

ADVISORY COMMITTEE
Probate Law Revision

Seventh Meeting

Date: Thursday, October 8, 1964
Time: 7 p.m.
Place: Coral Room, First Floor
Marion Motor Hotel
Salem

Note: Pursuant to the wishes of the committee expressed at the last meeting, arrangements have been made for members of the committee to dine together in the main dining area of the Marion Motor Hotel and thereafter to meet in the Coral Room on the first floor of the hotel. A table in the main dining area of the hotel has been reserved, in the name of R. W. Lundy, for 6 p.m. The Marion Motor Hotel is the site of the annual meeting of the Oregon State Bar, October 7-10.

Suggested Agenda

1. Approval of minutes of September 12 meeting of advisory committee.
2. Report on miscellaneous matters (Lundy).
3. Small estates.

The report of Denny Z. Zikes on his research for the committee in the area of summary proceedings for administration of small estates previously was tentatively scheduled for consideration at the October meeting. Copies of the report of Herbert E. Butler, entitled "Streamlining the Administration of Small Estates," previously were distributed to members of the committee. If Mr. Zikes' report is not available for consideration at this meeting, the matter of small estates will be postponed until a future meeting.

4. Dower and curtesy.

Consideration, among other matters, of (1) revision of proposed legislation on protecting property right during marriage by recorded declaration, and (2) proposed legislation on statement by grantor in deed of real property not joined in by grantor's spouse that property not place of residence of grantor or spouse.

5. Guardianship and conservatorship.

Consideration of proposed legislation (Rough Draft, 7/18/64), starting with section 2 thereof (accounts of guardian of estate). Pending matters on section 2 are: Revised rough draft of subsection (4) (intermediate accounts), revision of subsection (5) (final accounts), and effect of settlement of final accounts and discharge of guardian.

6. Next meeting of advisory committee.

ADVISORY COMMITTEE
Probate Law Revision

Seventh Meeting, October 8, 1964

Minutes

The seventh meeting of the advisory committee was convened at 8:05 p.m., Thursday, October 8, 1964, in the Coral Room, Marion Motor Hotel, Salem. All members, except Butler and Riddlesbarger, were present. Also present were Senator Donald R. Husband, a member of the Legislative Counsel Committee and the Law Improvement Committee; J. J. Ferder, Inheritance Tax Supervisor, State Treasurer's Office; Paul Griebenow, Fiduciary and Estate Supervisor, Audit Section, Income Division, State Tax Commission; Patricia Anne Lisbakken; William C. Martin; Denny Z. Zikes; and Robert W. Lundy, Chief Deputy Legislative Counsel.

Lundy distributed to the members present copies of (1) a rough draft of proposed legislation entitled "Changing Dower and Curtesy" (dated October 9, 1964); (2) a revised rough draft of proposed legislation entitled "Protecting Property Right During Marriage" (embodied in a report by Allison, dated October 8, 1964); (3) a revised rough draft of proposed legislation entitled "Protecting Property Right During Marriage" (embodied in a report by Lundy, dated October 1, 1964); and (4) a Model Special Power of Attorney for Small Property Interests Act, approved by the National Conference of Commissioners on Uniform State Laws at its annual conference in August 1964.

1. Minutes of Last Meeting. Zollinger moved, seconded by Jaureguy, that reading of the minutes of the last meeting (September 12, 1964) be dispensed with and that they be approved as submitted. Motion carried.

2. Report on Publicity and Miscellaneous Matters. Lundy reported that news releases on the last meeting, including references to the previous meeting (August 22), had been prepared and copies thereof distributed according to the established pattern. He noted that he had received no comments and suggestions on problem areas in Oregon's probate and related law since the last meeting.

Lundy indicated that the Law Improvement Committee had met the previous day (October 7), and that he had reported to the Law Improvement Committee on the activities of the advisory committee, the status of the advisory committee's immediate program and the costs incurred in the prosecution of the probate law revision project thus far (\$7,600, including salaries representing almost six months of professional staff time and almost two months of clerical staff time). Lundy stated that he had expressed his opinion to the Law Improvement Committee that proposed legislation arising out of the advisory committee's immediate program would not be ready for submission to and review by the Law

Improvement Committee before the convening of the 1965 legislature, but that at least some of that proposed legislation would probably be ready for such submission and review at some time during the 1965 legislative session. He noted that the Law Improvement Committee planned to prepare and submit to the 1965 legislature a general report on the law improvement program, which would refer to the probate law revision project and the advisory committee, but not contain any specific proposals for revision of the probate and related law. Lundy suggested that the advisory committee should realistically determine, as soon as possible, what proposed legislation arising out of the immediate program would be ready for consideration by the Law Improvement Committee and then by the 1965 legislature, so that the Law Improvement Committee might know approximately when it would receive such proposed legislation and might make plans on how to handle such proposed legislation on receipt thereof. He stated that the Law Improvement Committee had discussed these matters, but had decided to postpone action thereon until it had received more definite information from the advisory committee.

Lundy noted that, anticipating approval by the Oregon State Bar at its annual meeting in Salem, October 7-10, of at least some of the legislation proposed by the Bar Committee on Probate Law and Procedure, he had brought to the attention of the Law Improvement Committee the fact that such approved proposed legislation would be referred to it. He reported that the Law Improvement Committee had approved referral to the advisory committee of those legislative proposals of the Bar Committee that were approved by the Bar and thereby referred to the Law Improvement Committee. Allison stated that the Bar had approved that morning all of the legislative proposals of the Bar Committee except the one relating to attendance by a representative of the State Treasurer's office at the first opening by a guardian of the estate or conservator of the safe deposit box of the ward and filing an inventory of the contents of the safe deposit box with the county clerk. [Note: The advisory committee previously decided to schedule for consideration at a meeting to be held in November 1964 those legislative proposals of the Bar committee that were approved by the Bar. See Minutes, Probate Advisory Committee Meeting, 9/12/64, page 2.]

Lundy indicated that he had received no word from Campbell Richardson on the progress being made by Richardson on his research for the committee in the area of probate courts and their jurisdiction and on whether Richardson contemplated the submission of any proposed legislation in this area to the 1965 legislature. Dickson reported that Richardson was considering the matters of vesting all original probate jurisdiction in the circuit court and of clarifying the jurisdiction of probate courts, but that he did not know whether Richardson

planned to have any proposed legislation ready in time for submission to the 1965 legislature. Dickson stated that he would discuss the matter with Richardson, and mentioned the possibility of some report from Richardson for consideration by the committee at a meeting to be held in December 1964.

3. Small Estates. Dickson introduced Denny Z. Zikes, who had been engaged in research for the committee in the area of summary proceedings for administration of small estates of decedents, and Patricia Anne Lisbakken, attorney, Portland, and William C. Martin, attorney, Portland, who had been assisting Zikes. Dickson commented that he had met previously with Zikes, Lisbakken and Martin on the small estates project, and that tax matters in connection therewith had been discussed with representatives of the State Treasurer's office (J. J. Ferder) and the State Tax Commission (Paul Griebenow), whom he had invited to attend this meeting. Zikes distributed to the members and others present copies of a rough draft of proposed legislation entitled "The Small Estates Act" (dated October 7, 1964), and proceeded to comment on the background and summarize and explain some of the salient features of the proposed legislation. He noted that his research team had the benefit of materials on the subject of small estates provided by Lundy and a paper on the subject written by Thompson Snyder, attorney, Corvallis.

Zikes indicated that his research team had been faced with the decision as to which of several possible approaches to the matter of summary proceedings for administration of small estates of decedents should be adopted. He noted that two principal approaches were a summary procedure under court supervision and a summary procedure involving the use of affidavits and no court supervision. He referred to a New York statute, enacted in 1963 and effective in 1964, which had adopted the second principal approach (i.e., the use of affidavits and no court supervision), but which was limited to intestate estates consisting of personal property. He pointed out that the rough draft prepared by his research team embodied the affidavits and no court supervision approach, but was applicable to testate as well as intestate estates and to real as well as personal property. He called attention to the underlying purpose and policy of the proposed legislation set forth in section 2 of the rough draft (i.e., "to eliminate delay and unnecessary expense by creating a summary procedure for the settlement of small estates of decedents who die testate or intestate leaving real or personal property within this state").

Zikes commented that the central figure in the summary procedure under the rough draft for administration of estates

of a value of not more than \$5,000, exclusive of liens and encumbrances, was a so-called "voluntary administrator", who would file two affidavits with the clerk of the probate court: An initial affidavit including a list of the devisees, legatees and heirs, a description of the property of the decedent and a list of the debts and liabilities of the decedent; and a subsequent affidavit constituting a report and account upon the conclusion of the administration of the small estate. He pointed out that the forms for these affidavits were set forth at length in the rough draft. He noted that the voluntary administrator would be liable to heirs and creditors if his administration of the small estate was contrary to the provisions of the proposed legislation. He referred to problems with respect to inheritance tax clearances and income tax releases under the summary procedure, but expressed the opinion that such problems could be resolved with the cooperation of the State Treasurer's office and the State Tax Commission. He suggested that these agencies might consider the formulation of special forms to assist voluntary administrators in handling the tax aspects of the summary procedure. He pointed out that the initial affidavit filed by a voluntary administrator would include a description of property jointly owned by the decedent with a right of survivorship, and indicated that this information should be of value for inheritance tax purposes.

Zikes commented that the rights of creditors under the summary procedure embodied in the rough draft were limited, but that such limitation was necessary in order to achieve administration of small estates within a short period of time. He pointed out, however, that the limitation on the rights of creditors was merely such as would require them to be prompt and diligent in seeking payment of their claims. He noted that only creditors whose claims were denied would be entitled to overthrow the summary procedure by timely action to initiate regular probate proceedings.

Martin outlined some of the features of the proposed legislation that in his opinion might be the most controversial. He pointed out that the proposed legislation would be applicable only to estates of decedents of a value of not more than \$5,000, exclusive of liens and encumbrances, and recognized that this application would conceivably encompass, for example, an estate of a value of \$100,000 with liens and encumbrances of \$95,000. He remarked, however, that the research team contemplated primary use of the summary procedure in the case of small gross estates. He noted that while the voluntary administrator had most of the obligations of an executor or administrator in regular probate proceedings, he was entitled to no compensation for acting as such. He commented that the short period of time allowed for the presentation of claims by creditors (i.e., within 15 days after

notice published by the clerk of the probate court) would probably be a controversial feature, and indicated that the notice published by the clerk would probably be a simple one (for example, a list of names of decedents under a heading "the following small estates have been filed"). He pointed out that the voluntary administrator would be required to file his report and account within three months after the filing of the initial affidavit, unless the clerk of the probate court granted an extension of this time, and that the voluntary administrator could be held in contempt of court for failure to comply with this requirement. He called attention to the fact that the use of the summary procedure was optional and not mandatory, and that the rough draft included provision for overthrow of the summary procedure by timely initiation of regular probate proceedings at the instance of devisees, legatees, heirs or creditors.

a. Estates subject to summary procedure. Zikes referred to the description of small estates to which the summary procedure would be applicable as set forth in section 3 of the rough draft (i.e., "the estate of a decedent who dies testate or intestate leaving real or personal property in this state of a value, exclusive of liens and encumbrances, of \$5,000.00 or less"). In response to a question by Frohnmayer, Martin indicated that none of the statutes in 15 other states that provided for settlement of small estates without the formality of court supervision and that contained provisions similar to some of those of the rough draft defined a small estate in terms of a maximum value as high as \$5,000. Zikes commented that his research team initially had considered a maximum value of \$10,000, but finally had settled on the \$5,000 figure. He noted that the highest maximum value among those fixed in the statutes of the other states as \$3,000, but pointed out that the maximum values so fixed by some of those statutes had been increased in the past and that there was evidence of continuing efforts to accomplish further increases. Zikes remarked that some of those statutes provided for the deduction of the value of property exempt from execution in determining whether a particular estate had a value less than the maximum value fixed thereby.

In response to questions by Allison and Jaureguy, Zikes noted that the value of a homestead set apart for a surviving spouse or minor children of a decedent would be included in the value of the estate for the purpose of determining whether it would be subject to the summary procedure under the rough draft, and that only liens and encumbrances would be deducted for this purpose; for example, if a decedent died leaving a homestead of a value of \$6,000, on which there were no liens or encumbrances, the summary procedure

could not be used. Zikes pointed out, however, that one of the duties of a voluntary administrator under the proposed legislation was to set apart property exempt from execution for the persons entitled thereto, so that such property would not be subject to the claims of creditors.

Frohnmayr and Gooding suggested that the maximum value of an estate subject to the summary procedure under the rough draft should be a gross value; that is, without the deduction of liens and encumbrances. Frohnmayr expressed the view that the matter of the validity of liens and encumbrances could present a complicated legal problem beyond the scope of competency of the voluntary administrator and the clerk of the probate court. Zikes commented that the maximum value of \$5,000, exclusive of liens and encumbrances, had the advantage of achieving a uniformity in the values of estates subject to the summary procedure (that is, the summary procedure would apply to estates of approximately the same value), whereas with gross value as the yardstick there would be a considerable disparity with respect to the values of estates subject thereto by reason of differences in amounts of liens and encumbrances. He expressed the view, with which Zollinger agreed, that the deduction of liens and encumbrances in determining the value of an estate constituted a better yardstick for determining whether the estate was subject to the summary procedure than the gross value of the estate.

Dickson presented some statistics on the values of estates of decedents in his court for the period January 1, 1964, to September 30, 1964, based upon the inventories filed in those estates. He reported that 1,381 inventories had been filed during the nine-month period, of which 306 (22.15 percent) indicated an estate value of \$5,000 or less, 595 (43.1 percent) indicated an estate value of \$10,000 or less, and 786 (56.9 percent) indicated an estate value of more than \$10,000. He pointed out that the estate values set forth in those inventories were gross values, and that if liens and encumbrances were deducted, the number of estates with values of \$5,000 or less and \$10,000 or less would be greater. He commented that he did not know whether those statistics reflected accurately the values of estates in other probate courts in Oregon, but that perhaps they gave some idea of the number of estates that might be expected to be subject to the summary procedure under the proposed legislation.

Ferder noted that he had been asked whether he could supply any statistics on the values of estates of decedents handled by the State Treasurer's office for inheritance tax purposes. He stated that the State Treasurer's office did not make a systematic effort to compile statistics on that subject, but that he had prepared some statistics based upon the estates

handled in September 1964. He reported that 725 estates had been handled during that month (which he indicated he understood to be an unusually small number), of which there were 414 involving no inheritance tax and 311 on which inheritance tax was paid. Of the 414 estates involving no inheritance tax, he noted, 292 were not probated and 122 were probated, and of the 122 probated, 72 were of a value of \$5,000 or less and 50 were of a value of more than \$5,000. Of the 311 estates on which inheritance tax was paid, he indicated, 120 were not probated and 291 were probated, and of the 291 probated, 12 were of a value of \$5,000 or less and 179 were of a value of more than \$5,000.

Ferder suggested that the committee might wish to consider the possibility of including in the proposed legislation some provision for summary procedure with respect to estates of decedents that would escheat to the state. He expressed the view that it would probably be difficult to find a voluntary administrator to handle such estates. He offered to furnish advice and assistance if the committee wished to consider this matter.

b. Voluntary administrators. Martin indicated that the various persons eligible to act as a voluntary administrator under the summary procedure were listed in section 4 of the rough draft. He noted that the list included the executor and any devisee or legatee named in the will of the decedent, close relatives of the decedent and, if all those persons were not qualified to act, a qualified nominee of any of those persons. Zikes pointed out that section 4 of the rough draft established a definite order of preference with respect to the persons eligible to act as a voluntary administrator, and that persons of lesser preference were not entitled to act unless persons of higher preference renounced their rights in writing. He stated that the order of preference also was applicable to nominations. In response to a question by Jaureguy, Zikes indicated that an executor named in the will of a decedent had a first preference right to act as voluntary administrator.

In response to a question by Allison, Martin expressed the view that the fee for filing the initial affidavit by a voluntary administrator probably would have to be substantial, and that such fee might be comparable to the fee for filing initial papers in regular probate proceedings.

In response to a question by Zollinger, Zikes indicated that the authority of a voluntary administrator to collect the assets of the decedent would be evidenced by a certified copy of the initial affidavit, and referred to section 9 of the rough draft. In answer to a question by Jaureguy, Martin stated that a voluntary administrator would not be issued

letters of administration, and that a certified copy of the initial affidavit would constitute evidence of his authority to act.

Zikes expressed the view that there would be no problem with respect to the validity of the title of real property conveyed by a voluntary administrator acting in compliance with the proposed legislation. Martin referred to the authority of a voluntary administrator to sell property of the decedent set forth in paragraph (c) of subsection (1) of section 10 of the rough draft.

Allison noted that a voluntary administrator would not be required to furnish a bond [Note: See subsection (2) of section 5 of the rough draft], and asked about the liability of a voluntary administrator. Zikes responded that a voluntary administrator would be subject to both civil and criminal liability, and referred to section 12 of the rough draft.

c. Claims against estates. Zikes outlined the procedure for presentation and payment of claims by creditors against a small estate under the proposed legislation, and referred to section 8 of the rough draft. He pointed out that the clerk of the probate court was required to publish a notice within 15 days after the filing of the initial affidavit, that creditors were required to present their claims to the voluntary administrator within 15 days after publication of the notice and that the voluntary administrator was allowed a period of 10 days after a claim was filed to allow or deny it. He noted that if the voluntary administrator failed to act on a claim within the 10-day period, the claim would be considered denied. Zollinger commented that the notice published by the clerk of the probate court should include the name of the voluntary administrator so that creditors would know to whom they should present their claims against the small estate.

In response to questions by Jaureguy and Carson, Martin and Zikes pointed out that a creditor whose claim was denied might overthrow the summary procedure by initiating regular probate proceedings within 30 days after the notice was published by the clerk of the probate court, but noted that a creditor whose claim was allowed would not be permitted to overthrow the summary procedure in this manner. Carson suggested that a creditor whose claim could not be paid in full because of insufficient estate assets, as well as a creditor whose claim was denied, might be permitted to overthrow the summary procedure by initiating regular probate proceedings, perhaps on the theory that a lien or encumbrance on estate property might be found to be invalid and in that circumstance the estate assets might be sufficient to pay the claim in full.

Martin noted that under the summary procedure creditors with claims against the small estate were not afforded the same degree of protection as under regular probate proceedings, and that the research team was fully aware of this fact in their preparation of the rough draft. He suggested that the advantages of the summary procedure for small estates outweighed the disadvantages of reduced protection afforded creditors.

d. Taxes. Griebenow pointed out that a voluntary administrator under the summary procedure was required to obtain a tax clearance from the State Treasurer (inheritance tax) and a release from the State Tax Commission (income tax) [Note: See subsection (3) of section 11 of the rough draft], and that if he was unable to obtain the clearance and release, he was required to initiate regular probate proceedings [Note: See subsection (6) of section 11 of the rough draft].

In response to a question by Husband, Zikes commented that the priority of payment of inheritance and income tax under the summary procedure would be the same as in regular probate proceedings, and referred to the use of "in the order provided by law" in subsection (3) of section 11 of the rough draft. Griebenow noted that in subsection (3) of section 11 of the rough draft the requirement that a voluntary administrator obtain a tax clearance and release preceded the requirement that he pay administration and funeral expenses, and suggested that the requirement that inheritance and income tax be paid and a tax clearance and release be obtained probably should follow the requirement that administration and funeral expenses be paid. Allison suggested that subsection (3) of section 11 of the rough draft might be changed to read: "(3) * * * and, after the period of forty-five days has elapsed from the date of filing his affidavit, to pay so far as possible out of the assets of the decedent the necessary expenses of administration, the reasonable funeral expenses, the taxes and the debts of the decedent, in the order provided by law; and he shall then obtain a tax clearance from the State Treasurer and a release from the State Tax Commission; and he shall then distribute * * *." He noted that if this change was made, a similar change should be made in the form of the initial affidavit filed by a voluntary administrator set forth in subsection (1) of section 6 of the rough draft [Note: See page 12 of the rough draft]. In response to a question by Ferder, Martin expressed the view that it made no significant difference whether a tax clearance and release was obtained before or after payment of claims against the small estate.

Zollinger noted that the proposed legislation contained no provision for judicial determination of inheritance tax under the summary procedure, and questioned whether the State Treasurer would consider the absence of such a provision objectionable.

e. Regular probate superseding summary procedure. It was pointed out that the proposed legislation made provision for the overthrow of the summary procedure by initiation of regular probate proceedings in a number of circumstances: (1) Initiation of regular probate proceedings by a creditor whose claim against the small estate was denied [Note: See subsection (3) of section 8 of the rough draft]; (2) initiation of regular probate proceedings by the voluntary administrator if the assets of the decedent were found to exceed a value of \$5,000, or if the voluntary administrator was unable to obtain a tax clearance and release [Note: See subsection (6) of section 11 of the rough draft]; and (3) initiation of regular probate proceedings by a devisee, legatee, spouse or heir at law of the decedent [Note: See section 13 of the rough draft]. Zikes noted that the summary procedure under the proposed legislation was optional and not mandatory, and commented that if regular probate proceedings were initiated before a voluntary administrator had filed his initial affidavit the summary procedure apparently could not be used. He pointed out that if an executor or administrator under regular probate proceedings was appointed and qualified, the authority of a voluntary administrator would cease [Note: See subsection(3) of section 10 of the rough draft, and the similar provision in the form of the initial affidavit filed by a voluntary administrator set forth in subsection (1) of section 6 of the rough draft, at page 14 thereof].

Zikes suggested that perhaps there should be added to the proposed legislation a provision permitting overthrow of the summary procedure by initiation of regular probate proceedings by any interested person on the ground that the value of the estate exceeded \$5,000. Zollinger expressed the view that such a provision might be desirable. Zikes noted that some of the statutes in other states that provided a summary procedure for small estates similar to that provided in the rough draft specified that a person who wrongfully overthrew the summary procedure by initiating regular probate proceedings was liable for the costs of the regular probate proceedings.

Zollinger asked if it might not be desirable to permit any person interested, without restriction, to initiate regular probate proceedings, and thereby overthrow the summary procedure, at any time after commencement and before completion of the summary procedure. Martin expressed the view that it would not be desirable to overthrow the summary procedure where, for example, some of the claims against the estate had been paid by the voluntary administrator and others had not been so paid. Zollinger indicated that he saw no objection to overthrow of the summary procedure in such a circumstance, since the payment of claims could continue under the regular probate proceedings. Zikes commented that it should not be made too easy to overthrow the summary procedure by initiation of regular probate

proceedings, since such overthrow would result in greatly increased administration costs and negate the purpose of the proposed legislation, and that confusion would likely result if the summary procedure was overthrown without good reason during the course of administration by the voluntary administrator.

f. Clerk of probate court. Zikes noted that the proposed legislation would impose a considerable responsibility on the clerk of the probate court, including responsibility for determining whether the initial affidavit filed by a voluntary administrator was properly completed and whether the person filing the initial affidavit was eligible and qualified to act as a voluntary administrator. He referred to the description of the clerk in subsection (3) of section 3 of the rough draft.

Zikes and Dickson commented that if the proposed legislation was enacted some uniform instructions for the guidance of clerks of probate courts might be prepared by someone. Zikes suggested that if a clerk encountered problems with respect to the summary procedure he would probably consult with and seek advice and assistance from the judge of the probate court, although the aim of the summary procedure embodied in the rough draft was to avoid involvement of the judge of the probate court and, to as great an extent as possible, to leave primary responsibility for administration of a small estate to the voluntary administrator and the clerk.

In answer to a question by Frohnmayer, Dickson expressed the view that there would probably have to be a trained and experienced clerk of the probate court in each county to properly handle the functions of the clerk under the summary procedure for small estates, although the clerk need not be an attorney. Frohnmayer commented that the need for a clerk with such competence appeared to be one drawback to the proposed legislation. Martin suggested that a clerk might obtain some assistance from an attorney with respect to matters beyond the competence of the clerk, and that such assistance might be paid for as an expense of administering the small estate. Zikes expressed the view that there would be few really complicated problems with respect to small estates under the proposed legislation. Martin commented that the research team did not contemplate any significant burden on the clerk with respect to most small estates handled under the summary procedure, that the principal responsibility of the clerk probably would be to assist voluntary administrators to complete the initial affidavits and that if a voluntary administrator was faced with some really difficult problem the clerk could advise him to consult an attorney.

g. Attorney participation in summary procedure. Frohnmayer

commented that use of the summary procedure under the proposed legislation would likely tend to reduce participation by attorneys in the handling of small estates, and expressed some doubt that this would be desirable from the standpoint of securing proper administration thereof. Zikes noted that one aim of the proposed legislation was to reduce the expense of administering small estates, and that reducing the necessity of participation of attorneys was one way of reducing administration expense. Zikes and Martin pointed out that a voluntary administrator would be authorized to incur reasonable and necessary administration expenses and to charge such expenses against the estate [Note: See paragraph (e) of subsection (1) of section 10 of the rough draft]. Zikes expressed the view that payment for the necessary services of an attorney would be an administration expense chargeable against the estate, but that such services probably would not be necessary in the administration of most small estates. Martin indicated that the research team did not view the summary procedure as one designed to remove attorneys from participation in the administration of small estates, but rather as a device to permit accomplishment of relatively simple administrations in a simple manner.

In response to a question by Frohnmayer, Ferder commented that many of the estate filings with the State Treasurer's office for inheritance tax purposes were by lay persons, with apparently no participation by attorneys.

Husband noted that the suggestion had been made that the clerk of the probate court might advise a voluntary administrator to consult an attorney in the event a difficult problem arose under the summary procedure, and questioned whether this would not make the task of the attorney more difficult than if he had participated in the summary procedure from its inception. Frohnmayer commented that the reputation of an attorney was at stake when he participated in the administration of an estate, whereas the clerk of the probate court might not have as strong an incentive to see that the administration was done properly.

Carson and Dickson expressed the opinion that presently there was a certain amount of estate administration being handled by lay persons without the assistance of attorneys and, contrary to law, without regular probate proceedings. Frohnmayer agreed that this practice probably was going on, but suggested that such administration probably was faulty in certain respects and that some loss of inheritance tax to the state probably resulted from such practice. He expressed the view that administration of estates should be done properly, and that in many instances, even in the case of small estates, this required some assistance on the part of attorneys. Frohnmayer and Husband commented that presently many attorneys

probably assisted in the administration of small estates for very small fees out of a genuine desire to see that such estates were handled properly and to help persons involved in such estates. Carson suggested that the existence of the summary procedure contemplated by the proposed legislation might encourage the use of more formal and proper procedures in instances where regular probate proceedings were not presently being used in the administration of small estates.

In response to a question by Frohnmayer, Martin and Zikes pointed out that an attorney could not act as a voluntary administrator under the summary procedure unless he happened to be one of the persons made eligible by the proposed legislation, and that if he was eligible and did so act he would not be entitled to compensation as such. Frohnmayer expressed the view that an attorney should be permitted to act as a voluntary administrator in appropriate circumstances. Martin suggested that a provision might be added to the proposed legislation specifically authorizing attorney fees as a charge against a small estate. Frohnmayer commented that there might be added to the provision of the proposed legislation relating to the purpose thereof a statement to the effect that the services of an attorney were encouraged where such services were necessary to the proper administration of a small estate and that a voluntary administrator assumed a burden of risk in failing to use such services where necessary. Martin suggested that the form set forth in the proposed legislation for the initial affidavit filed by a voluntary administrator might contain a statement to the effect that if problems arose in the course of the summary procedure, it would be advisable for the voluntary administrator to seek the advice of an attorney and that the voluntary administrator would be liable for his errors committed in the course of the administration of the small estate. Allison suggested the possibility of a requirement that the initial affidavit filed by a voluntary administrator be signed by the attorney for the voluntary administrator. Zikes expressed the opinion that a voluntary administrator who did not require the services of an attorney to adequately perform his functions should not be compelled to engage such services, but that encouragement of a voluntary administrator to seek legal advice and assistance where necessary would be proper.

h. In general. Dickson expressed the opinion that the research team had done a fine job for the committee in the preparation of the proposed legislation, and commented that the committee was sincerely appreciative of the efforts of Lisbakken, Martin and Zikes. He noted that attorneys often inquired of him whether there was not some way to simplify probate proceedings and shorten the time presently involved therein. He noted, however, that the summary procedure contemplated by the proposed legislation, or any other summary

procedure devised by the committee, probably would be quite controversial, although perhaps no more so than the proposal of the committee to abolish dower and curtesy. Jaureguy commented that in his opinion a summary procedure for the administration of small estates was needed.

Dickson suggested that copies of the proposed legislation might be distributed to appropriate committees of the Oregon State Bar and to the Law Improvement Committee, and the comments and suggestions with respect thereto by members of those committees solicited. Allison pointed out that Bar committees were presently in a stage of transition, that new members would be appointed to those committees before the end of the year and that the newly constituted committees might not be able to meet and take any action for several months. Zollinger suggested, and Dickson agreed, that instead of attempting to obtain reaction to the rough draft in its present form, the committee should work out proposed legislation it could substantially agree upon, have a bill introduced in the legislature and the invited comments and suggestions on that bill.

Dickson suggested that at its next meeting the committee should undertake to consider the proposed legislation in more detail, and that in the meantime members should give some thought to the matter so as to be ready to present their views at the next meeting.

Zikes expressed his thanks to Dickson for the latter's attendance at the meetings of the research team and to Ferder and Griebenow for their advice and assistance.

At this point all except members of the committee and Lundy left the meeting.

4. Dower and Curtesy. Allison referred to and explained briefly the rough draft of proposed legislation entitled "Protecting Property Right During Marriage" (embodied in his report dated October 8, 1964), which was a revision of previous rough drafts with the same title. [Note: Copies of this report were distributed to members present. This report is reproduced as an Appendix to these minutes.] Allison noted that, in preparing the rough draft he had drawn upon some of the ideas and wording contained in Gooding's letter to Lundy, dated September 14, 1964 [Note: A copy of this letter was mailed to each member]; Jaureguy's letter to Gooding, dated September 21, 1964; Allison's letter to Lundy, dated October 1, 1964 [Note: A copy of this letter was mailed to each member]; and the rough draft entitled "Protecting Property Right During Marriage" (embodied in a report by Lundy, dated October 1, 1964), copies of which had been distributed to members present.

a. Section 1. Allison referred to subsection (1) of

section 1 of the rough draft and pointed out that by use of "then or thereafter owned" he intended to make clear that a declaration claiming a marital right in all real property situated in the county was applicable not only to such real property owned at the time of the recording of the declaration but also to such real property owned thereafter and while the marital right claimed by the declaration was in effect. He also indicated that "now or hereafter owned" was used in the declaration form set forth in subsection (2) to clarify this matter.

Frohmayer referred to subsection (4) of section 1 of the rough draft and suggested that "in the declarant" should follow "shall become vested," rather than following "upon the death of the spouse of the declarant." Carson questioned the use of "during the marriage" in subsection (4) and elsewhere in section 1, and suggested substitution of "within the period of the existence of the marriage" therefor.

Allison referred to subsection (7) of section 1 of the rough draft, pointed out that comparable provisions of previous rough drafts had been phrased in terms of revocation of the recorded declaration and noted that subsection (7) was phrased in terms of termination of the marital right, which he considered a more accurate way of describing the effect of divorce decrees and the other occurrences listed in subsection (7). Lundy questioned whether phrasing subsection (7) in terms of termination of the marital right was accurate with respect to the court order referred to in paragraph (d) of subsection (7) and in subsection (8). He pointed out that under subsection (8) a court would determine the validity and sufficiency of a recorded declaration and asked whether a court order terminating the marital right would be consistent with the nature of the inquiry by the court into the validity and sufficiency of the recorded declaration. Allison noted that the existence of the marital right was dependent upon there being a valid and sufficient recorded declaration. Lundy remarked that the recorded declaration might be found to be invalid or insufficient, but that such a finding should not necessarily prevent the subsequent recording of a proper declaration; that a court order terminating the marital right might be construed to preclude such a subsequent recording. Gooding agreed that a finding that a recorded declaration was invalid or insufficient should not preclude a subsequent recording of a proper declaration. Zollinger suggested that the last sentence of subsection (8) might be deleted. Lundy expressed the view that subsection (8) and the reference to it in paragraph (d) of subsection (7) would be incomplete without the last sentence of subsection (8) or some similar provision. Allison suggested that paragraph (d) of subsection (7) might be deleted and the last sentence of subsection (8) phrased in terms of revocation of the recorded declaration,

rather than in terms of termination of the marital right.

Allison referred to subsection (9) of section 1 of the rough draft and pointed out that its purpose was to make clear that a surviving spouse would be entitled to real property owned by a decedent at the time of his death by reason of intestate succession or election against will, whether or not a declaration claiming a marital right had been recorded.

Jaureguy commented that, contrary to views he had expressed previously, he was inclined not to favor the declaration device or any other means of creating and maintaining any kind of inchoate right in real property owned in sole right by one spouse in favor of the other spouse, and that the rights of a surviving spouse to real property owned by a decedent at the time of his death by reason of intestate succession or election against will were sufficient.

b. Section 3. Allison referred to section 3 of the rough draft and, in response to a question by Carson, pointed out that at the last meeting the committee had agreed that a guardian of the estate should not have authority to record a declaration claiming a marital right for and on behalf of the ward, on the theory that the general duty of the guardian to protect the estate of the ward would require the guardian to make maximum use of the declaration device if he were authorized to employ it, and that this would impose an undue burden on the guardian. Frohnmayer expressed the view that perhaps a guardian of the estate should be authorized to record a declaration in appropriate circumstances.

5. Next Meeting of Advisory Committee. The next meeting of the advisory committee was scheduled for Saturday, November 14, at 9 a.m., in Dickson's courtroom, 244 Multnomah County Courthouse, Portland. Lundy indicated that he would be unable to attend the next meeting.

Dickson requested Lundy to prepare an agenda for the next meeting that would include pending matters in the areas of dower and curtesy, guardianship and conservatorship and small estates and those legislative proposals of the Bar Committee on Probate Law and Procedure that had been approved by the Bar.

The meeting was adjourned at 11:15 p.m.

APPENDIX

(Minutes, Probate Advisory Committee Meeting, October 8, 1964)

REPORT

October 8, 1964

To: Members of the Advisory Committee
on Probate Law Revision

From: Stanton W. Allison

Subject: Revised rough draft on "Protecting Property Right
During Marriage."

I have prepared, and hereby submit for consideration by the Advisory Committee, the following revised rough draft of the proposed legislation entitled "Protecting Property Right During Marriage." Incorporated in this revised rough draft are some of the ideas embodied in Mr. Gooding's letter, dated September 14, 1964; my letter, dated October 1, 1964; and Mr. Lundy's report, dated October 1, 1964.

Protecting Property Right During Marriage

Section 1. (1) A married person, referred to in this section as the declarant, may cause to be recorded in the record of deeds of any county a written, signed and acknowledged declaration claiming a marital right to an undivided one-fourth interest in specifically described real property or in all real property then or thereafter owned during the marriage in sole right by the spouse of the declarant and situated in the county.

(2) A declaration applicable to all real property may be in the following form:

(7) A marital right is terminated by:

(a) A decree declaring the marriage void or dissolved.

(b) A decree of permanent or unlimited separation from bed and board specifically terminating the marital right.

(c) The death of the declarant before the death of the spouse of the declarant.

(d) A court order as provided in subsection (8) of this section.

(8) The spouse of a declarant, or any person to whom he conveys or mortgages real property to which a recorded declaration is applicable without the joinder of the declarant, may maintain, within 10 years after the date of the recording of the declaration, an action to determine the validity and sufficiency of the declaration in the circuit court for the county in which the declaration is recorded. If the court finds that the declaration is invalid or insufficient, the court shall order the marital right terminated.

(9) Nothing in this section shall affect the inheritance rights of a declarant to real property of which the spouse of the declarant died seised as provided in ORS 111.020.

Section 2. Section 3 of this Act is added to and made a part of ORS 126.006 to 126.565.

Section 3. A guardian of the estate, with prior approval

of the court by order, may exercise for and on behalf of the ward the right of the ward under section 1 of this 1965 Act to cause a revocation of a recorded declaration claiming a marital right of the ward to be recorded or to release or subordinate the marital right.