

ADVISORY COMMITTEE  
Probate Law Revision

Forty-eighth Meeting, November 15 and 16, 1968  
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The forty-eighth meeting of the advisory committee (a joint meeting with the Committee on Probate Law and Procedure, Oregon State Bar) was convened at 1:30 p.m., Friday, November 15, 1968, in Suite 2201, Lloyd Center, Portland, by Vice Chairman Zollinger.

The following members of the advisory committee were present: Dickson (arrived 2:10 p.m.), Zollinger, Allison, Butler, Frohnmayer, Gooding, Husband, Mapp (arrived 2:45 p.m.) and Riddlesbarger. Carson, Jaureguy and Lisbakken were absent.

The following members of the Bar committee for 1968-1969 were present: McKay, Shetterly, Georgeson, Heisler, Mayer, Ramstead, Schaumberg, Smith, Thompson and Walton. Anderson, Buhlinger, Field, Hornecker, Kraemer, Pendergrass, Rhoten and Thomas were absent.

Also present were Robert W. Gilley, Donald G. Krause, Lillian Meyers, Campbell Richardson, Judge J. J. Thalhofer and Robert W. Lundy, Legislative Counsel.

General Discussion of Proposed Probate Code

Zollinger suggested that Allison give a brief resume of work he had been doing in connection with drafting changes in sections of the preliminary draft of the proposed Oregon probate code which may require amendment.

Allison commented that from meetings he had attended and correspondence received there seemed to be little opposition to the transfer of probate jurisdiction to the circuit court, and went on to explain certain changes he had drafted regarding changes of wording or amending certain sections of the proposed code.

The first section he reviewed was the one providing for transfer of jurisdiction from the county court and the district court (section 2), with the thought of amending that section to limit transfer of probate jurisdiction from the county court to the circuit court. In a number of counties, mentioning Clatsop County, circuit judges did

not desire to take over probate jurisdiction which was presently being handled in district court where such court has been given probate jurisdiction and where no particular problems have arisen.

Another suggestion being considered, according to Allison, is, in the counties where there is a county court and also a district court not having probate jurisdiction, that the circuit court judge would have the right to assign all probate matters to the district court where there is a district court sitting.

Another area where criticism was expressed was regarding the surety bond of a personal representative, particularly by lawyers in smaller counties unaccustomed to dealing with surety companies, and that strong opposition had been expressed in some areas. One suggestion had been that where the personal representative is the sole devisee or sole heir no bond should be required. A good many opinions were expressed that the power of the court should be retained to approve personal sureties where required.

Another area was the sale of real property. All meetings and much of the correspondence showed great concern over giving unrestricted power of sale of real property, and Allison wondered about having an order entered by the court authorizing any sale of real property; not to require a hearing, but go in on a petition and get an order for the sale. It was Allison's feeling that this should be considered.

Another area was including in the proposed code an increase in the fee schedule for the personal representative. It was felt this was a controversial matter and if made a part of the code it might cause a "dogfight" in the legislature; also the wording is too vague. Allison has not drafted an amendment on this.

Allison had received many suggestions regarding elimination of some of the sections. These, he felt, should be considered by a subcommittee of two or three people.

A heavily criticized area was giving to the court the right to cut down on the widow's claim where spouses have separated; that this question perhaps would be better settled in domestic relations court, rather than have a probate judge analyze every personal situation where there is a separation.

Gooding then reviewed results of meetings he had attended, beginning with LaGrande and talking with people from Baker, Wallowa County, Pendleton and others, where

little opposition had been expressed to transfer of jurisdiction to the circuit court, although they also felt the probate commissioner system was satisfactory. In Ontario there was more opposition to transfer of jurisdiction because of distance involved, in some instances 150 miles or more from a resident circuit court judge. Senator Anthony Yturri had suggested the possibility of an alternative provision which would save probate jurisdiction for county courts in Malheur County, and further commented he would be going to the legislature for four counties and was quite sure people in those counties would be unanimously opposed to the transfer. Gooding felt objections can be expected from the legislature, but that is no reason to abandon the principal of the transfer and carve out a special area or class for individual areas. He also felt some of the difficulty might be due to personalities in connection with the circuit court judge.

Allison asked whether the possibility had been considered in Pendleton and LaGrande that the county judge could be named the probate commissioner, and Gooding said that the county judge had been present and it had been and would be discussed.

McKay commented that the county judge from Malheur County said he would go before the county judges and speak in opposition to the transfer of jurisdiction.

Richardson added that he had been told in Eugene that the reason a proposed new probate code originally failed in Wisconsin was because the county judges' association had opposed it, but some compromise had been reached and it was expected to pass.

Following a general discussion about budgetary problems surrounding transfer of jurisdiction -- increased costs of courts would not be eliminated; increased funds for circuit courts would be requested to pay commissioners, assuming they were other than county clerks -- Lundy stated that the present law provides that the county pay salaries for all court officers other than those paid by the state to judges.

Husband brought up the problem in previous legislative sessions on the abolition of justices of the peace, the same problem which had arisen when juvenile jurisdiction was taken away from the county courts, stemming mainly around distances involved and personalities of individuals involved. General comments of committee members were that this could be expected, and since it had worked out in connection with juvenile matters, it was felt the transfer of probate jurisdiction would also work out once it became a fact.

Shetterly questioned why there should be classes of judges, and commented that there was no reason why one class of judge should not be able to handle anything that comes into his court. Frohnmayer reported that this matter is under study by the Bar Committee on Judicial Administration currently.

It was pointed out that, under the proposed code, the court should have less work to do. A probate commissioner could handle many petitions for probate of wills and appointment of personal representatives and other preliminary matters. The court might have to handle only two appearances -- the first on initiation of the proceeding and the second on approval of the final account. Other matters coming before the court might be only if somebody requests restrictive authority or the equivalent or asks for a court instruction so the personal representative will know what he is authorized to do, which should not place too great a burden on lawyers as to distances involved.

Krause started a general discussion regarding mailing of notices, which brought out some expression that perhaps matters would get more careful analysis if the court has documentation to consider, and this also would be less time consuming in the end.

#### Specific Provisions of Proposed Probate Code

The committees began a consideration of suggested changes in specific provisions of the preliminary draft of the proposed Oregon probate code. Allison distributed copies of a draft of suggested changes in a number of sections of the proposed code. [Note: Allison's draft is set forth in the Appendix to these minutes.]

Section 1 (4). Allison stated he had received some criticism of the definition of "advancement", which he had amended by crossing out "an irrevocable", adding the word "a", and crossing out "in praesenti", and the subsection now reads:

"Advancement" means a gift by a decedent to an heir to enable the donee to anticipate his inheritance to the extent of the gift.

Section 1 (20). Allison felt there has been some proper criticism registered against the definition of "intestate," which could be corrected by crossing out "having made" and substituting "leaving" in two places, and the subsection would read:

"Intestate" means one who dies without leaving a valid will or the circumstance of dying without leaving a valid will.

Section 1 (7) and (25). Allison stated that it had been called to his attention that the definitions of "claims" and "obligations" are almost identical, except that "claims" are described as including liabilities of the estate which arise at or after the time of death; and "obligations" presumably are liabilities of the decedent, not obligations arising after death. There may be a distinction, but he did not make any changes.

Zollinger felt the distinction is a valid one and does not think claims include post-death obligations; that claims on post-death obligations are obligations of the estate.

Allison brought up that claims are filed for funeral expenses and wondered whether there should be a distinction in the definition as to claims arising after death, such as funeral expenses. Lundy agreed it was crucial in determining what terms to use in various sections of the proposed code, and what they are intended to mean. Allison doubted whether expenses of administration of the estate and inheritance taxes fall within the ordinary meaning of "claims". Thalsofer wanted to be sure the word "survive" remained. Lundy felt subsection (7) could be terminated with the second line.

Allison agreed that subsection (7) should read: "Claims includes liabilities of a decedent which survive, whether arising in contract, in tort or otherwise." This would limit actual requirements of filed claims to items which arose before death.

Lundy questioned whether it might be preferable to say "'Claims' means" instead of "'Claims' includes", but this was not discussed further.

Sections 2, 3 and 257. Allison explained that in view of opinions expressed in the 9 counties having district courts vested with probate jurisdiction that probate jurisdiction be left in the district courts, which are presided over by attorneys, he had revised sections 2 and 3 to provide only for transfer of probate jurisdiction from county courts to circuit courts. He had also rewritten subsection (2) of section 257 and drafted a new subsection (3) to be added to section 257. Rewritten subsection (2) of section 257 was as follows:

(2) A district court judge may exercise the powers and duties of circuit court judge in any matter, cause or proceeding in probate pending in the county which is assigned to him by the circuit court judge.

After reading the above subsection (2), Allison emphasized the use therein of the words "may exercise" and, before reading subsection (3), commented it is present language but has been placed in a separate subsection as follows:

(3) Whenever by reason of absence, illness or injury there is not within the county a judge of the circuit court able to preside over and conduct the business of the circuit court, any judge of the district court for the county may, within the county, exercise the powers and duties of judge of the circuit court for the county in any matter, cause or proceeding pending in the county.

Heisler referred to subsection (3) and wondered about using "any judge of the district for the county or adjoining county"; this change would solve problems in Sherman County, at least.

Frohmayer wondered whether in counties with district court judges presently vested with probate jurisdiction all of the judicial powers under the proposed code could be vested in that district judge, and then provide any appeal from a decision of the district judge would go direct to the Supreme Court rather than to the circuit court.

Thalhofer expressed his opinion that many of the circuit court judges would rather let the district court probate matters as pro tems. He did not think there would be much of a problem where there are district courts, but he did not think it was a good idea to have probate jurisdiction in three different courts. He wondered whether there might be a real problem in Malheur County.

Zollinger suggested two approaches - one to have a district court judge act as a referee and the other to have him act as a circuit court judge pro tem, and in either case appeal would be from the circuit court to the Supreme Court.

Allison commented that probate jurisdiction is given certain district courts by present statutes and while

changes may be needed in certain counties, he does not feel any particular problem exists in those counties and suggests possibly leaving this jurisdiction alone.

Frohnmayr stated he would rather see the district court judges be probate judges in probate matters.

Zollinger brought up a possible solution to vest the power in the circuit court and enable the circuit court to appoint a probate commissioner or judge pro tem, who should be a district court judge and then act as circuit court judge in probate matters.

Dickson suggested the matter could be considered further and discussed again at a later date.

Frohnmayr commented that under the statute what happens in each specific county can be designated and suggested certain counties be singled out and someone such as Gooding talk to them regarding a possible solution as regards their county, following which there was a general discussion of alternatives, such as putting in "except in Harney and Malheur Counties" and let the legislature work at it.

Riddlesbarger moved, seconded by Thalhofer, to let the jurisdiction provision stand as it is, with the exception of the provision that the district court judge, wherever a district court exists, may serve as a circuit court judge pro tem for the purposes of handling probate jurisdiction.

Following further discussion, the motion was carried and the task of redrafting the appropriate section assigned to Allison and Lundy.

Section 8. Allison read section 8 of his draft and commented on the addition of "within 30 days after the orders are entered."

Dickson asked if there were any objections. It was suggested that "an order is" be substituted for "the orders are."

Section 11. Allison referred to section of his draft, which read:

A guardian, a guardian ad litem, a conservator or a person who is neither incompetent nor a minor may waive notice by a writing ....

Following discussion, Butler moved and Thompson seconded that the words "not incompetent or a minor" be replaced by the words "not under legal disability."

After voice vote Butler asked that the vote be clarified. On a second vote by show of hands, over half indicated "nay", whereupon Dickson stated the wording used by Allison was accepted.

Section 13 (1)(c). Allison explained the words "testamentary or letters of administration" were added because of questions to him verbally and by letter, and then read the paragraph:

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

Richardson preferred "may" to "shall", as did Butler and to which Allison had no objection.

Dickson stated that since there was no objection to the section as amended by Allison and further amended by changing "shall" to "may," the paragraph would stand approved as read.

Section 39 (3)(c). Allison's draft deleted "Having been informed that the instrument is the will of the testator" and changed "be subscribing" to "by signing."

The only comment was by Riddlesbarger, who felt witnesses should be required to testify to something, not only the signature of the testator.

Upon receiving no objection to the changes made, Dickson ruled the paragraph would stand approved as written, as follows:

Attest it by signing his name to the will in the presence of the testator and at his request.

Section 52. Allison said he had added "expressed in the will" and then read the section:

Any property acquired by the testator after the making of his will shall pass thereby, and in like manner as if title thereto were vested in him at the time of making the will, unless the intent expressed in the will is clear and explicit to the contrary.

Dickson, hearing no objection to this change, stated that section 52 stands approved as read.

Section 54. Allison commented that "expressed intent" is a state of mind and may cause problems unless in each case it is spelled out.

Zollinger did not feel this was appropriate and moved it be left as originally drafted, seconded by Frohnmayer. Motion carried.

Section 55. No objection being stated to the suggested change, the addition of the words "unless otherwise provided in the testator's will," it was ruled by the Chair that the amendment stands approved.

Section 56 (1). Allison stated there had been a great deal of misunderstanding about this section, which he took from the New York statute.

After lengthy discussion, particularly over the meaning of the word "settlement" and how an after-born child is affected, and the advisability of appointing a subcommittee to work with Allison and Lundy in rewording the section, a subcommittee was appointed to go over the matter on Saturday at a breakfast meeting. The subcommittee was to consist of Allison, Frohnmayer, Gilley, Mapp, Richardson and Zollinger.

Section 56 (4). Following discussion, it was moved by Frohnmayer, seconded by Butler, that the entire last sentence be removed. Motion carried.

Section 57 (1). After an explanation by Allison of change proposed in this section, and no objection stated, the Chair ruled the section would stand amended as indicated.

Section 57 (2). No objection being stated, the Chair ruled the section would stand amended as indicated.

Section 78. Zollinger moved and it was seconded that the section as now written, without the changes, be accepted. Motion carried.

Section 84. After detailed discussion, the Chair stated that unless some objection were voiced, and none were, the section was amended as follows:

Add "and probate of will" in the leadline.  
After the words "personal representative"  
insert the words "and for the probate of a  
will."

In subsection (1) substitute "taxpayer identification number" for "Treasurer's identification number."

Subsection (6) will be renumbered subsection (5), and the following language will be deleted: "If the decedent died wholly or partially intestate."

Capitalize the word "the", and then delete the word "heirs" as it appears below and insert in lieu thereof the following language: "persons who are or would be his heirs upon intestate death." Then delete the words "birth dates" and insert in lieu thereof the word "ages."

"Subsection (5) would be renumbered subsection (6) and would be amended by deleting the following language after the word " devisees": "and any pretermitted children," and then also delete the words "birth dates" and insert in lieu the word "ages."

Section 87 (1). After Allison explained there had been some question as to just what was meant by "photographic or photostatic copy" of a will, there being little comment and no objection, the words "or photostatic" were deleted.

Section 87 (3). After discussion which indicated the suggested change of striking "or" and adding "and" between "signature of the testator" and "at least one of the witnesses" was unnecessary, the suggested amendment was unanimously rejected.

Section 88. Following discussion, it was suggested there be a period after the words "personal representative" instead of a comma and the remainder of the section be deleted.

Frohnmayr moved and it was seconded that the amendment be adopted as set forth. Motion carried.

Riddlesbarger then moved, and it was seconded, that following the word "preference" insert the words "in the following order." Motion carried.

Mapp brought up the question of inserting a time limit as to when a qualified person may be appointed and

what would happen if a more qualified person came in at a later date. After considerable discussion, no action was taken on this matter.

Section 89 (6). Allison felt removal of the words "named executor in the will," and the addition of "an active member of the Oregon State Bar as" and at the end of the sentence "if a bond is required thereunder" were self-explanatory.

Zollinger agreed on the advisability of restriction to an active member of the Bar to prevent any lay individual acting as agent for a nonresident executor.

Gilley moved to reject the suggested change, after which there was further discussion and he withdrew his motion.

Zollinger moved, and it was seconded, that after the word "appoints" and before the words "a resident agent" that the language suggested be inserted. Motion carried.

No vote was taken on the other changes proposed.

Section 90 (1). Following discussion, Riddlesbarger moved, and it was seconded, that section 90 be amended so the bond may be either a corporate surety bond or a personal surety bond and that necessary provisions be inserted concerning the qualifications of the surety. Motion carried.

Allison asked Husband and Riddlesbarger to redraft the section for final consideration on Saturday.

Section 93 (3). Allison referred to section 10 and stated that the change in section 93 was following along with section 10.

No comments or objections being made, the Chair ruled the amendment would stand as written.

Section 99 (2). Allison felt, from comments made about insuring a house or place of abode, there should be some guideline as to how much insurance, and suggested insurance "to the extent of the fair market value of the improvements."

There being no objection stated, the Chair ruled the amendment would stand approved as indicated.

Allison called attention to the fact that sections 100, 104 and 107 went together and probably would entail lengthy discussion and suggested they be taken up the following morning, which appeared to be agreeable with all members.

Dickson then appointed a subcommittee consisting of Zollinger, Frohmayer, Mapp, Richardson and Allison, to meet on Saturday morning before the regular meeting started and take up matters Allison had referred to.

Husband was appointed as chairman of a subcommittee with Lundy and McKay to work out alternatives on the question of probate jurisdiction, to meet at a time satisfactory to them and to have suggestions ready in January.

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

The meeting was reconvened at 9:10 a.m., Saturday, November 16, 1968, in Suite 2201, Lloyd Center, Portland, by Chairman Dickson.

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

The following members of the Bar committee were present: McKay, Shetterly, Georgeson, Mayer, Ramstead, Schaumberg, Smith, Thomas, Thompson and Walton.

Also present were Gilley, Krause, Meyers, Richardson, Thalhofer and Lundy.

#### Reports of Subcommittees

In a general way the discussion of the "breakfast subcommittee" was passed on, beginning with the question of whether there would be funds to pay for Allison to continue his revision work.

Zollinger stressed the importance of compensation to personal representatives and the disparity between compensation for attorney fees and amounts paid personal representatives.

Carson asked for opinions on making the schedule for the personal representative the same as the present Bar schedule for the attorneys, but Butler did not think this would be acceptable and expressed belief many attorneys would agree with him.

Dickson asked what about an approach where it would be left open and say "entitled to reasonable compensation," to which suggestion Butler expressed the belief that in the proposed code the amount is reasonable, but in ORS it is not.

Allison felt something definite should be put in regarding such compensation and then let the legislature argue it out.

Frohmayer was in favor of the personal representative's fee being on the basis of the value of his services, but felt that the biggest obstacle to that would be to decide what is a "reasonable fee."

Dickson told of the recent meeting of the Circuit Court Judges' Association at Salishan where some prominent members of the Bar discussed the disparity of attorney's fees allowed by judges throughout the state. He thinks the Oregon judges are planning to make a study in an effort to establish some degree of uniformity, taking into consideration local problems. He also thinks it can be reasonably expected that if probate jurisdiction is vested in the circuit court, the probate fees will be considered in the same study.

Mapp questioned whether, even if the judges get together to try to work out uniformity, there may not be variations in different counties as to what is reasonable; that reasonable compensation for a personal representative could not be solved in the same way, and upon transfer of jurisdiction to the circuit courts might not be able to go the same "reasonable compensation" route.

Carson wondered if the trust companies' association might not handle it on about the same basis as the Bar, but Butler said that could not be discussed with them because of antitrust laws.

Butler then went on to say the attempt to establish reasonable compensation up to \$60,000 was because that was the area in which there was more inequity in the amount of services often rendered and the amount of the fee, and where the present fee schedule does not do the job. He expressed doubt that the Bar would want its present fee schedule made a matter of statute.

Allison expressed the thought it might be unwise to try to increase compensation in a presentation as part of the proposed probate code package.

Butler thought the whole proposed code as Allison has put it together is a tremendously good job and should be "picked up by the corners instead of nit picking," and that the fee schedule is equitable and should stand as it is. Husband commented he was inclined to agree with Butler.

Dickson suggested adopting Allison's philosophy of leaving the matter of fee schedules to the courts to fix, taking into consideration variances from one county to another.

Frohnmayr then referred to the provision of section 3-420 of the Uniform Probate Code that "a personal representative may also renounce his right to all compensation," and Husband and Butler agree that "reasonable compensation" might be more acceptable.

Zollinger moved to delete section 183, on page 185 of the proposed code, and substitute for it ORS 117.680, making only such changes as are necessary. Seconded by Riddlesbarger. Voice and show of hands not conclusive and the Chair called for a vote of the advisory committee only. Six ayes. Four noes. Motion carried.

Butler moved and it was seconded that the present fee provisions be supplemented by a provision to the effect that the personal representative shall be entitled to one percent of property, exclusive of life insurance proceeds, not included in the appraised value of the estate, but reportable for Oregon inheritance or federal tax purposes, whichever is greater. No discussion, no objection. Motion carried.

Zollinger expressed concern of the members of the breakfast subcommittee regarding section 166 of the proposed code, and following discussion Gooding was appointed chairman of a subcommittee (with Walton and Smith) to recommend a proposal regarding changes, to report first to the subcommittee comprised of Zollinger, Richardson, Gilley, Krause, Butler and Allison.

Allison reported the thinking of the "breakfast" subcommittee regarding acknowledgments to those writing letters regarding suggested changes, following which it was decided that Allison, with the help of other members if needed, would follow through.

Husband and Riddlesbarger, speaking alternately and informally, presented briefly the discussion had over sections 90 and 91 as to whether a replacement for ORS 115.460 is covered, and brought up questions as to whether

all surety bonds must be approved by the court, whether personal sureties must be residents of the state, when a new bond is issued what happens to the old bond, does section 91 cover it if a bondsman becomes nonresident or insolvent, whether a surety should be a freeholder and whether \$1,000 should be the minimum bond required. The subcommittee report proposed that the bond be executed by a surety company or by one or more sufficient personal sureties approved by the court, and that a personal surety must be a resident of the state. It was moved by Thomas, and seconded, that the report be accepted in the form it was given. Motion carried.

Specific Provisions of Proposed Probate Code (continued)

The committees then returned to consideration of the suggested changes in specific provisions of the proposed code set forth in Allison's draft.

Section 100. Allison read the words "for the period of administration" which had been added, and which was the only change made. Following discussion, it was moved by Zollinger, and seconded by Riddlesbarger, that the amendment be rejected. Motion carried.

Section 104 (2). Allison stated that the suggested change in language had been brought to his attention in several letters and then read the amendment:

The court, in determining provision for support, shall take into consideration the solvency of the estate, property available for support other than property of the estate, and estate property inherited by or willed to the spouse and minor children.

Zollinger moved, and it was seconded by Thompson, that the amendment be accepted as read by Allison, with the exception that the word "willed" be changed to "devised." Motion carried.

Husband started a discussion of section 106, mainly about expenses of administration and what expenses, if any, should come ahead of support payments to the widow. There appeared to be some difference of opinion and the discussion terminated with Husband moving that a period be placed in section 106 after the word "estate." Zollinger moved that the amendment read "priority over claims and obligations," since the word "claims" is to be redefined. The Chair ruled that both motions failed for want of a second.

Section 107. Allison explained it was his impression there was a good deal of feeling generally that there should be some kind of a provision for small estates where there is property which might go to someone other than wife or children to whom it can be set aside, and the suggestion was made that this matter of closing the estate, setting aside the entire estate to the widow, should not be done until after the creditors have had a chance to file claims.

Allison then read the additions to section 107: "after the expiration of four months after the date of the first publication of notice to creditors", "of the spouse and any minor or incompetent child of the decedent", the change of "shall" to "may" in "the court ... so order", and "and the estate shall be summarily closed." Deletions were: "under section 100 of this Act" and "unless further property is discovered."

Following discussion, Zollinger moved, seconded by Frohnmayer, that the changes suggested be adopted. Motion carried.

Section 108 (1) (b). Allison read the words he had omitted, "if capable of valuation with reasonable certainty," and Butler moved, seconded by Krause, that the amendment be adopted. Motion carried.

Section 109 (4). After discussion, Frohnmayer moved, and it was seconded, that the suggested amendment to this section be disregarded and that it remain as originally written. Motion carried.

Frohnmayer brought up a question which had arisen in Medford over paragraph (g) in section 109(2), whether property held under a trust should be included. After discussion of paragraphs (d) and (g), it was moved by Gilley that changes suggested, the insertion of the word "full" before "consideration" and the words "by the decedent" after "Transfers", (paragraph (d)) be made. Seconded and carried.

Section 111. Allison read the words to be added, "or 30 days after the filing of the inventory, whichever is later."

Zollinger moved for approval of the addition, seconded by Riddlesbarger. Motion carried.

Section 112. After discussion, Zollinger moved and Butler seconded, that the proposed change be disregarded. Motion carried.

A discussion came up on section 110 and a motion was made and seconded to delete this section, but following further discussion in opposition the motion was denied and the section remains as written.

Section 113 (2). Zollinger moved, and it was seconded, to delete the last sentence of this subsection. Motion carried.

To eliminate any misunderstanding, the Chairman read the subsection as it now stands:

After the intestate property is exhausted, each devisee shall contribute ratably to the elective share out of the portion of the estate passing to him under the will, except that in abating the interests of the devisees the character of the testamentary plan adopted by the testator shall be preserved so far as possible.

Section 119. Allison read the changes suggested: The words "sections 1 to 208" in the first sentence and the word "he" after "However" in the second sentence be deleted, and the words "a personal representative or an interested person" after the word "However," in the second sentence be added.

Zollinger moved to accept the amendment as changed, seconded by Mapp. Motion carried.

Section 120 (1). Butler moved that section 120(1) be amended by inserting the words "certified or registered" after the word "ordinary." This motion, although not formally withdrawn, was not acted upon.

After further discussion, it was moved and seconded that section 120(1) would read:

Upon his appointment a personal representative shall deliver or mail to the devisees or heirs named in the petition for appointment of a personal representative ...

Motion carried.

Frohmayer moved, and it was seconded, that the same change be made in section 10. Motion carried.

Section 120 (2). Zollinger moved, and it was seconded, that this new subsection be rejected. Motion carried.

Section 120 (3). No action taken.

Section 120 (4). Following discussion, Zollinger moved, seconded by Butler, to delete original subsection (4) and renumber (5) to be (4). Motion carried.

Section 120 (5). Allison stated that there was only a minor amendment to original subsection (5) simply so that the personal representative does not have to file this thing himself; an attorney or somebody else can file it.

The Chairman then stated that, there being no objection to subsection (5), it will be amended as indicated.

Discussion followed about the importance of making sure changes be made so all sections will conform in wording, otherwise serious mistakes might result. An example was given of being sure words such as "ordinary" in subsection (3) and "certified or registered" correspond in all sections. Mapp expressed concern over omissions which might occur when working on the proposed code piecemeal and adopting parts of wording of codes from various states; that unless all ideas coincide and the written material is put together coherently, problems will arise. He expressed willingness to do what he could to check on this matter.

Mapp was then assigned to that special duty and to report to the subcommittee he already is on, which is chaired by Allison. Attention was called to the fact that Lundy sits in the driver's seat in connection with making any changes as to the precise language to be used, and then in turn the Law Improvement Committee.

Section 121 (1). Following discussion, Butler moved, and Carson seconded, to delete the word "creditors" and put in "interested persons," and that "successive" be changed to "consecutive." Motion carried.

Section 121 (2)(b)(c)(d)(e). After lengthy discussion regarding various facets of section 121(2), no formal action was taken on these paragraphs, although the consensus seemed to be they should be as written in Allison's draft.

Section 129 (2)(c). After discussion, it was moved and seconded that changes in this section be approved. Motion carried.

Section 135 (1). After lengthy discussion and motions made but not formally withdrawn, Carson moved, seconded by Frohnmayer, "to incorporate in this place (paragraph (b)) in the proposed code the same language in the existing ORS section (ORS 116.820) relating to the same subject." Motion carried.

Later, discussion resumed and Frohnmayer moved, and it was seconded, to leave the beginning clause of this subsection as previously written by the committees. Motion carried.

Section 135 (1) (a). Gooding moved, and it was seconded, that this paragraph be amended by placing a period after the word "thereby" and deleting the rest of the sentence. Motion carried.

The meeting was recessed at 12 noon.

The meeting was reconvened at 1:00 p.m., Saturday, November 16, 1968, in Suite 2201, Lloyd Center, Portland, by Vice Chairman Zollinger.

The following members of the advisory committee were present: Zollinger, Allison, Butler, Carson, Gooding, Husband and Mapp.

The following members of the Bar committee were present: McKay, Georgeson, Ramstead, Smith and Thomas.

Also present were Gilley, Krause, Meyers, Richardson and Lundy.

Section 136. Butler moved, seconded by Smith, to reject the proposed changes. Motion carried.

Section 142 (3). No objection being stated, the Chair ruled the amended section stands approved.

Section 147. No objection being stated, the Chair ruled the amended section stands approved.

Section 148. No objection being stated, the Chair ruled the amended section stands approved.

Section 150. No objection being stated, the Chair ruled the amended section stands approved.

Section 151. Following discussion, McKay moved, seconded by Mapp, that the changes be accepted. Motion carried.

Gooding brought up a question relating to the third and fourth lines, "after making provision for support of spouse and children," is this going to mean that the statute requires a personal representative to make provision for support of spouse and children without reference to whether they need it, which elicited a suggestion this might be more clear if the words "as ordered by the court" were added. No formal action taken on this suggestion.

Section 153 (3). No objection being stated, the Chair ruled the amended section stands approved.

Section 154 (1). Gilley moved, and Krause seconded, that the change to "30" days be accepted. Motion carried.

Section 158. No objection being stated, the Chair ruled the amended section stands approved.

Section 159. Following discussion, Mapp moved, and Gooding seconded, that the proposed amendment be rejected. Motion carried.

Section 168 (2). No objection being stated, the Chair ruled the amended section stands approved.

Section 174 (3)(a). Gooding moved, and it was seconded, that the amendment be accepted with the deletions as shown. Motion carried.

Section 175 (1). Zollinger began the discussion by saying that he had a proposed amendment for this subsection worked up by Ronald Bailey in his office, which he proceeded to read:

Upon filing the final account and petition for order of distribution, the personal representative shall fix a time for filing objections thereto in the notice thereof mailed not less than 20 days before such time.

Upon further discussion, the words "which shall be" were inserted before "mailed."

Zollinger felt the wording was good and, lacking any objection, proposed to leave it with those charged with editorial responsibilities. No formal action was taken.

Section 176. After discussion, Gooding moved, and McKay seconded, that the amendment be rejected. Motion carried.

Section 177 (1). Carson moved, and it was seconded, to accept the new first sentence after changing "shall" to "may" in "the court ... give its decree of final distribution." Motion rejected.

Section 177 (3). Zollinger suggested this be carried over and considered by the revision subcommittee.

The meeting was adjourned at 2:20 p.m.



## APPENDIX

(Minutes, Probate Advisory Committee Meeting,  
November 15 and 16, 1968)

Section 1. (4) "Advancement" means ~~an irrevocable a~~  
gift ~~in praesenti~~ by a decedent to an heir to enable the  
donee to anticipate his inheritance to the extent of the  
gift.

Section 1. (20) "Intestate" means one who dies  
without ~~having made~~ leaving a valid will or the circum-  
stance of dying without ~~having made~~ leaving a valid will.

Section 2. All probate jurisdiction, ~~authority,~~  
~~powers,~~ ~~functions~~ and ~~duties~~ of the county courts and  
the judges thereof and the ~~district courts~~ and the judges  
thereof in all counties are is transferred to the circuit  
courts and the judges thereof.

Section 3. (1) All matters, causes and proceedings  
relating to probate jurisdiction, ~~authority,~~ ~~powers,~~  
~~functions~~ and ~~duties~~ pending in a county court or in a  
~~district court~~ on the effective date of this Act are  
transferred to the circuit court for the county.

Section 8. (1) A probate commissioner may act upon  
uncontested petitions for appointment of special adminis-  
trators, for probate of wills and for appointment of per-  
sonal representatives, guardians and conservators, to the

extent authorized by rule of the court. Pursuant thereto he may make and enter orders on behalf of the court admitting wills to probate and appointing and setting the amount of the bonds of special administrators, personal representatives, guardians and conservators, subject to his orders being set aside or modified by the judge of the court. within 30 days after the orders are entered.

Section 11. A guardian, a guardian ad litem, a conservator or a person who is ~~not~~ neither incompetent ~~or~~ nor a minor may waive notice by a writing signed by him or his attorney and filed in the proceeding, or by his appearance at the hearing.

Section 13. (1)(c) Of letters, testamentary or letters of administration, by a certified copy thereof. The certification shall include a statement that the letters have not been revoked.

Section 39. (3)(c) ~~Having been informed that the instrument is the will of the testator,~~ Attest it be subscribing by signing his name to the will in the presence of the testator and at his request.

Section 52. Any property acquired by the testator after the making of his will shall pass thereby, and in like manner as if title thereto were vested in him at the time of making the will, unless the intent expressed in

the will is clear and explicit to the contrary.

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

Section 55. When property is devised to any person who is related by blood or adoption to the testator and who dies before the testator leaving lineal descendants, the descendants take by representation the property the devisee would have taken if he had survived the testator, unless otherwise provided in the testator's will.

Section 56. (1) If a testator is survived by a child born or adopted after the execution of his will and dies, leaving the after-born or after-adopted child unprovided for by any settlement and neither provided for by the will nor in any way mentioned in the will, a share of the estate of the testator disposed of by the will passes to the after-born or after-adopted child as provided in this section.

Section 56. (4) The after-born or after-adopted child may recover the share of the estate to which he is entitled, as provided in this section, either from the other children under paragraph (b) of subsection (2) of this section or from the testamentary beneficiaries under subsection (3) of this section, ratably, out of the portions of the estate passing to those persons under the will. In abating the interests of those beneficiaries, the character of the testamentary plan adopted by the testator shall be preserved so far as possible. However, persons to whom the will gives only tangible personal property not used in trade, agriculture or other business are not required to contribute unless the particular gift forms a substantial part of the total estate and the court specifically orders contribution because of such gift.

Section 57. (1) A person having custody of a will, other than an executor named therein, shall deliver the will, within 30 days after the date of receiving information that the testator is dead, to ~~the~~ a court having jurisdiction of the estate of the testator or to an executor named in the will.

Section 57. (2) If it appears to ~~the~~ a court having jurisdiction of the estate of a decedent that a person has custody of a will made by the decedent, the court may issue

an order requiring that person to deliver the will to the court.

Section 78. A person may renounce intestate succession or a devise of property, wholly or partially, by filing a signed declaration of such renunciation with the court and serving a copy on the personal representative within four months after the date of appointment of the personal representative. No interest in the property so renounced is considered to have vested in the heir or devisee and the renunciation is not considered a transfer by gift of the property renounced, but the property so renounced passes as if the heir or devisee had failed to survive the decedent. The rights of creditors of the renouncing heir or devisee, including judgment creditors, attachment and execution creditors and tax lien claimants, have no interest in the property renounced; shall not be divested or prejudiced by such renunciation, and the renunciation shall not be effective as to them.

Section 84. (Petition for appointment of personal representative and probate of will.) Any interested person may petition for the appointment of a personal representative and for the proof of a will.

Section 84. (5) (6) If the decedent died wholly or partially intestate, The names, relationship to the decedent,

and post-office addresses of the heirs, and the birth dates ages of any of them who are minors.

Section 84. (6) ~~(5)~~ If the decedent died testate, the names and post-office addresses of the devisees and any pretermitted children, and the birth dates of any who are minors.

Section 87. (1) Upon the hearing of a petition for the appointment of a personal representative, if the hearing is ex parte, before contest is filed and involves the proof of a will, an affidavit of an attesting witness may be used instead of the personal presence of the witness in court. The witness may give evidence of the execution of the will by attaching to his affidavit a photographic or photostatic copy of the will, and may identify the signature of the testator and witnesses to the will by use of the copy. The affidavit shall be received in evidence by the court and have the same weight as to matters contained in the affidavit as if the testimony were given by the witness in open court. The affidavit of the attesting witness may be made at the time of execution of the will or at any time thereafter.

Section 87. (3) If the evidence of none of the attesting witnesses is available, the court may allow proof of the will by testimony or other evidence that

the signature of the testator ~~or~~ and at least one of the witnesses is genuine.

Section 88. Upon the filing of the petition, if there is no will or there is a will and it has been proved, the court shall appoint a qualified person it finds suitable as personal representative, giving with preference: as follows:

- (1) To the executor named in the will.
- (2) To the surviving spouse of the decedent or his nominee.
- (3) To the nearest of kin of the decedent or his nominee.

Section 89. (6) A nonresident of this state, except that a nonresident ~~named executor in the will~~ may qualify if he appoints an active member of the Oregon State Bar as a resident agent to accept service of summons and process in all actions affecting the estate, files the appointment in the probate proceeding, and files a bond as provided in section 90 of this Act if a bond is required thereunder.

Section 90. (1) Unless a testator declares that no bond shall be required of the executor of his estate, or unless the personal representative is the sole heir or devisee, the personal representative shall not act nor shall letters be issued to him until he files with the

clerk of the court a bond executed by a surety company authorized to transact surety business in this state. The court may, in its discretion, require a bond notwithstanding any provision in a will that no bond is required, and shall require a nonresident executor to give bond. The bond shall be for the security and benefit of all persons interested and shall be conditioned upon the personal representative faithfully performing the duties of his trust.

Section 93. (3) When grounds of removal of a personal representative appear to exist, the court, on its own motion or on the petition of any interested person, shall order the personal representative to appear and show cause why he should not be removed. A copy of the order to show cause and of the petition, if any, shall be served upon the personal representative and upon his surety, or, if the personal representative after due diligence cannot be found within the state, service may be made on his attorney and his surety: as provided in section 10.

Section 99. (2) The occupants shall keep the abode insured against fire and other hazards to the extent of the fair market value of the improvements within the extended coverage provided by fire policies. In the event

of loss or damage from those hazards, to the extent of the proceeds of the insurance, they shall restore the abode to its former condition.

Section 100. The court by order shall make necessary and reasonable provision from the estate of a decedent for the support of the spouse and any minor or incompetent child of the decedent for the period of administration upon:

Section 104. (2) The court, in determining provision for support, shall take into consideration the solvency of the estate, property available therefor for support other than property of the estate, and estate property inherited by or willed to the spouse and minor children.

Section 107. If it appears after the expiration of four months after the date of the first publication of notice to creditors that necessary and reasonable provision for support under section 100 of this Act of the spouse and any minor or incompetent child of the decedent requires that the whole of the estate, after payment of claims against the estate, taxes and expenses of administration, be set apart for such support, the court ~~shall~~ may so order. There shall be no further proceeding in the administration of the estate unless further property is discovered, and the estate shall be summarily closed.

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

(a) Property given outright;

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

Section 109. (4) As used in subsection (2) of this section, "property in the joint names" means all property held or owned under any form of ownership with right of survivorship, including cotenancy with remainder to the survivor, stocks, bonds or bank accounts in the name of two or more persons payable to the survivor, United States Government bonds in co-ownership form or payable on death to a designated person, and shares in credit union or building and loan associations payable on death to a designated person or in joint form, passing to or vesting in the survivor by operation of law or by contract provisions upon the death of the decedent.

Section 111. The surviving spouse is considered to have elected to take under the will unless, within 90

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

Section 112. An election under section 108 of this Act may be filed on behalf of an incompetent surviving spouse by a guardian of the spouse. A guardian may elect against the will only if additional assets are needed for the reasonable support of the surviving spouse, taking into account the probable needs of the spouse, the provisions of the will, any nonprobate property arrangements made by the decedent for the support of the spouse and any other assets, whether or not owned by the spouse, available for such support. The election shall be subject to the approval of the court, with or without notice to other interested persons.

Section 113. (2) After the intestate property is exhausted, each devisee shall contribute ratably to the elective share out of the portion of the estate passing

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

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

Section 120. (1) Upon his appointment a personal representative shall deliver or send by ordinary, certified or registered mail to the devisees and heirs named in the petition for appointment of personal representative,

at the addresses there shown, information that shall include.....

Section 120. (2) If the devisee or heir is a minor, notice may be given to his guardian, his parent or the person with whom he resides.

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

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

(5) ~~(4)~~ A personal representative may inform other persons of his appointment ~~by delivery or ordinary mail~~ as provided in section 10.

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

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

Section 121. (2) (b) The court where the estate proceeding is pending.

(c) ~~(b)~~ The name and address of the personal representative and his attorney and the address to which claims are to be presented.

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

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

Section 129. (2) (c) Bond has been required, the inventory value sale price of the property to be sold exceeds \$5,000, and the bond of the personal representative has not been increased by the amount of cash to be realized on the sale; and unless the court has not directed otherwise.

Section 135. (1) Any sale or encumbrances, whether directly or indirectly, to the personal representative, his spouse, agent or attorney, or any corporation or trust

in which he has more than a one-third a substantial beneficial interest or a substantial degree of control, is voidable unless:

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

Section 136. If the exercise of power by the personal representative in the administration of the estate is improper he shall be liable for breach of his fiduciary duty to interested persons for resulting damage or loss to the same extent as a trustee of an express trust. Exercise of power in violation of a court order is a breach of duty. Exercise of power or contrary to the provisions of the will may be is a breach of duty.

Section 142. (3) State the names and addresses of the claimant and his attorney, if any.

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

Section 148. (2) If the debt becomes absolute or liquidated before distribution of the estate, the claim shall be paid in the same manner as a claim on an absolute or liquidated debt. of the same class.

(3)(c) The court may order the personal representative to make distribution of the estate as though the claim did not exist.

(d) If after distribution the debt becomes absolute or liquidated, the distributees are liable to the creditor to the extent of the estate received by them. Payment of the debt may be arranged by creating a trust, giving a mortgage, securing a bond from a distributee or by such other method as the court may order.

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

Section 151. Upon the expiration of four months after the date of the first publication of notice to creditors, the personal representative shall, after making provision for support of spouse and children, for expenses of