (When Letters Issued.) Same as Section 10 of Second Tentative Draft except on line 2 delete "his oath and"

SECTION 10. (Powers of The Independent Administrator.) Same as Section 11 except on line 6 after "approval" add, "save and except the power to sell real property."

SECTION 11. (Claims.) Same as Section 12 except (b) (1) should read "institute full administration proceedings."

Delete paragraph (2) and change (3) to (2).

SECTION 12. (Title to Property.) Same as Section 13 except in lines 6 and 7 delete "whether real or personal."

SECTION 13. (Application for Decree of Distribution.) Same as Section 14 except on lines 6 and 10 change "may" to "shall."

SECTION 14. (Hearing and Notice on Decree of Distribution.) Same as Section 15.

SECTION 15. (Decree of Distribution.) Same as Section 16.

SECTION 16. (Effect of Decree of Distribution.) Same as Section 17.

SECTION 17. Delete Section 18 of Second Tentative Draft.

SECTION 17. (Removal for Cause.) Same as Section 19.

SECTION 18. Delete Section 20 of Second Tentative Draft.

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, October 14, 15, 1966)

TO: Advisory Committee on Probate Law Revision and Oregon
State Bar Committee on Probate Law and Procedure

FROM: Wallace P. Carson and Herbert E. Butler, Sub-committee

SUBJECT: Inventory and Appraisal

The following draft is as it was submitted, without the changes made at the October meeting.

It is the recommendation of this sub-committee that the following be substituted for ORS 116.405 to 116.465 inclusive.

(1) Within 60 days after the date of his appointment, the personal representative of a decedent's estate shall make and file in the estate proceeding a verified inventory of all the property of the decedent which comes to his possession or knowledge.

(2) Whenever, by reason of the complicated nature of the estate, or by reason of other circumstances, it is impracticable for the personal representative of the estate to file with the clerk of the court a complete and accurate inventory of the assets belonging to the estate within 60 days from the date of the personal representative's appointment, the court may, upon the application of such representative, extend the time for filing the appraisal for such period as the court may determine to be necessary.

(3) Whenever any property of the decedent not mentioned in the inventory comes to the possession or knowledge of the personal representative of the estate, he shall either make and file in the estate proceeding a verified supplemental

inventory within 30 days after the property comes to his possession or knowledge, or include the property in his next accounting but the court may order which of the two methods the personal representative shall follow.

(4) Property belonging to the estate of a decedent need not be appraised unless appraisement is required for inheritance tax purposes or for purposes of administration or distribution or by order of the court. The court may direct that specific property be appraised by a person or persons appointed by the court. The court may dispense with the appointment of any appraiser or appraisers with respect to any property described in the inventory.

(5) Each appraiser shall be allowed such reasonable fees, and expenses as may be fixed by the court, all which shall be paid by the personal representative as expenses of administration.

(6) Each article of property for which appraisement is required shall be appraised at its true cash value as of the date of the decedent's death. The appraisement shall be in writing and shall be subscribed by the appraiser or appraisers appointed by the court to make the appraisal.

(7) The naming of any one as executor of a will shall not operate to discharge that person from any claim which the testator had against him, and the claim shall be included in the inventory. If a person so named accepts the administration of the estate he shall be liable for the claim as would any other debtor of the decedent.

(8) The discharge or bequest in a will of any claim of the testator against a person named as executor therein or against any other person, shall, as against the creditors of the decedent, be ineffective. The claim shall be included in the inventory, and for the purposes of administration shall be deemed and treated as a specific legacy of that amount.

NOTE: The foregoing proposal constitutes a substantial departure from existing statutes. The following changes are deserving of particular attention:

(1) The subjects of inventory and appraisal are treated separately.

(2) Changes from one month to 60 days the time from date of appointment for the personal representative to file the inventory.

(3) Permits extension of time for filing the inventory if necessary by reason of the complicated nature of the estate or by reason of other circumstances. This is in keeping with existing provisions of the Inheritance Tax Code (ORS 118.620) and is designed to assist the State Treasurer's office in administering the inheritance tax law.

(4) Eliminates the need for appraisement unless required for inheritance tax, administration or distribution purposes or by order of the court. Further, the court is authorized to direct that specific property be appraised by one or more persons and specifies that the appraisers so appointed shall be allowed reasonable fees and expenses approved by the court. These provisions constitute a combination of Section 365 of the Iowa Probate Code and Senate Bill 308,

as amended, introduced in the 1965 Session of the Oregon Legislature.

(5) Deletes ORS 116.430 having to do with oath of appraisers and simply requires the appraisement to be in writing and to be subscribed by the appraisers.

(6) Substitutes for ORS 116.435 a requirement that each article of property for which appraisement is required shall be appraised at its true cash value. This language has been adopted in preference to the term "full and true value" now appearing in the Inheritance Tax Code (ORS 118.640.)

(7) Revises ORS 116.440 having to do with debts due a decedent's estate from a person named as executor by making clear that acceptance of administration by the person named as executor renders him liable for the claim in the same manner as a claim against any other debtor of the deceased without causing acceleration of a debt which by its terms would not be due until some future date. The general tenor of ORS 116.440 is preserved because it is in derogation of common law.

(8) The provisions of ORS 116.450 have been adopted verbatim in our proposal except that the word "ineffective" has been substituted for the word "invalid."

(9) ORS 116.450 to 116.465 inclusive have been deleted in their entirety. These code sections have to do with partnership interests in a decedent's estate. It is the

sub-committee's view that there is no more justification for special partnership provisions than there would be for comparable provisions dealing with interests in closely held corporations. It is submitted that the Uniform Partnership Act adequately establishes the relationship between partners and the nature of their interests in the partnership assets. If a surviving partner is reluctant to cooperate with the personal representative of a deceased partner in providing required information concerning the nature and conduct of the partnership business, the personal representative is in a position to seek required assistance of the courts through discovery statutes and otherwise.

APPENDIX C

(Minutes, Probate Advisory Committee Meeting, October 14, 15, 1966)

TO: Advisory Committee on Probate Law Revision and
Oregon State Bar Committee on Probate Law and
Procedure

FROM: Wallace P. Carson and Herbert E. Butler, Sub-committee

SUBJECT: ORS 118.610 to 118.700 (Inheritance tax statutes
relating to inventory and appraisement).

It is the recommendation of this sub-committee that those ORS sections be repealed or amended as indicated below.

118.610 Duty of representative; filing inventory and appraisement.

Repeal.

118.620 Extension of time to file appraisement.

Repeal.

118.630 Appointment of appraisers.

Repeal.

118.640 Immediate appraisal; evaluating particular interests.

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

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

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

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

118.650 Fixing time and place of appraisement; notice; attendance of witnesses; report of appraisers; limitation on fees.

Repeal.

118.660 Delivery to State Treasurer of copy of inventory and appraisement and other information.

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

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

118.670 Court's duty to determine tax.

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

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

118.680 Court may act on first inventory.

Delete "such" from sixth line of this section and insert "the" in lieu thereof; delete "executor, administrator" and insert "personal representative" in lieu thereof; delete "as provided in ORS 118.005 to 118.840"; and delete "full and true value" and insert "true cash value" in lieu thereof.

118.690 Court to give notice on determination of value.

Delete "probate" from the first line of this section.

118.700 Reappraisement; appeal.

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

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

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

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

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

NOTE: Matter in italics in an amended section is new; matter ~~lined out and bracketed~~ is existing law to be omitted; complete new sections begin with Section .

FIFTY-THIRD LEGISLATIVE ASSEMBLY—REGULAR SESSION

House Bill 1480

Introduced by Representative ANUNSEN, Senator ELFSTROM (at the request of the Oregon Bankers Association) and read first time February 9, 1965

A BILL FOR AN ACT

1 Relating to inheritance taxes; amending ORS 118.640; and prescribing an
2 effective date.

3 *Be It Enacted by the People of the State of Oregon:*

4 Section 1. ORS 118.640 is amended to read:

5 118.640. (1) Every inheritance, devise, bequest, legacy or gift, upon
6 which a tax is imposed under ORS 118.005 to 118.840, shall be appraised
7 at its full and true value immediately upon the death of the decedent,
8 or as soon thereafter as may be practicable; provided, that when ~~such~~
9 ~~interest is~~ *interests are* contingent, defeasible or of such a nature that
10 ~~its~~ *their* full and true value cannot be ascertained at the date of de-
11 cedent's death ~~it~~ *they* shall be appraised at the time when ~~such~~ *their*
12 *aggregate of the interests* actual value first becomes ascertainable, ~~at its full and true value as of~~
13 ~~the date of decedent's death and without diminution for or on account of any~~
14 ~~valuation made or tax paid theretofore upon the particular estates upon which~~
15 ~~the devise, bequest, legacy or gift may have been limited.~~ and the value of
16 each interest shall be that percentage of the full and true value of the
17 ~~entire estate~~ *of each interest* as of the date of decedent's death which the actual value of
18 the interest is of the actual value of the aggregate interests. "Actual value"
19 *means full and true value as of the date of the decedent's death, increased*
20 *first becomes ascertainable.* ~~by distributions of income following that date.~~ Subsection (4) of this sec-
21 tion does not apply in the determination of the value of interests described
22 in the foregoing proviso.

23 (2) Whenever a gift or devise of real property which is subject to
24 inheritance tax passes to or vests in a husband and wife as tenants by
25 the entirety, the inheritance tax thereon shall be determined in the same
26 manner as though each of such tenants by the entirety took an undivided
27 one-half of the property as tenants in common.

Note: The handwritten deletions and interlineations were not introduced in the legislature.

1 (3) Whenever any estate or interest is so limited that it may be di-
2 vested by the act or omission of the devisee or legatees, such estate or
3 interest shall be taxed as if there were no possibility of such divesting.

4 (4) The value of every limited estate, income, interest or annuity de-
5 pendent upon any life or lives in being shall be determined by the rules
6 or standards of mortality and of value used by the "Actuaries' or Combined
7 Experience Tables," except that the rate of interest on computing the
8 present value of all such limited estates, incomes, interests or annuities
9 shall be four percent per year. The value of the interest or estate remain-
10 ing after such limited estate, income, interest or annuity shall be deter-
11 mined by deducting the amount found to be the value of such limited
12 estate, income, interest or annuity from the value of the entire property
13 in which such limited estate, income, interest or annuity exists.

14 Section 2. The amendments contained in this Act are effective with
15 respect to taxable values which become ascertainable on or after Janu-
16 ary 1, 1935.

Second Tentative Draft

PART X. INDEPENDENT ADMINISTRATION

1 SECTION 1. [Definitions and Use of Terms.] When used in this
2 Part, unless otherwise apparent from the context:

3 (1) "independent administrator" means any personal representa-
4 tive qualifying under the terms of this Part providing for administra-
5 tion of estates independent of judicial control;

6 (2) "independent administration" means the process whereby an
7 independent administrator administers an estate independent of
8 judicial control;

9 (3) "full administration" means the process whereby a personal
10 representative administers an estate under judicial supervision, as
11 provided in Part(s) of this Code.

Comment

Definitions applicable to the entire Code are equally applicable to this Part. The above definitions are peculiar to this Part.

1 SECTION 2. [Independent Administration not Exclusive.] Inde-
2 pendent administration shall be an alternative to other procedures for
3 settling estates. When an independent administration is pending, any
4 person interested in the estate may petition the probate court for a
5 full administration. The court will grant such petition if in the best
6 interest of the estate. If the court grants such petition, it shall
7 terminate the independent administration, and appoint a personal
8 representative under the full administration to succeed to the re-
9 sponsibility of administering the decedent's estate.

Comment

If a full administration is desired, it may be had by petition filed with the probate court. Independent administration is an alternative available in all estates. The Code provides a number of additional procedures (e. g., special provisions for small estates, collection of assets on affidavit, and the like) in special situations.

1 SECTION 3. [Who May Make Applicatinn.] Any person named
2 as personal representative in the decedent's will or any person
3 interested in the decedent's estate, if otherwise qualified to act
4 as a personal representative of the decedent, may make application
5 for the independent administration of the estate and seek the
6 appointment of himself or another person so qualified, as
7 independent administrator.

Comment

In Texas and Washington, the decedent must provide for the independent executor in his will. The above section extends the principle of independent administration, as an alternative procedure, to all estates. See Fletcher, Washington's Non-Intervention Executor--Starting Point for Probate Simplification, 41 Wash. L. Rev. 33 (1966).

1 SECTION 4. [Contents of the Application.] The application for
2 appointment of an independent administrator shall contain, but shall
3 not necessarily be limited to, the following:

4 (1) information about the decedent, including his name, date of
5 death, domicile at death, and a statement that he had property within
6 the county where the petition is filed if he died domiciled outside the
7 state;

8 (2) a listing of all properties comprising the estate, giving a

9 description of such properties, their values, and the location of all
10 known real estate;

11 (3) a statement whether decedent died testate or intestate (if
12 testate, a copy of the will should be attached or its absence explained);

13 (4) a statement that an independent administration is sought;

14 (5) information about the distributees, including names, addresses,
15 and relationship to the decedent;

16 (6) information about the heirs and next of kin of the decedent,
17 including names, addresses, and relationship to the decedent;

18 (7) a listing of all known claims against the estate, including
19 names and addresses of creditors, and amount claimed by them;

20 (8) information about any person whose appointment is sought
21 as independent administrator, including name, address and relation-
22 ship to the decedent, and a statement that he is qualified to be
23 appointed administrator;

24 (9) information about any person named in the will to serve in any
25 fiduciary capacity, such as trustee or guardian, whether such service
26 is to be as original, successor, or joint fiduciary, including the
27 name, address, and relationship to the decedent, and a statement
28 that he is qualified to serve in such capacity; and

29 (10) information about the person making the application, if
30 different from the person whose appointment is sought, including
31 name, address, and relationship to the decedent, and facts entitling
32 him to make application for the appointment.

Comment

Section 4 requires the person seeking appointment as independent administrator to provide the probate court with a complete picture of the estate. The application serves as an inventory of both the properties in the estate and claims against the estate.

1 SECTION 5. [Time to File Application.] All applications for the
2 grant of letters of independent administration must be filed within
3 two years from the date of death of the decedent.

Comment

A short statute of limitations will prompt persons to seek an independent administration soon after the decedent's death, thereby expediting administration.

1 SECTION 6. [Time For Hearing; Notice.] Upon the filing of an
2 application under this Part, the clerk of the Court shall set a day
3 and time for a hearing on the application not less than twenty (20)
4 days subsequent to the time of filing, and shall forthwith cause
5 notice of the hearing to be sent by certified or registered mail to
6 every creditor, distributee, heir, next of kin, executor, trustee,
7 and guardian, named in the application and in the will, if any, and
8 shall secure the publication of such notice in a newspaper of
9 general circulation at least ten (10) days prior to the time for hearing.

Comment

The 20 day period is ample to allow time for the notice by certified or registered mail and by publication, which should satisfy the requirements of due process. See Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950) (any party to whom actual notice is given of hearing is bound by any order, made pursuant thereto). See also Fletcher, Washington's Non-Intervention Executor-Starting Point for Probate Simplification, 41 Wash. L. Rev. 33, 87 et seq. (1966).

1 SECTION 7. [Court's Discretion In Appointment.] If, at the
2 hearing, the Court is persuaded that the requirements of the Code
3 have been met, he shall appoint an independent administrator of the
4 estate, and grant letters of independent administration to such
5 independent administrator, provided that the Court may in his
6 discretion appoint any qualified person, instead of the person whose
7 appointment is sought in the application, if he considers such an
8 appointment in the best interest of the estate.

Comment

The Court may appoint another person (e. g., an adult son, rather than the decedent's widow) independent administrator, if this is the best interest of the estate.

1 SECTION 8. [Oath Of Independent Administrator.] Before
2 receiving letters, the independent administrator shall take and file
3 with the clerk of the Court an oath to discharge faithfully the duties
4 of independent administrator of the estate. For convenience, the
5 oath may be filed in advance as part of the application.

Comment

The requirement of an oath emphasizes the importance of the fiduciary's role as an independent administrator.

1 SECTION 9. [Bond of Independent Administrator.] No bond
2 shall be required of an independent administrator, but any person
3 interested in the estate may, for good cause, request that a bond be
4 filed, and the court shall require that such bond be filed if it finds
5 that such good cause exists. The court may at any time, for good
6 cause shown, require that a bond be posted, or that the amount of a

7 bond be increased.

Comment

Dispensing with the requirement of bond in the usual case will reduce the costs of administration. Granting the Court discretion provided in this section should insure that the estate is protected.

1 SECTION 10. [When Letters Issued.] When the independent
2 administrator is appointed, and he has filed his oath and any bond
3 which the Court may have required, the clerk of the court shall
4 forthwith issue to the independent administrator as many copies as
5 he shall desire of the letters of independent administration. Unless
6 revoked or otherwise terminated, such letters of independent
7 administration shall remain in full force and effect for a period of
8 6 months from the date of their issue. The expiration of such
9 letters shall appear on their face. Such letters may be extended
10 by order of the Court for additional periods of 6 months as may be
11 necessary to complete administration of the estate. Upon extension,
12 the Court shall endorse the letters to show the extended expiration
13 date.

Comment

This section encourages the independent administrator to wind up the estate within 6 months of the granting of letters. If more time is needed, he may seek an extension from the probate court.

1 SECTION 11. [Powers of The Independent Administrator.] The
2 independent administrator shall have the power to do, without
3 judicial supervision or control, all things in connection with the
4 management and distribution of the estate that a personal representa-

5 tive in a full administration might have the power to do with or without
6 court approval. The independent administrator shall have such ad-
7 ditional fiduciary powers as may be given him by the will of the
8 decedent.

Comment

This provision is the heart of this Part. It gives the independent administrator the powers of a personal representative, but with the freedom necessary for the simplification of probate. The decedent may give the independent administrator any additional fiduciary powers (e. g., the powers of his testamentary trustee) as he may desire.

1 SECTION 12. [Claims.]

2 (a) No claim against the decedent or his estate shall be barred
3 because of independent administration prior to the entry of a decree
4 of distribution, except as such claim may be discharged by the
5 independent administrator by payment or other settlement with the
6 claimant, or may be barred by the statute of limitations applicable
7 to such claim.

8 (b) Any creditor remaining unpaid at the time of the
9 expiration of the letters of independent administration or at the time
10 such letters would have expired had there been no extension of the
11 expiration date, may either

12 (1) institute full administration proceedings in accordance
13 with Section _____ of this Code,

14 (2) require the independent administrator to institute
15 proceedings to determine claims as in full administration, as provided
16 in Section _____ of this Code, or

17 (3) seek recovery of his claims directly against the
18 distributees of the estate, jointly or severally, if the independent
19 administrator has distributed the estate to such distributees.

Comment

The statute encourages the independent administrator to settle claims quickly. The creditor is protected by being given several choices where his claim is not settled within the first 6 months term of an independent administration.

1 SECTION 13. [Title to Property.] The title to all property of the
2 decedent, both real and personal, passes upon his death to the
3 distributees, subject to the right of possession in the independent
4 administrator for the purposes of administration, sale or other
5 disposition, and subject to the debts of the decedent and the expenses
6 of administration. Any sale or disposition of property, whether real
7 or personal, made by an independent administrator, to persons other
8 than the distributees, shall be effective to pass marketable title to
9 such property, so long as the letters of such independent administrator
10 are in force and effect at the time of such sale or disposition.

Comment

This section is based upon Section 300 of the California Probate Code, and Section 37 of the Texas Probate Code. Iowa has recently provided that title shall pass directly from the decedent to the distributees upon the decedent's death. Except for the difference with respect to title, the independent administrator's powers (particularly where broadened by additional powers granted in the will) will often place him, from the standpoint of dealing with the property, in much the same position as a trustee.

1 SECTION 14. [Application For Decree of Distribution.] At any
2 time after the expiration of 6 months after the issuance of letters of

3 independent administration, and after all claims against the estate
4 have been paid or otherwise settled and the property of the estate has
5 been distributed to those entitled thereto, the independent administra-
6 tor may prepare an application for a decree of distribution, setting
7 out the foregoing facts, the name and address of each distributee and
8 his interest in the decedent's property, and a complete description
9 of all the property, both real and personal, of the estate; such ap-
10 plication may ask that the estate be closed and title to the decedent's
11 property be recognized as being in the distributees; and such appli-
12 cation shall be accompanied by a final accounting setting forth a
13 statement regarding the payment of claims and the disposition of all
14 property in the estate.

Comment

The application pinpoints the distributees and the property in the estate. Simple forms for setting out the above information may be adopted. While filing the application is permissive, the benefits of obtaining a final decree of distribution are such that the independent administrator will normally file the application as soon as possible.

1 SECTION 15. [Hearing And Notice On Decree Of Distribution.]
2 Hearing shall be set and notice given of the hearing on the application
3 for decree of distribution in the same manner as in the filing of an
4 application for independent administration.

Comment

In contrast to the many trips to the courthouse required in full administration, only 2 hearings will normally occur in independent administration, one to launch the administration, and the other to close it. While the second hearing is permissive, most independent administrators will seek to since the obtaining of a decree of distribution will better protect the distributee, the creditors, and the independent administrator.

1 SECTION 16. [Decree of Distribution.] Upon hearing, the Court,
2 being satisfied as to the truth of the matters contained in the applica-
3 tion for decree of distribution and in the final accounting, shall endorse
4 such application, and thereby cause to be entered a decree of distribu-
5 tion of the estate, declaring that title to the property of the estate is
6 in the distributees, approving the final accounting, and discharging the
7 independent administrator.

Comment

The endorsement of the independent administrator's application for the decree of distribution constitutes the issuance by the Court of a final decree of distribution.

1 SECTION 17. [Effect Of Decree Of Distribution.] All claims
2 against the estate not presented to the independent administrator prior
3 to entry of the decree of distribution are barred upon entry of the
4 decree. Such decree may be recorded in the deed records of the
5 county where realty of the decedent is located and will have the effect
6 of a deed from the decedent to the distributees. The decree shall not
7 be subject to collateral attack, but shall be presumed final and valid
8 as to all persons and property over which the court had jurisdiction.
9 Appeal from such decree of distribution may be taken as in full ad-
10 ministration, as provided by Section _____ of the Code.

Comment

The finality of the decree of distribution will prompt independent administrators to seek quick closing of estates and the early termination of their liability. The decree will not be subject to attack by reason of procedural discrepancies. Later contentions with respect to the decree, other than those regarding jurisdiction, will be eliminated.

1 SECTION 18. [Affidavit That Estate Is Closed.] At any time
2 after the expiration of 6 months after the issuance of letters of
3 independent administration, and after all claims against the estate
4 have been paid or otherwise settled and the property of the estate has
5 been distributed to those entitled thereto, the independent administrator
6 may file an affidavit with the Court stating that the estate is closed.
7 No claim may be asserted against the independent administrator by
8 any creditor of the decedent, distributee of the estate, or other person
9 interested in the estate at any time after 2 years from the date of the
10 filing of such affidavit; provided that a distributee, heir, or next of
11 kin may, at any time, within 3 years from the date of the death of the
12 decedent, assert a claim against an undischarged independent admin-
13 istrator, for any improper handling of the estate during the course of
14 his administration.

Comment

Normally, the independent administrator will seek a decree of distribution under Section 14 of this Part. Alternatively, he may elect to file an affidavit as permitted by this section. If he does so, a 2 year statute of limitations begins to run. But, in any event, a distributee, heir, or next of kin may question the independent administrator's handling of the estate within 3 years following the decedent's death. If the independent administration is still pending, such a person may seek a full administration under Section 2 of this Part.

1 SECTION 19. [Removal For Cause.] The Court shall have the
2 right to remove the independent administrator for cause at any time,
3 where he has been guilty of a breach of his fiduciary duty or any duty
4 imposed upon him by this Code, upon the same notice and hearing as
5 provided for in the case of full administration in Section ___ of this Code.

Comment

Self-explanatory.

1 SECTION 20. [Community Property.] The entire community
2 property, including any interest in the surviving spouse which is not
3 subject to the decedent's power of testation, shall be subject to
4 independent administration under this Part, and unless otherwise
5 exempt by law, shall remain subject to the debts of the community.

Comment

This section is to be adopted by community property jurisdictions that adopt the Code. Since the entire community is subject to his right of possession, the independent administrator is able to deal effectively with community debts.

4/28/66

First Tentative Draft

PART ____ FOREIGN PERSONAL REPRESENTATIVES:
ANCILLARY ADMINISTRATIONS

[Definitions to be included in a general section on definitions.]

1 (1) "Foreign personal representative" means any representative who
2 has been appointed by the court of another jurisdiction in which the
3 decedent was domiciled at the time of his death, and who has not also
4 been appointed by a court of this state.

5 (2) "Local personal representative" means any representative
6 appointed as ancillary representative by a court of this state who
7 has not been appointed by the domiciliary court.

8 (3) "Local and foreign personal representative" means any representa-
9 tive appointed by both the domiciliary court and by a court of this state.

Comment

Adapted from the Uniform Ancillary Administration of Estates Act.

1 SECTION 1. [Proof of Authority-Bond.] When no local administra-
2 tion or application therefor is pending in this state, a foreign personal
3 representative may file with a [probate] court authenticated copies of
4 his appointment and of his official bond if he has given a bond.

1 SECTION 2. [Insufficient Bond.] If the [probate] court believes
2 that the security furnished by the foreign personal representative in
3 the domiciliary administration is insufficient, it may at any time order
4 the foreign representative to refrain from acting until sufficient
5 security is furnished in the domiciliary administration.

1 SECTION 3. [Powers.] A foreign personal representative who
2 has met the requirements of section 1 may exercise all powers
3 which would exist in favor of a local personal representative, and
4 may maintain actions and proceedings in this state subject to the
5 conditions imposed upon nonresident suitors generally.

Comment

Adapted from Uniform Powers of Foreign Representatives Act Section
2.

1 SECTION 4. [Releases, Discharges, Assignments and Deeds.]
2 A foreign personal representative who has met the requirements of
3 section 1 may release, discharge or assign, in whole or in part
4 as to any particular property, judgments rendered by any court of
5 this state and mortgages belonging to an estate, and such representa-
6 tive may execute deeds in performance of real estate contracts
7 entered into before the death of the decedent. Such release,
8 discharge, assignment or deed may be made without any order of
9 court in any manner or by any instrument which would be valid and
10 effective if made by a like officer qualified under the law of this
11 state.

Comment

Iowa Probate Code, § 144, modified to some extent.

1 SECTION 5. [Proceedings to Bar Creditors' Claims.] Upon
2 application by a foreign representative, who has met the require-
3 ments of section 1, to the [Probate] court of the county in which
4 property of the decedent is located, the court shall cause notice

5 of the appointment of the foreign representative to be published
6 once in each of [three] consecutive weeks in some newspaper of
7 general circulation in the county. The claims of all creditors of
8 the decedent, unless filed with the court within [] after date
9 of first publication, are barred as a lien upon all property of the
10 decedent in this state, to the extent that claims are barred by a
11 local administration. If any claims have been filed before the
12 expiration of such period and remain unpaid after reasonable
13 notice thereof to the foreign representative, ancillary administration
14 may be had under section 7.

Comment

Adapted from: Uniform Powers of Foreign Representatives Act, § 4.

1 SECTION 6. [Powers in Transition.] The powers granted by
2 preceding sections 3 through 5 shall be exercised only when there is
3 no administration or application therefor pending in this state,
4 except to the extent that the court granting local letters may order
5 otherwise, but no person who, before receiving actual notice of
6 local administration or application therefor, has changed his
7 position by relying on the powers granted by sections 3 through 5
8 shall be prejudiced by reason of the application for, or grant of,
9 local administration. The local representative or the local and
10 foreign representative shall be subject to all burdens which have
11 accrued by virtue of the exercise of the powers, or otherwise,
12 under section 3 to section 5 and may be substituted for the
13 foreign representative in any action or proceedings in this state.

Comment

Uniform Powers of Foreign Representatives Act, section 5.

1 SECTION 7. [Application for Ancillary Letters and Notice
2 Thereof.]

3 (a) Granting of Ancillary Letters. Ancillary letters of Admini-
4 stration may be granted as provided in Section _____.

5 (b) Qualification of and Preference for Foreign Personal
6 Representative.

7 (1) Any foreign, personal representative upon the filing of
8 an authenticated copy of the domiciliary letters with the [probate]
9 court may be granted ancillary letters in this state notwithstanding
10 that the representative is a nonresident of this state or is a
11 foreign corporation.

12 (2) If the foreign personal representative is a foreign
13 corporation it need not qualify under any other law of this state
14 to authorize it to act as local and foreign personal representative
15 in the particular estate if it complies with the provisions of
16 sections 9 and 10 of this Act.

17 (3) If application is made for the issuance of ancillary
18 letters, any interested person may intervene and pray for the
19 appointment of any person who is eligible under this Act or the law
20 of this state.

21 (c) Notice to foreign representative. When application is made
22 for issuance of ancillary letters to any person other than the foreign
23 personal representative, the applicant shall send notice of the appli-

24 cation by registered mail to the foreign personal representative if
25 the latter's name and address are known and to the court which ap-
26 pointed him if the court is known. These notices shall be mailed
27 upon filing the application if the necessary facts are then known, or
28 as soon thereafter as the facts are known. If notices are not given
29 prior to the appointment of the local personal representative, he
30 shall give similar notices of his appointment as soon as the
31 necessary facts are known to him. Notice by ordinary mail is
32 sufficient if it is impossible to send the notice by registered mail.
33 Notice under this subsection is not jurisdictional.

Comment

Adapted from Uniform Ancillary Administration of Estates Act, section 2.

1 SECTION 8. [Denial of Application.] The [probate] court may
2 deny the application for ancillary letters if it appears that the
3 estate may be settled conveniently without ancillary administration.
4 Such denial is without prejudice to any subsequent application if it
5 later appears that ancillary administration should be had.

Comment

Uniform Ancillary Administration of Estates Act, section 3.

1 SECTION 9. [Bond.] No nonresident shall be granted ancillary
2 letters unless he gives an administration bond.

Comment

Uniform Ancillary Administration of Estates Act, section 4.

1 SECTION 10. [Agent to Accept Service of Process.] No non-
2 resident shall be granted ancillary letters and no person shall be
3 granted leave to remove assets under section 12, until he files in
4 the [probate court] an irrevocable power of attorney constituting the
5 [clerk of the court] as his agent to accept and be subject to service
6 of process of notice in any action or proceeding relating to the
7 administration of the estate. The [clerk] shall forthwith forward to
8 the personal representative at his last known address any process or
9 notice so received, by registered or certified mail requesting a
10 return receipt signed by addressee only. [Forwarding by ordinary
11 mail is sufficient if when tendered at a United States Post Office
12 an envelope containing such notice addressed to such representative,
13 as aforesaid, is refused registration.]

Comment

Uniform Ancillary Administration of Estates Act, section 5.

1 SECTION 11. [Substitution of Foreign for Local Personal
2 Representative.]
3 (a) Application and procedure. If any other person has been
4 appointed local personal representative, the foreign personal repre-
5 sentative, not later than [fourteen] days after the mailing of notice
6 to him under section 7, unless this period is extended by the
7 court for cause which the court deems adequate, may apply for
8 revocation of the appointment and for grant of ancillary letters to
9 himself. [Ten] days written notice of hearing shall be given to the
10 local personal representative. If the court finds that it is for the

11 best interests of the estate, it may grant the application and direct
12 the local personal representative to deliver all the assets, documents,
13 books and papers pertaining to the estate in his possession and make
14 a full report of his administration to the local and foreign personal
15 representative as soon as the letters are issued and he is qualified.
16 The local personal representative shall also account to the court.
17 The hearing on the account may be forthwith or upon such notice as
18 the court directs. Upon compliance with the court's directions,
19 the local personal representative shall be discharged.

20 (b) Effect of substitution. Upon qualifications, the local and
21 foreign personal representative shall be substituted in all actions and
22 proceedings brought by or against the local personal representative in
23 his representative capacity, and shall be entitled to all the rights
24 and be subject to all the burdens arising out of the uncompleted
25 administration in all respects as if it had been continued by the local
26 personal representative. If the latter has served or been served
27 with any process or notice, no further service shall be necessary
28 nor shall the time within which any steps may or must be taken be
29 changed unless the court in which the action or proceedings are
30 pending so orders.

Comment

Uniform Ancillary Administration of Estates Act, section 6.

1 SECTION 12. [Removal of Assets to Domiciliary Jurisdiction.]

2 (a) Application. Prior to the final disposition of the ancillary
3 estate under section 17 and upon giving such notice as provided in

4 section [General Notice Section], the foreign personal representa-
5 tive or the local and foreign personal representative may apply for
6 leave to remove all or any part of the assets from this state to the
7 domiciliary jurisdiction for the purpose of administration and
8 distribution.

9 (b) Prerequisites to granting application. Before granting such
10 application, the court shall require compliance with section 10 and
11 the filing of a bond by the foreign personal representative or of an
12 additional bond for the protection of the estate and all interested
13 persons unless the court finds that the bond given under section 9
14 by the local and foreign personal representative is sufficient.

15 (c) Granting application -- terms and consequences. Upon
16 compliance with this section, the court shall grant the application
17 upon such conditions as it sees fit unless it finds cause for the
18 denial thereof or for postponement until further facts appear. The
19 granting of the application shall not terminate any proceedings for
20 the administration of property in this state unless the court finds
21 that such proceedings are unnecessary. If the court so find, it may
22 order the administration in this state closed, subject to reopening
23 within [one year] for cause.

Comment

Uniform Ancillary Administration of Estates Act, section 7.

1 SECTION 13. [Effect or Adjudications for or against Personal
2 Representatives.] A prior adjudication rendered in any jurisdiction
3 for or against any personal representative of the estate shall be as

4 conclusive as to the local or the local and foreign personal represen-
5 tative as if he were a party to the adjudication unless it resulted
6 from fraud or collusion of the party representative to the prejudice
7 of the estate. This section shall not apply to adjudications in
8 another jurisdiction admitting or refusing to admit a will to probate.

Comment

Uniform Ancillary Administration of Estates Act, section 8.

1 SECTION 14. [Payment of Claims.] No claim against the
2 estate shall be paid in the ancillary administration in this state
3 unless it has been proceeded upon in the manner and within the
4 time required for claims in domiciliary administrations in this
5 state.

Comment

Uniform Ancillary Administration of Estates Act, section 9.

1 SECTION 15. [Liability of Local Assets.] All local assets are
2 subject to the payment of all claims, allowances and charges,
3 whether they are established or incurred in this state or elsewhere.
4 For this purpose local assets may be sold in this state and the
5 proceeds forwarded to the representative in the jurisdiction
6 where the claim was established or the charge incurred.

Comment

Uniform Ancillary Administration of Estates Act, section 10.

1 SECTION 16. Payment of Claims in Case of Insolvency.

2 (a) Equality subject to preferences and security. If the estate
3 either in this state or as a whole is insolvent, it shall be disposed
4 of so that, as far as possible, each creditor whose claim has been
5 allowed, either in this state or elsewhere, shall receive an equal
6 proportion of his claim subject to preferences and priorities and to
7 any security which a creditor has as to particular assets. If a
8 preference, priority or security is allowed in another jurisdiction
9 but not in this state, the creditor so benefited shall receive
10 dividends from local assets only upon the balance of his claim
11 after deducting the amount of such benefit. Creditors who have
12 security claims upon property not exempt from the claims of
13 general creditors, and who have not released or surrendered them,
14 shall have the value of the security determined by converting it to
15 money according to the terms of the security agreement, or by
16 such creditor and the personal representative by agreement,
17 arbitration, compromise or litigation, as the court may direct, and
18 the value so determined shall be credited upon the claim, and
19 dividends shall be computed and paid only on the unpaid balance.
20 Such determination shall be under the supervision and control of
21 the court.

22 (b) Procedure. In case of insolvency and if local assets permit,
23 each claim allowed in this state shall be paid its proportion, and
24 any balance of assets shall be disposed of in accordance with
25 Section 17. If local assets are not sufficient to pay all claims

26 allowed in this state the full amount to which they are entitled
27 under this section, local assets shall be marshalled so that each
28 claim allowed in this state shall be paid its proportion as far as
29 possible, after taking into account all dividends on claims allowed
30 in this state from assets in other jurisdictions.

Comment

1953 Amendment to Uniform Ancillary Administration of
Estates Act.

1 SECTION 17. [Transfer of Residue to Domiciliary Represent-
2 tative.] Unless the court shall otherwise order, any moveable
3 assets remaining on hand after payment of all claims allowed in
4 this state and of all taxes and charges levied or incurred in this
5 state shall be ordered transferred to the representative in the
6 domiciliary jurisdiction. The court may decline to make the order
7 until such representative furnishes security or additional security
8 in the domiciliary jurisdiction, for the proper administration and
9 distribution of the assets to be transferred.

Comment

Uniform Ancillary Administration of Estates Act, section 12.

1 SECTION 18. [General Law to Apply.] Except where special
2 provision is made otherwise, the law and procedure in this state
3 relating generally to administration and representatives apply to
4 ancillary administration and representatives.

Comment

Uniform Ancillary Administration of Estates Act, section 13.

1 SECTION 19. [Payment of Debt to Spouse Without Administra-
2 tion.] Upon the death of a creditor it shall be lawful for a debtor
3 to pay to the surviving spouse of the decedent not more than one
4 thousand dollars of the debt, upon an affidavit, made by such
5 spouse, showing that such payment and all other payments received
6 by such spouse under this section do not in the aggregate exceed
7 one thousand dollars.

1 SECTION 20. [Payment of Debt to Foreign Personal
2 Representative Without Administration.] Not less than six months
3 after the death of a creditor, it shall be lawful for a debtor to pay
4 a debt which does not exceed five hundred dollars, or any part of
5 such debt, to a foreign personal representative upon an affidavit
6 made by the representative showing:

- 7 (1) the date of the death of the decedent,
8 (2) that no local administration or application therefor is
9 pending in this state,
10 (3) that the affiant is entitled to the payment,
11 (4) that such payment and all other payments made under this
12 section by all debtors do not in the aggregate exceed _____ dollars.

1 SECTION 21. [Payment Discharges.] A payment made in
2 good faith shall be a complete discharge of the debtor to the extent
3 of the payment, even though the affidavit on which payment is made

4 be false, provided only that the creditor be dead and that the
5 required number of days elapse between the death and payment
6 and that the affiant is in fact the person designated for payment.

1 SECTION 22. Accountability. Any person receiving pay-
2 ment pursuant to this section is accountable therefor to any
3 personal representative appointed in this state.