

ADVISORY COMMITTEE
Probate Law Revision

Eighth Meeting

Date: Saturday, November 14, 1964
Time: 9 a.m.
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland

Suggested Agenda

1. Approval of minutes of October 8 meeting of advisory committee.
2. Disposition of 1964 proposals of Bar Committee on Probate Law and Procedure that were approved by Bar.
3. Small estates.

Proposed legislation entitled "The Small Estates Act" (dated October 7, 1964).
4. Dower and curtesy.
 - a. Protecting property right during marriage.
 - (1) Report by Allison (dated October 8, 1964), containing revised rough draft on "Protecting Property Right During Marriage."
 - (2) Report by Lundy (dated October 1, 1964), containing revised rough draft on "Protecting Property Right During Marriage."
 - (3) Report by Allison and Lundy (dated September 11, 1964), containing rough draft on owner spouse's statement in conveyance or mortgage that property conveyed or mortgaged not residence of either spouse.
 - b. Changing dower and curtesy.

Proposed legislation entitled "Changing Dower and Curtesy" (Rough Draft, 10/9/64).
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

Eighth Meeting, November 14, 1964

Minutes

The eighth meeting of the advisory committee was convened at 9:05 a.m., Saturday, November 14, 1964, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland. All members, except Frohnmayer, were present. Also present was William E. Love, a member of the Law Improvement Committee.

1. Minutes of Last Meeting. No objection being raised, Dickson ordered that reading of the minutes of the last meeting (October 8, 1964) be dispensed with and that they be approved as submitted.

2. 1964 Proposals of Bar Committee on Probate Law and Procedure. Allison referred to the proposed annual report of the Oregon State Bar Committee on Probate Law and Procedure, and to the proposed legislation contained as exhibits therein. [Note: A copy of these exhibits constitutes Appendix A to these minutes.] He noted that this report was submitted to the Oregon State Bar at its annual meeting in Salem, October 7-10, 1964, and that the Bar, at that meeting, had approved the general recommendation of the Bar committee that legislation proposed thereby, and approved by the Bar, should be referred to the Law Improvement Committee and the advisory committee for study and consideration in the course of the probate law revision project. He pointed out that the Bar had approved all the Bar committee recommendations of specific proposed legislation except the one relating to attendance of a representative of the State Treasurer's office at the first opening of a ward's safe deposit box by the guardian of the estate or conservator (Exhibit C). Proposals approved by the Bar were those relating to: (a) Objections by interested persons to the confirmation of sales of real property by executors or administrators (Exhibit A); (b) revocation of wills by the subsequent marriage, divorce or annulment of the marriage of testators (Exhibit B); (c) waiver in certain circumstances by probate courts of the appointment of appraisers of estates of decedents (Exhibit D); (d) clarification of the procedure when power of sale is given under the terms of wills (Exhibit E); (e) obligation of executors and administrators to pay mortgages or other liens or encumbrances on property of decedents (Exhibit F); and (f) appointment of administrators to reopen estates of decedents under certain circumstances (Exhibit G).

Dickson suggested, and Allison agreed, that the advisory committee should proceed to consider the legislation proposed by the Bar committee and approved by the Bar, and to determine which of these proposals, with whatever changes the advisory committee considered necessary or desirable, should be recommended to the Law Improvement Committee.

a. Objection to confirmation of sale of real property by personal representative (Exhibit A). Allison explained the Bar committee's proposed legislation amending ORS 116.805 to permit any interested person to file objection to confirmation of the sale of real property by an executor or administrator. He pointed out that at present only persons who were cited to appear on the application for the order of sale were entitled to file objections (i.e., devisees

and heirs; see ORS 116.745), and suggested that other persons (such as legatees, creditors and spouses of interested persons, including the wife of the decedent) should also be entitled to file objections.

Zollinger suggested that another person who should be entitled to file objection might be a potential purchaser in the event the court vacated the sale of the real property and directed resale. He questioned the qualification that a person entitled to file objection be "interested," commented that there might be some difficulty in determining who was an "interested" person and expressed the view, with which Allison, Dickson and Jaureguy agreed, that any "person," rather than any "interested person," should be entitled to file objection. In answer to a question by Butler, Zollinger noted that "any person" was the terminology used in the comparable provision of the guardianship statutes. [Note: See ORS 126.451.]

Allison moved, seconded by Zollinger, that Exhibit A, as amended by deletion of "interested" before "person," be approved. Motion carried unanimously.

Butler commented that he would like to see the provision of the probate statutes relating to confirmation of the sale of real property (i.e., ORS 116.810) conformed to the comparable provision of the guardianship statutes (i.e., ORS 126.456).

b. Revocation of will by subsequent marriage, divorce or annulment of marriage of testator (Exhibit B). Allison explained the Bar committee's proposed legislation relating to revocation of the will of a testator by his subsequent marriage, divorce or annulment of his marriage. He pointed out that the present statute (i.e., ORS 114.130), which would be repealed by the proposed legislation, operated as an absolute revocation of the will of a testator in the event of his subsequent marriage, referring to the statement by the Oregon Supreme Court in Booth's Will, (1901) 40 Or. 154, that "the statute does not make the marriage a presumptive revocation, which may be rebutted by proof of a contrary intention, but makes it operate eo instanti as a revocation." He noted that the proposed legislation would provide three exceptions to revocation of the will of a testator by his subsequent marriage: First, no revocation unless his spouse survived the testator; second, no revocation if provision for the spouse had been made by written antenuptial agreement or marriage settlement; and third, no revocation if the will provided for the spouse or mentioned the spouse in such a manner as to show an intention not to make such provision. Allison expressed the view that in many instances the effect of the present statute was unreasonably harsh; for example, where a will was made in contemplation of marriage and other provision was made for the testator's prospective spouse, where a will devised or bequeathed much of the testator's property to persons other than his spouse and he had not contemplated the effect of his possible subsequent divorce or where the testator and his spouse were divorced but the spouse predeceased the testator. He noted that, under the proposed legislation, a subsequent divorce would only revoke those provisions in a will in favor of the former spouse of the testator.

Zollinger suggested that section 2 of Exhibit B be amended by inserting, after "annulled," the words "unless his will shall otherwise provide." He commented that a will might be made in contemplation of divorce and might contain some provision for the spouse to be divorced, and that under such circumstances the

divorce should not be considered to revoke the will. In answer to a question by Carson, Zollinger expressed the view that the provision in the will should not be qualified by the word "expressly" or "explicitly," that the intention of the testator should control and that the court should be relatively free to determine what the testator's intention was. Allison expressed agreement with Zollinger's suggested amendment.

Allison moved, seconded by Carson, that Exhibit B, as amended by insertion of the words suggested by Zollinger, be approved, Motion carried unanimously.

c. Guardian's access to ward's safe deposit box (Exhibit C). Allison noted that the Bar committee's proposed legislation to require the presence of a representative of the State Treasurer's office at the time of the first opening of a ward's safe deposit box by the guardian had been disapproved by the Bar. Dickson suggested, and the committee agreed, that Exhibit C was not properly before the committee for study and consideration and that, therefore, it should not be considered.

d. Waiver of appraisal of estates of decedents (Exhibit D). Allison explained the Bar committee's proposed legislation amending ORS 116.420 to permit the court to waive the appointment of appraisers to appraise property of a decedent in certain specified circumstances. He commented that there were probably many estates of decedents that consisted wholly or largely of cash or other property the value of which was readily ascertainable, and suggested that in such cases the appointment of an appraiser or appraisers was not necessary. He noted that although the present statute requires the appointment of at least one appraiser in all cases, he was aware that some courts have more or less disregarded the statute and waived the appointment of appraisers in cases involving cash or other property with readily ascertainable value.

Zollinger questioned the necessity of the reference to the inheritance tax statutes (i.e., ORS 118.005 to 118.840) in subsection (3) of ORS 116.420, as amended by Exhibit D, and suggested that the reference be deleted. In response to a suggestion that the appraisal provision of the inheritance tax statutes (i.e., ORS 118.630) might also be amended to permit waiver of appraisal, Zollinger noted that the provision authorized the court, on its own motion or that of an interested party, to appoint one or more appraisers if no previous inventory or appraisal had been made or if a previous inventory or appraisal was considered insufficient or inadequate, and expressed the view that no change in this provision need be made.

Dickson expressed disapproval of the proposal in Exhibit D that the court, in its discretion, be authorized to waive the appointment of any appraisers under certain circumstances. He commented that the court would probably be flooded with requests for waiver, and that this would impose a considerable burden on the court to determine the propriety of waiver in each case. Zollinger expressed agreement with the view advanced by Dickson.

Dickson suggested that the present maximum of \$10,000 on the value of estates for appraisal of which a court was authorized to appoint a single appraiser be increased, perhaps at least to \$15,000, thus reducing the cost of appraisal in a larger number of estates, but not leaving the matter within

the discretion of the court. In answer to a question by Allison, Dickson commented that he would not object to a maximum value of \$25,000.

Love commented that he had observed, in some estates administered in eastern Oregon, that appraisal was often handled by the attorney for an estate, with the appraisers merely confirming valuations determined by the attorney, and that the appraisers were only called upon to do the actual work of appraisal where real property or contracts or other property sometimes difficult to value were involved. He suggested that this might be the usual pattern of appraisal, as a practical matter, outside of Multnomah County. Riddlesbarger noted that Love's observation was probably accurate. He commented that, in his experience, security dealers seldom charged a fee for appraising securities of an estate. Gooding indicated that he had similar experience with respect to security dealers and that the reason for not charging a fee in such cases probably was that the security dealers had, or hoped to obtain, the business of handling the securities.

Allison suggested that waiver by the court of the appointment of any appraisers might be limited to estates consisting solely of cash. Dickson responded that courts probably waived appraisal in such cases now, even though the statutes did not expressly authorize this, because no one objected to such waiver.

Zollinger expressed the view that most personal representatives themselves were sufficiently capable to appraise cash and securities listed by any national security exchange and that appraisers should not be required for property of this kind. Dickson suggested that some consideration might be given to an approach, somewhat similar to that adopted by the provision in the inheritance tax statutes, involving no appointment of appraisers unless requested by some interested person. Zollinger commented that if that approach was adopted there might be few requests for the appointment of appraisers, but Butler and Riddlesbarger disagreed with Zollinger on this point. Dickson stated that he understood that the various tax agencies usually relied upon their own appraisers, and suggested that personal representatives might select their own appraisers, without requesting the court to appoint them, and use the reports of those appraisers for tax purposes, which the tax agencies would probably accept.

Allison suggested, and the committee agreed, that further consideration of Exhibit D be postponed pending preparation by himself and perhaps others of a revised draft of proposed legislation on the subject.

e. Sale of property of decedent under power in will (Exhibit E). Allison explained the Bar committee's proposed legislation relating to sale or other disposition of property of a decedent under a provision made in the will of the decedent, noting that the purpose of Exhibit E was to clarify the ambiguity, or at least uncertainty, of the procedures under the present statute (i.e., ORS 116.825).

Zollinger questioned the need for court confirmation of a sale of real property under a power granted in a will. Allison suggested that one argument for confirmation might be the circumstance that the court order confirming the sale would be entered in the probate journal as a record of the transaction. He expressed the view that if a power of sale was granted in a will to the executor, the executor should be permitted to proceed under the power and make a return

of the sale, but not obtain court confirmation. He indicated, however, that he was not in favor of dispensing with court confirmation if the sale was made by an administrator with the will annexed. Zollinger commented that, in his opinion, if the power of sale was to be exercised only by the executor, court confirmation was not essential, but stated that he would not object to court confirmation if the authority to exercise a power of sale was in an administrator with the will annexed as well as an executor. Carson suggested, and Butler and Gooding agreed, that the best solution would be to permit either an executor or an administrator with the will annexed to exercise the power of sale and to require court confirmation in both cases.

Carson noted that he had previously suggested deletion of the words "from a well drilled" from ORS 116.825 [Note: See Minutes, Probate Advisory Committee Meeting, 6/13/64, Appendix B.], and suggested that, since Exhibit E amended ORS 116.825, Exhibit E be amended to delete the words in question.

Dickson asked if there was any sentiment in favor of reducing the time limits for return and court confirmation after a sale of property (i.e., return of sale of personal property within 15 days after sale, under ORS 116.715; return of sale of real property within 10 days after sale, under ORS 116.805; objections to sale of real property within 15 days after filing of return, under ORS 116.810), whether in connection with a power of sale granted in a will or generally. The matter of these time limits was discussed at some length. Dickson suggested that a 10-day time limit was sufficient for both a return and objections, and whether the property involved was real or personal. He expressed the view that, in the case of personal property, requiring a return of sale served little purpose if court confirmation was not also required.

Allison suggested that Exhibit E be amended to delete the words "from a well drilled" as suggested by Carson, and to authorize sale or other disposition under a power granted in a will of any property by an executor or administrator with the will annexed, with the only exception being that in the case of the sale of real property a return be required within 10 days after the sale and court confirmation be required. Butler suggested that a period of time also be allowed for the filing of objections.

Allison moved, seconded by Butler, that Exhibit E be redrafted in accordance with the views expressed by members of the committee, and that the redraft then be considered by the committee. Motion carried unanimously.

f. Payment of mortgages or other encumbrances on property of decedent (Exhibit F). Allison explained the Bar committee's proposed legislation relating to the obligation of a personal representative to pay mortgages or other encumbrances on property of a decedent. He pointed out that under the present statute (i.e., ORS 116.140), which would be repealed by Exhibit F, an heir, creditor or other person interested could force the executor or administrator to sell personal property of the estate and use the proceeds to redeem property under encumbrance, and expressed the view that this would impose hardship in some cases. Jaureguy noted the inconsistency of ORS 116.155, which appeared to deny the authority of an executor or administrator to redeem when a mortgage had been foreclosed or when proceedings had been commenced for foreclosure, and

ORS 116.165, which appeared to authorize such redemption. He expressed the view that a testator whose will devised real property subject to a mortgage prior to execution of the will probably intended that the devisee take the property subject to the mortgage and be responsible for discharging the obligation secured by the mortgage, but recognized that a reasonable argument might be made for a contrary intent on the part of the testator. He noted that similar opposing arguments might be made as to the intent of the testator when devised real property was subjected to a mortgage after the execution of the will devising it. Jaureguy commented that there should be some definite rule on the subject.

Zollinger questioned the meaning of "other lien or encumbrance" in section 1 of Exhibit F. He referred to the exception as to judgment liens, and suggested that tax liens fell into the same category as judgment liens. He commented that perhaps the application of the section should be limited to mortgages and trust deeds, noting that these were voluntary encumbrances. Carson suggested that mechanics' liens might be included. Riddlesbarger asked whether security agreements covering personal property should not be included. Dickson expressed the view that the section should apply to either real or personal property and to encumbrances thereon voluntarily assumed.

Gooding expressed some concern about that part of section 1 that would require an executor or administrator to apply rents or profits to the payment of instalments of principal or interest falling due upon a lien or encumbrance, indicating that he did not favor this use of rents or profits in some circumstances. Carson suggested, and the committee agreed, that the words "any installments of" be deleted and that "or legatee" be inserted after "devisee."

Riddlesbarger suggested, and the committee agreed, that "specific" should be substituted for "express" in that part of section 1 relating to directions in a will for payment of a lien or encumbrance.

It was suggested, and the committee agreed, that section 1 should be amended to apply to a "mortgage, trust deed or security agreement," rather than a "mortgage or other lien or encumbrance." It was also agreed that "lien or" should be deleted from the phrase "lien or encumbrance."

Allison suggested, and the committee agreed, that "administrator with the will annexed" be substituted for "administrator" in section 1.

It was moved and seconded that Exhibit F, as amended in accordance with suggestions agreed upon by the committee, be approved. Motion carried unanimously.

g. Reopening of estate of decedent for further administration (Exhibit G).
Allison explained the Bar committee's proposed legislation relating to reopening the estate of a decedent for further administration after it had been closed. In response to a question by Jaureguy, Allison noted that Exhibit G would provide statutory authorization for a practice that was presently being permitted in some cases, such as where other property of the estate was discovered after closure of the estate.

Riddlesbarger suggested for committee consideration the section of the 1963

Iowa Probate Code on the subject of reopening administration, which reads as follows:

"§ 489. Upon the petition of any interested person, the court may, with such notice as it may prescribe, order an estate reopened if other property be discovered, if any necessary act remains unperformed, or for any other proper cause appearing to the court. It may reappoint the personal representative, or appoint another personal representative, to administer any additional property or to perform other such acts as may be deemed necessary. The provisions of law as to original administration shall apply, insofar as applicable, to accomplish the purpose for which the estate is reopened, but a claim which is already barred can, in no event, be asserted in the reopened administration."

The matter of when claims against estates were barred under Oregon law was discussed briefly. Carson asked whether a creditor barred under original administration should be allowed to reassert his claim against property of the estate discovered after closure of the original administration, and commented that perhaps at least a creditor who received only partial payment of his claim under original administration because of inadequacy of the estate to pay in full should be allowed to seek payment of the balance of his claim unpaid from after-discovered property. Dickson expressed the view that in the case of partial payment because of estate inadequacy the creditor probably would not be barred from seeking such payment from after-discovered property.

Butler asked about the application of the Iowa statute to the situation of an insolvent estate reopened because of after-discovered property, and whether in this situation creditors would be barred from asserting their claims for payment from the after-discovered property. Riddlesbarger responded that the Iowa statute did not appear to cover this situation.

Love commented that in some situations creditors, after noting the inadequacy of the estate to pay their claims, might not bother to file such claims, and in such situations they would be barred if additional property was discovered after closure of the estate. Dickson remarked that this was a matter which should be given more consideration in the course of the probate law revision project.

Zollinger moved, seconded by Riddlesbarger, that Exhibit G be amended by substitution of the substance of section 489 of the 1963 Iowa Probate Code for the substance of section 1 of Exhibit G, and that Exhibit G, as so amended, be approved. Motion carried unanimously.

3. Small Estates. Dickson suggested, and the committee agreed, that consideration of the proposed legislation relating to small estates be postponed until a future meeting, and that the committee proceed with consideration of the proposed legislation relating to dower and curtesy in an effort to complete action thereon at this meeting.

4. Dower and Curtesy.

a. Protecting property right during marriage. Allison referred to 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. He noted that the draft had been considered briefly at the last meeting of the committee on October 8, and was reproduced as an Appendix to the minutes of that meeting. He pointed out that several changes in the wording of section 1 of the draft had been suggested at the last meeting, as follows: (a) In subsection (1), line 6, substitution of "within the period of the existence of" for "during"; (b) in subsection (4), line 2, substitution of "within the period of the existence of" for "during"; (c) in subsection (4), line 5, insertion of "in the declarant as a marital right" after "vested" and, in line 6, deletion of "in the declarant as a marital right"; (d) deletion of paragraph (d) of subsection (7); and (e) in subsection (8), line 9, substitution of "recorded declaration revoked" for "marital right terminated."

In response to a question, Carson indicated that "within the period of the existence of the marriage" was preferable to "during the marriage," since the principal meaning of "during" was "throughout," and "throughout the marriage" was not what was intended. Allison suggested that "during the marriage" be retained in the form of a general declaration set forth in subsection (2) of section 1. The committee agreed that the wording in the form should be "at any time during the marriage." The committee also agreed that, in subsection (1), line 5, "either" should be inserted after "interest," and that the suggestions for changes in wording made at the last meeting, as pointed out by Allison, should be approved.

The proposition of whether the declaration to protect a property right during marriage, as embodied in the rough draft, should be approved was discussed at some length. Jaureguy indicated that, after much thought on the matter, he was opposed to the declaration device as it applied to all real property, although he might be in favor of the device if it was applicable only to the homestead. He also indicated that he would be inclined to favor some general requirement that the homestead might not be sold without the signatures of both spouses. Allison pointed out that the declaration device, as embodied in the rough draft, represented an effort to fill, to some extent, the gap that would be left by abolition of inchoate dower and curtesy by other legislation to be proposed by the committee. He expressed the view that there would be a few hardship cases arising out of the abolition of inchoate dower and curtesy, and that the declaration device would constitute a protection available for use in such cases. He also suggested that the declaration device would make it somewhat easier to convince the legislature that dower and curtesy should be abolished. Butler indicated that he did not favor the declaration device on its merits, but that, like Allison, he believed it would be necessary to support abolition of dower and curtesy before the legislature.

Zollinger commented that limiting the application of the declaration device to the homestead, as mentioned by Jaureguy, would require either a precise identification of what was a homestead or an assumption that any property being conveyed was a homestead. Jaureguy suggested that the statutes relating to exemption of homestead from execution, under which a homestead owner may file a declaration of homestead, might be followed. [Note: See ORS 23.240 to 23.270, particularly subsection (2) of ORS 23.270.] Allison agreed that the major problem area probably was the homestead, but expressed the view that the practical

problem of sufficiently identifying what was a homestead, for purposes of conveying or encumbering, was an extremely difficult one and that the end result would likely be a requirement, as it was now, that both spouses join in every conveyance or encumbrance. Zollinger stated that he saw no need for and did not favor protection of a spouse by means of the declaration device, even in the case of the homestead. He noted that no such protection presently existed with respect to personal property, and asked why it should exist with respect to real property.

Jaureguy remarked that another basis for his objection to the declaration device was that, under it, a spouse would acquire both a right in the real property and a share in the proceeds of the sale thereof, either immediately or upon the death of the other spouse. Zollinger noted that in the case of a gift of the property there would be no proceeds. Alison commented that if a spouse who filed a declaration did not join in a conveyance, he would be unlikely to share in the proceeds of a sale, and that if he did share in the proceeds, he would likely join in the conveyance, thus releasing the marital right established by the declaration. Love expressed the view that the situation described by Jaureguy would almost never arise, since as a practical matter the property subject to the filed declaration probably would not be conveyed unless the spouse who filed the declaration joined in the conveyance.

Allison moved, seconded by Gooding, that the rough draft embodying the declaration device, as amended in accordance with suggestions agreed upon by the committee, be approved. Motion carried, with Jaureguy and Zollinger voting no.

b. Changing dower and curtesy. Allison referred to the latest rough draft of proposed legislation entitled "Changing Dower and Curtesy" (dated October 9, 1964). He moved, seconded by Zollinger, that section 1 (amending ORS 111.020) of the draft be approved. Motion carried unanimously.

Allison explained the change in ORS 113.050 proposed by section 2 of the draft. Zollinger noted that section 2 referred to real property of which the decedent died "possessed," and asked whether, with respect to real property, "seised" should not be used instead of "possessed." Allison pointed out that "seised" was used in ORS 111.020, which dealt with descent of real property. Riddlesbarger suggested, and the committee agreed, that, with respect to real property, "seised" should be used instead of "possessed."

Carson questioned the use of "possessed" in section 2 with respect to personal property, and suggested that "owned" be substituted therefor. He commented, and Butler agreed, that a person might possess personal property without owning it. Allison suggested that the wording "owned by the decedent at the time of death" might be used. Riddlesbarger asked whether bonds payable to another person on the death of a decedent constituted personal property "owned" by the decedent at the time of death and thus subject to the election against will, and expressed the view that such bonds should not be so considered. He recalled a situation in which a court had ruled that such bonds were not a part of a decedent's estate. Butler suggested use of "owned by the decedent's estate" instead of "owned by the decedent." Zollinger suggested, and the committee agreed, that the wording should be "personal property of the estate of the

decedent owned by the decedent at the time of death."

Jaureguay asked whether some provision should be made for an offset against the one-fourth interest taken by a surviving spouse under election against will in the event the surviving spouse also received real property held by the entirety with the decedent, who furnished the purchase price therefor; life insurance proceeds; or bonds payable to the surviving spouse on the death of the decedent. Butler expressed disapproval of such an offset, and commented that the matter was one subject to the control of the decedent during his life and that an attempt to regulate it after his death should not be made by statute. Zollinger pointed out that election against will was a statutory right, and expressed the view that if a surviving spouse received property of a decedent on his death that was not part of his estate, it was not unreasonable to limit the right of election against will. Allison noted that information concerning amounts received by a surviving spouse as life insurance beneficiary or real property received by a surviving spouse as surviving tenant by the entirety ordinarily did not appear in estate proceedings, and commented on the difficulty of obtaining accurate information of this nature as a drawback to the suggested offset against or limitation on election against will. Butler remarked that the question of who furnished the purchase price for jointly owned property also would constitute a difficult problem in connection with the offset or limitation. Carson suggested that a proposal to limit election against will submitted to the legislature at the same time as the proposal to abolish dower and curtesy and substitute a substantial equivalent might tend to reduce chances of legislative approval of the latter proposal. Dickson expressed the view that a proposal to limit election against will, if favored by the committee, should be embodied in separate proposed legislation rather than in that relating to changing dower and curtesy.

Allison moved, seconded by Gooding, that sections 2 and 3 of the draft be approved. Motion carried unanimously.

Allison noted that the balance of the sections of the draft primarily dealt with deletion of references to dower and curtesy in a number of existing statutes. He suggested postponement of consideration of those sections until all members had an opportunity to review them. Dickson suggested, and the committee agreed, that consideration of those sections be made a special order of business for the next meeting of the committee.

Riddlesbarger left the meeting at this point.

5. Guardianship and Conservatorship. Zollinger pointed out that the rough draft of proposed legislation on guardianship and conservatorship (dated July 18, 1964) was still under consideration, and that the committee had not taken action on the amendment of ORS 126.336 (relating to accounting by guardians) by section 2 of the draft. He noted that the latest revision of that part of ORS 126.336 relating to disposition of accounts other than final accounts of a guardian of the estate was embodied in a report dated September 11, 1964, which members had previously received. [Note: This report is reproduced as Appendix B to these minutes.] Jaureguay suggested, and the committee agreed, that the wording of paragraph (a) (D) of the September 11 revised draft be adjusted to make clear that copies of accounts were to be mailed or delivered to all persons listed who requested them, as follows: " * * * to [any] those of the ward's

children, parents, brothers or sisters who [is] are not under legal disability and [has] have presented a request * * *."

The committee then turned to consideration of subsection (5) of ORS 126.336, as amended by section 2 of the July 18 draft, relating to disposition of final accounts. Carson commented that the committee had previously discussed limiting personal service of a final account to a ward not under legal disability and providing for mail or delivery of copies thereof to the other persons listed in subsection (5). Dickson suggested deletion of the word "personally." After further discussion, it was suggested that subsection (5) be amended to read as follows: "The guardian of the estate shall cause a copy of his final account to be mailed or delivered to [served personally on a ward not under legal disability, the person or institution having the care, custody or control of a ward under legal disability,] each person to whom copies of other accounts are required to be mailed or delivered as provided in subsection (4) of this section, the executor or administrator of a deceased [ward] ward's estate and a successor guardian. Within 10 days after the date of such mailing or delivery [the service], any such person [or institution so required to be served] may make and file in the guardianship proceeding written objections to the final account." Zollinger expressed the view that 10 days might not be sufficient in some circumstances. Dickson responded that additional time might be allowed by order of the court or by stipulation. Zollinger moved, seconded by Carson, that subsection (5), as amended pursuant to the previous suggestion, be approved. Motion carried.

The effect of settlement of final accounts and discharge of the guardian was discussed briefly. Zollinger suggested, and the committee agreed, that consideration of this matter should be deferred until a future time, and perhaps be considered in conjunction with similar matters as to decedents' estates.

Zollinger referred to and explained the amendment of ORS 126.346 by section 3 of the July 18 draft. Gooding moved, seconded by Butler, that section 3 be approved. Motion carried unanimously.

6. Next Meeting of Advisory Committee. The next meeting of the advisory committee was scheduled for Saturday, December 12, at 9 a.m., in Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The meeting was adjourned at 1:30 p.m.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, November 14, 1964)

The following are the Exhibits (i.e., proposed legislation) contained in the proposed annual report of the Oregon State Bar Committee on Probate Law and Procedure for the year 1963-1964. The Oregon State Bar, at its annual meeting in Salem, October 7-10, 1964, approved Exhibits A, B, D, E, F and G, and disapproved Exhibit C.

EXHIBIT A

A BILL

FOR AN ACT

Relating to return of sale and objections thereto; amending ORS 116.805.

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

Section 1. ORS 116.805 is amended to read:

116.805. Within 10 days after the sale of real property, the executor or administrator shall make a return of his proceedings concerning the sale, and file the same with the clerk of the probate court. At any time within 15 days from the filing of such return [any person cited to appear on the application for the order of sale,] any interested person may file his objection to the confirmation of such sale.

EXHIBIT B

A BILL

FOR AN ACT

Relating to revocation of wills by subsequent marriage or divorce of testator; creating new provisions; and repealing ORS 114.130.

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

Section 1. If, after making any will, the testator shall marry, and the wife or husband of testator shall be living at the time of his death, such will shall be deemed revoked, unless provision shall have been made for such survivor by a written antenuptial agreement or marriage settlement or unless such

survivor be provided for in the will or in such way mentioned therein as to show an intention not to make such provision, and no other evidence to rebut the presumption of revocation shall be received.

Section 2. If, after making any will, a testator shall be divorced, or his marriage shall be annulled, such divorce or annulment shall revoke all provisions in the will in favor of the former spouse, including any provision appointing such spouse as the executor or executrix of the will.

Section 3. ORS 114.130 is repealed.

EXHIBIT C

A BILL

FOR AN ACT

Relating to the power of a Guardian or Conservator to gain access to the safe deposit box of his ward; requiring the presence of a representative from the State Treasurer's Office at the time of first access; and the filing of an inventory of the contents thereof.

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

Section 1. No person, safe deposit company, trust company, corporation, bank or other institution engaged in the business of renting safe deposit boxes or other receptacles of similar character, shall permit the guardian or conservator of the estate of the owner or tenant thereof to gain access thereto unless the State Treasurer, personally or by representative, shall be present at the first opening of such safe deposit box by such guardian or conservator.

Section 2. The State Treasurer, or his representative, shall, within ten days after being present at the opening of the safe deposit box of a ward by the guardian or conservator of his estate, file with the Clerk of the county wherein the guardianship or conservatorship of such ward is pending an inventory

of the contents of said safe deposit box.

EXHIBIT D

A BILL

FOR AN ACT

Relating to appraisal, appointment of appraisers and waiver of appraisal;
creating new provisions; and amending ORS 116.420.

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

Section 1. ORS 116.420 is amended to read:

116.420. (1) Before the inventory is filed, the property therein described shall be appraised at its true cash value by three disinterested and competent persons, who shall be appointed by the court; provided, that the court may, in its discretion, appoint but one appraiser if the probable value of the estate does not exceed \$10,000, exclusive of cash and securities of the United States Government, and provided, further, that the court, in its discretion, may waive the appointment of any appraisers if, in its judgment, the value of the property may be definitely ascertained and entered in the inventory by the personal representative and if no useful purpose will be served by the appraisal.

(2) If any part of the property is in a county other than that wherein the administration is granted, the appraiser or appraisers thereof may be appointed by such court, or the court of the county in which the property is located. In the latter case, a certified copy of the order of appointment shall be filed with the inventory.

(3) Nothing contained herein shall limit the power of the court to require the filing of an inventory and the making of an appraisal as provided in ORS 118.005 to ORS 118.840.

EXHIBIT E

A BILL

FOR AN ACT

Relating to the disposition of property under power in will; creating new provisions; and amending ORS 116.825.

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

Section 1. ORS 116.825 is amended to read as follows:

116.825. When a testator makes provision in his will for the sale, lease, including, without limitation, a lease granting the right to explore or prospect for and remove and dispose of oil, gas and other hydrocarbons, and all other minerals or substances, similar or dissimilar, which may be produced from a well drilled pursuant to such lease, or other disposition of all or any particular portion of his estate, the same may be sold, leased or otherwise disposed of as directed, by the executor [or administrator with the will annexed, without an order of the court therefor, but any sale conducted under such power shall be made and a return filed thereon in all respects as if it were made by order of the court, unless there are special directions in the will concerning the manner and terms of sale, in which case he is governed by such direction in such respects] without regard to any statutory requirements or procedure except that in the case of the sale of personal property the executor shall file a return of sale within 15 days after the completion of the sale, but such sale need not be confirmed, and in the case of the sale of real property the executor shall file a return of sale and obtain a confirmation of the sale by the court in the manner required by ORS 116.805 and 116.810.

EXHIBIT F

A BILL

FOR AN ACT

Relating to the obligation of executors to make payments upon encumbered property; creating new provisions; and repealing ORS 116.140.

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

Section 1. When any real or personal property subject to a mortgage or other lien or encumbrance, except the lien of a judgment against the decedent, is specifically bequeathed or devised, the legatee or devisee thereof shall take such property subject to such mortgage or other lien or encumbrance and there shall be no obligation upon the executor or administrator to make any payments of principal or interest thereon unless (1) there are express directions in the will that said lien or encumbrance be so paid, or (2) the executor or administrator obtains rents or profits from said property, in which case the same, if requested by the devisee, shall first be applied to the payment of any installments of principal or interest falling due upon any such lien or encumbrance, or (3) any beneficiary of the estate consents that such payments be made and charged against his interest.

Section 2. ORS 116.140 is repealed.

EXHIBIT G

A BILL

FOR AN ACT

Relating to appointment of an administrator when after discovered property is found in an estate or when it becomes necessary or proper that letters should again be issued.

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

Section 1. The final settlement of an estate shall not prevent a subsequent issue of letters testamentary or of administration, or of administration with the will annexed, if other property of the estate is discovered, or if it becomes

Relating to the obligation of executors to make payments upon encumbered property; creating new provisions; and repealing ORS 116.140.

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

Section 1. When any real or personal property subject to a mortgage or other lien or encumbrance, except the lien of a judgment against the decedent, is specifically bequeathed or devised, the legatee or devisee thereof shall take such property subject to such mortgage or other lien or encumbrance and there shall be no obligation upon the executor or administrator to make any payments of principal or interest thereon unless (1) there are express directions in the will that said lien or encumbrance be so paid, or (2) the executor or administrator obtains rents or profits from said property, in which case the same, if requested by the devisee, shall first be applied to the payment of any installments of principal or interest falling due upon any such lien or encumbrance, or (3) any beneficiary of the estate consents that such payments be made and charged against his interest.

Section 2. ORS 116.140 is repealed.

EXHIBIT G

A BILL

FOR AN ACT

Relating to appointment of an administrator when after discovered property is found in an estate or when it becomes necessary or proper that letters should again be issued.

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

Section 1. The final settlement of an estate shall not prevent a subsequent issue of letters testamentary or of administration, or of administration with the will annexed, if other property of the estate is discovered, or if it becomes

necessary or proper for any cause that letters should be again issued.

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, November 14, 1964)

REPORT

September 11, 1964

To: Members of the Advisory Committee
on Probate Law Revision

From: Robert W. Lundy
Chief Deputy Legislative Counsel

Subject: Disposition of intermediate accounts of guardian of estate.

At the last meeting of the Advisory Committee, I submitted a revised draft of subsection (4) of ORS 126.336 (relating to the disposition of accounts other than final accounts of a guardian of the estate), embodying, in so far as possible, the revisions apparently agreed upon by the committee at the July 18 meeting. At the last meeting the committee considered that revised draft, directed or suggested certain revisions thereof and requested that I prepare and submit a new revised draft. See Minutes, Probate Advisory Committee Meeting, 8/22/64, page 13. Following is such a new revised draft of subsection (4).

126.336. * * *

* * *

(4) (a) [The] Before filing any account other than his final account,
a guardian of the estate shall [give a copy of each account to the person
or institution having the care, custody or control of the ward.] cause a
copy of the account to be mailed or delivered:

(A) If the ward has been committed or admitted to, and not discharged
from, a state institution listed in ORS 426.010, 427.010 or 428.420, to
the Secretary of the Oregon State Board of Control and to the superintendent
of the institution who has presented a request for a copy to the guardian
before the filing of the account.

(B) If there is a guardian of the person for the ward other than the
guardian of the estate, to the guardian of the person.

(C) If the ward is a minor 14 years of age or older or a spendthrift,
to the ward.

(D) If the ward is a minor or an incompetent, to the ward's spouse who is not under legal disability and to any of the ward's children, parents, brothers or sisters who is not under legal disability and has presented a request for a copy to the guardian before the filing of the account.

(b) The guardian of the estate shall file with each account other than his final account his affidavit or other proof satisfactory to the court that copies of the account have been mailed or delivered as provided in paragraph (a) of this subsection, showing the names of the persons to whom, and the addresses to or at which, the copies were mailed or delivered.

* * *

Comment: The revision of subsection (4) of ORS 126.336 by the above draft is based upon Minutes, Probate Advisory Committee Meeting, 8/22/64, pages 11 to 14, and Appendix B.

See also: Minutes, 7/18/64, pages 8 to 12.
Section 2, Guardianship and Conservatorship Bill, Rough Draft, 7/18/64, pages 4 and 5.
Minutes, 6/13/64, pages 11 to 13, and Appendix C.
Minutes, 5/16/64, pages 10 and 11, and Appendix B, page 8.