

ADVISORY COMMITTEE
Probate Law Revision

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

Dates) 1:30 p.m., Friday, November 18, 1966
and: and
Times) 9:00 a.m., Saturday, November 19, 1966
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland

Suggested Agenda

1. Approval of minutes of October meeting.
2. Reports on miscellaneous matters.
3. Chapter 117, Periodic Accounting and Distribution (Report and draft by subcommittee, Campbell Richardson, William Keller and William Tassock).
4. Proposal for Allocation of Income (Report and proposed revision, Jack McMurchie).
5. Sale or other disposition of estate property (ORS 116.705 to 116.900, Clifford Zollinger).
6. Possession and control of property (ORS 116.105).
7. Unauthorized administration of personal estate of a decedent (ORS 116.990).
8. Ancillary administration (Draft by Professor Mapp and William Riddlesbarger).
9. Next meeting.

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

Minutes

The thirtieth 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 18, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

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

The following members of the Bar committee were present: Braun, Gilley, Lovett, Meyers, Kraemer, McKenna, Piazza, Thalsofer and Thomas (arrived 3:15p.m.). Biggs, Krause, McKay, Mosser, Silven and Pendergrass were absent.

Also present were Campbell Richardson and William Keller, members of the subcommittee which had been appointed to draft proposed probate provisions relating to accounting, and James Sorte from the staff of Legislative Counsel.

Minutes of October Meeting

Jaureguy moved, and the motion was seconded, that the reading of the minutes of the last meeting (October 14 and 15, 1966) be dispensed with and that they be approved as submitted. Motion carried.

Miscellaneous Matters

Subcommittee Meeting with Law Improvement Committee.
Zollinger reported that he, together with Dickson, Allison and Frohnmayer, had appeared before the Law Improvement Committee in Salem on November 10, 1966, to discuss the need for additional assistance from the Legislative Counsel staff in

accordance with the committees' discussion at the October meeting. [Note: See Minutes, Probate Advisory Committee, 10/14, 15/66, pages 2 to 4.] Zollinger indicated that the subcommittee was advised that the Law Improvement Committee was not in a position to allocate responsibilities of the Legislative Counsel staff, but had agreed to present the probate subcommittee's request to the Legislative Counsel Committee with the recommendation that the probate law revision committees be provided the services of Lundy one day a week during the forthcoming legislative session. Zollinger said that the plan was to have drafts from Lundy by the time the committees had completed the examination of the entire code, and in time to start the re-examination. In the meantime, Zollinger said, it was agreed that Sorte would continue to devote virtually full time assisting the committees and preparing materials currently being considered. Zollinger added that the subcommittee had been given expressions of good will from all members of the Law Improvement Committee.

Secretarial Assistance. Dickson remarked that the services of the current reporter at committee meetings would not be available during the 1967 legislative session and asked Sorte to obtain a replacement and report to the committees on the new arrangements at the December meeting.

Arrangement of Proposed Revised Probate Code. Dickson indicated that the arrangement of the proposed probate code should be resolved at an early date. He noted that three subcommittees had been appointed at the April, 1966, meeting to prepare independent proposed outlines of the revised code. Those appointed were: Subcommittee #1: Frohnmayer, Mapp and Warden; subcommittee #2: Copenhaver, Gooding and Thalhoffer; subcommittee #3: Dickson, Lisbakken and Richardson. Dickson directed that the discussion of this subject be placed at the top of the December agenda.

Distribution of Drafts. Allison suggested that when a draft is completed by Lundy and Sorte, it be sent to the committee member or members who had originally drafted the proposal prior to the time of general distribution to all committee members. No definite conclusion was reached.

Oregon State Bar Committee on Law Revision. Sorte called attention to the minutes of the Oregon State Bar Committee on Law Revision dated August 20, 1966, and read the following excerpt from the minutes:

"Chairman Branchfield discussed deliberations of the Committee on Taxation which reported that both the Inheritance and Gift Tax statutes are in need of substantial revision. After considerable discussion concerning the need for revision of the statutes in this area, a motion was unanimously passed directing the Chairman to recommend to the Board of Governors that a special committee of lawyers be appointed to work with other interested groups to study and revise Oregon's Gift and Inheritance Tax laws. The Committee felt that the Tax Committee as presently constituted and conceived is primarily concerned with income tax matters and a new committee or a new subcommittee of the Tax Committee is needed to undertake this work. It was also agreed that the Chairman would add this recommendation to the annual report of the Law Revision Committee to be presented at the State Bar Convention."

Dickson remarked that revision of the inheritance and gift tax statutes had been assigned to a subcommittee consisting of Carson, Lisbakken and Braun and asked Lisbakken to inform Carson of the Bar committee's decision and request that he arrange for appropriate meetings with either the appropriate Bar committee or the Board of Governors.

Model Probate Code. Mapp informed the committees that a hard cover edition of the Model Probate Code was available at \$5.25, including postage, from the University of Michigan Law School, Ann Arbor, Michigan.

1966 Proposed Wisconsin Probate Code. Dickson advised the committees that copies of the 1966 proposed Wisconsin Probate Code had been distributed to members of the advisory committee and the offices of the advisory committee members throughout the state where they would be available for use by Bar committee members.

Proposed Probate Provisions Relating to Accounting

Sorte had mailed to all members a memorandum dated November 14, 1966, to which was attached the draft prepared by Richardson, Keller and Tassock entitled "Draft of Proposed Probate Provisions Relating to Accounting." To facilitate referral to draft sections, Dickson asked that the sections of the draft be numbered 1 to 24 consecutively. [Note: The memorandum should be appended to these minutes with the sections numbered 1 to 24 consecutively.]

Section 1. Allison called attention to a problem raised because of the committee's previous action in deciding that upon death the real and personal property "vested" in those persons entitled to receive it. The difficulty, he indicated, is that now the discussion concerns "distribution", and the question is whether this terminology is consistent with the concept that the real and personal property vests immediately upon death. Other members acknowledged this as a problem that will have to be resolved but no definite action was taken.

Richardson read section 1 and Allison suggested that subsection (c) be revised to include "loss to the estate arising from the following:" in the opening clause, and other members agreed.

Zollinger inquired if subsection (c) authorized self-dealing by the personal representative and asked if this was the committees' intention. Allison noted that even if it might be possible to make an advantageous sale of real property under the present statute, ORS 116.820, the sale was absolutely void. This, he said, was not only senseless but had caused serious problems for title companies. He was of the opinion that a sale should not be void, but voidable, and then only if the estate suffered a loss by reason of it.

Braun moved, seconded by Jaureguy, that the concept of section 1 be adopted. Motion carried unanimously.

Kraemer suggested that "unauthorized" be inserted preceding "self-dealing" in subsection (c) of section 1, and McKenna, Gilley and Mapp expressed agreement. They noted that it would not be wise to advise a fiduciary client to buy estate property because it could be an invitation to blackmail by one of the heirs without the protection given him by insertion of "unauthorized." Zollinger expressed the opposing view and remarked that in an ex-parte proceeding, the right to surcharge the account should not be limited to those cases in which the self-dealing was authorized. Allison expressed agreement with Zollinger's position. Richardson remarked that the section as written would place the personal representative on the same basis as though the property was sold to any other party.

After further discussion, Kraemer moved, seconded by Gilley, that subsection (c) be amended to read "for loss to the estate through unauthorized self-dealing." Motion carried.

Zollinger questioned the meaning of "chargeable in his accounts" in subsection (b) of section 1. Allison suggested "in his accounts" be eliminated and Braun proposed that the entire subsection (b) be deleted. Allison observed that there should be a distinction between (a) and (b) and was of the opinion that the distinction would be made clear if "in his accounts" were eliminated.

Allison moved, seconded by Thalsofer, that "in his accounts" be deleted from subsection (b). Motion carried.

Kraemer questioned the need for including the particular circumstances under which a personal representative was responsible for non-probate assets and proposed deleting subsections (b) (1) and (b) (2) of section 1. Mapp read section 862.05 of the proposed 1966 Wisconsin Probate Code. Zollinger expressed approval of that section and commented that it included everything necessary to be covered in the accounting.

Mapp proposed a hypothetical situation where a widow collected \$20,000 under the wrongful death statute and the money was put in the personal representative's account. He asked if the personal representative's fee would be based on the total amount in the final account. McKenna remarked, and others concurred, that if the personal representative were going to be held responsible for everything that passed through his hands, he should be paid for that responsibility. Zollinger commented that if the personal representative's compensation were based upon his recovery in a wrongful death action, it should not be charged against the beneficiary of the wrongful death action. He expressed the view that it would be proper to have him account separately for such assets and to have a fee payable out of the recovery for such assets.

After further discussion, Zollinger moved, seconded by Husband, that section 862.05 of the proposed 1966 Wisconsin Probate Code be substituted for sections (1) and (2). Braun suggested "all property of the estate" in the first clause be substituted for "all property of the decedent" and Dickson suggested a further amendment to read "all property of the estate of the decedent." Zollinger and Husband accepted the amendments. The motion was to substitute the following for subsections (1) and (2) of section 1:

"Every personal representative shall be charged in his accounts with all the property of the estate of the decedent which comes to his possession; with all profit and income which comes to his possession from the estate and with the proceeds of all property of the estate sold him him." Motion failed.

Allison moved, seconded by Braun, that subsection (b) of section 1 be deleted, that subsection (c) then become subsection (b) and that the latter section be referred to Richardson's subcommittee for redrafting of an appropriate statute to cover the question of non-estate assets and the duty to account for them in the original account or in a separate account and the liability of the personal representative for the non-estate assets in his possession. Motion failed.

Kraemer observed that subsection (b) of section 1 made the personal representative chargeable and responsible for assets received and said he saw no reason to set forth with particularity those assets by including subsections (1) and (2).

Kraemer moved, seconded by Jaureguay, that subsection (b) be amended to read as follows:

"Every personal representative shall be chargeable with property not a part of the estate which comes into his hands at any time and shall be liable to the persons entitled thereto." Delete "if" and subsections (1) and (2).

Gilley spoke in opposition to the motion and indicated that the personal representative's responsibility should be limited to property he received in his capacity as personal representative and he should not be held responsible for property which was not a part of the estate.

Piazza suggested subsections (b) (1) and (b) (2) of section 1 be eliminated and "in his capacity as personal representative" be added in their place. This phrase, he said, would restrict the personal representative's liability to accounting only for the property which he received. He also recommended that "in his accounts" be restored in subsection (b). Richardson pointed out that it was not unusual for funds to be inadvertently commingled with estate funds

and when this was done, it should be possible for the personal representative to withdraw the money from the estate account, pay it back to the person entitled to receive it, and account for the withdrawal at the proper time.

Kraemer withdrew his motion and Jaureguy withdrew his second.

Gilley moved, seconded by Piazza, that the committee reconsider the action previously taken in deleting "in his accounts" from subsection (b) and that the phrase be restored. Motion carried.

Dickson then recapitulated the action taken by the committee on section 1 and noted that the comma in subsection (b) (1) should be deleted. Keller read subsection (c) which was reworded to incorporate the suggestion made earlier by Allison to include "for loss to the estate arising from":

"(c) Every personal representative shall be liable and chargeable in his accounts for loss to the estate arising from:

"(1) Neglect or unreasonable delay in collecting the credits or other assets of the estate or in selling, mortgaging or leasing the property of the estate;

"(2) Neglect in paying over money or delivering property of the estate he shall have in his hands;

"(3) Failure to account for or to close the estate within the time provided by this Code;

"(4) Embezzlement or commingling of the assets of the estate with other property;

"(5) Unauthorized self-dealing;

"(6) Wrongful acts or omissions of his co-representatives which he could have prevented by the exercise of ordinary care; and

"(7) Any other negligent or wilful act or non-feasance in his administration of the estate by which loss to the estate arises."

Dickson took a vote on members favoring section 1 with the modifications set forth above and the section was adopted unanimously.

Section 2. Richardson explained that section 2 conformed basically to the comparable guardianship code section (i.e., ORS 126.336). Dickson remarked that "personal" should be deleted before "income tax" in subsection (3) (a) and suggested that if state and federal clearances were to be required, the section should say so. Allison asked if inheritance taxes were to be included and Husband suggested insertion of "Oregon income tax and inheritance tax."

Zollinger advised that the present statute required a showing at the time of filing the final account that taxes due had been paid and those that would become due would be paid and were secured. He contended that this was not an appropriate requirement, and what should be required at the time of approval of the final account is that taxes will have been paid or secured and appropriate receipts will be filed. Gilley agreed and noted there is often income after the final account and this, under present law, required payment of estimates. Richardson suggested subsection (3) (a) read:

"A statement prior to the presentation of an order approving final account that, the personal representative will obtain and file appropriate receipts or releases showing that all Oregon income taxes and inheritance taxes which have become payable have been paid, and that all such taxes which will become due are secured by bond, deposit or otherwise."

Allison proposed alternative wording for subsection (3) (a):

"An affirmative statement that all Oregon income and inheritance taxes either have been paid or will be paid prior to final closing of the estate and that appropriate receipts therefor will be procured and filed prior to such final closing."

Husband called attention to the fact that Allison's proposal did not include income taxes which would become due by reason of instalment, and Allison suggested that the following be added: "or that such taxes have been secured by bond, deposit or otherwise."

Dickson requested that Richardson and Allison prepare appropriate wording for subsection (3) (a) of section 2 to be submitted to the committees following the next item on the agenda.

Allocation of Income

Mr. Jack McMurchie had prepared a proposed statute on allocation of income in accordance with his presentation and discussion of the problems involved in such a proposal at the October, 1966, meeting. He distributed copies of his draft and read it to the committees:

"Income from the assets of a decedent's estate which accrues and is received after the death of the decedent and before final distribution, including income from property used to discharge liabilities, shall be determined in accordance with the provisions of ORS 129.010 to 129.140 and, unless the decedent's will otherwise provides, shall be distributed as follows:

(1) "To specific legatees and devisees the income received from the property bequeathed or devised to them respectively, less taxes, ordinary repairs and other expenses incurred in the management and operation of the property, any interest paid during the period of administration on account of such property, and an appropriate portion of taxes imposed on income (excluding taxes on capital gains) which are paid during the period of administration.

(2) "To all residuary legatees and devisees, all legatees of pecuniary bequests in trust and all legatees of pecuniary bequests which are not in trust but which qualify for the marital deduction provided for in Section 2056 of the 1954 Internal Revenue Code, the remaining income, in proportion to the respective interests of such legatees and devisees in the assets of the estate which have not been distributed or expended for the payment of inheritance and estate taxes, claims and other expenses properly chargeable against the principal of the estate, computed at the time of each distribution or payment, on the basis of inventory values.

"As used in this subparagraph, remaining income means the total income from all property which is not specifically bequeathed or devised less the taxes, ordinary repairs, and other expenses incurred in the management and operation of all such property from which the estate is entitled to income, any interest paid during the period of administration on account of such property and the taxes imposed on income (excluding taxes on capital gains) which are paid during the period of administration, and which are not charged against the property specifically bequeathed or devised."

McMurchie explained that his proposal made it clear that it referred only to income which accrued and was received after the death of the decedent. He also noted that no provision was made for allocation of income in an intestate estate and suggested the committee might want to include such a provision following their revision of the intestate laws.

Zollinger suggested that it might be better to refer to a specific section or sections of the Uniform Principal and Income Act rather than referring to the entire Act.

In reply to a question by Zollinger concerning testate estates, McMurchie explained that specific legatees would not share in any income from assets which were sold during administration, and in order to qualify for a share of the income it would have to be a pecuniary bequest left in trust or one which would qualify for the marital bequest. All others who would share, he said, would share proportionately in the net income realized from all of the assets either sold or remaining on hand during administration with adjustment to compensate for expenditures. McMurchie said that the main purpose of the proposed Act was to require adjustments to compensate for expenditures made and charged against another bequest.

Zollinger contended that it would be desirable to use a less complicated formula for smaller estates. He commented that the purpose of this proposal was to do justice in cases where at present the law is not clear, non-existent or arrives at an unjust result. Where the injustice was not very important because the amount was small, Zollinger was of the opinion that the procedure set forth in the proposal would call for an

additional burden on the personal representative and could meet with a considerable amount of resistance. McMurchie contended that both personal representatives and attorneys should be competent to perform the computations required and the extra time involved was worthwhile when it accomplished a just result.

Husband asked how the income distributions would be handled under a will which gave 10% to one beneficiary and 20% to another but left no specific property to a particular person. McMurchie said that in that situation the particular percentage of each particular asset would be required to be distributed to each of the beneficiaries. Keller indicated that it was his understanding under the present law the percentage bequest was considered effective as of the time of distribution and the recipient had no particular right to receive a certain asset. He asked if that had been changed by the committee's adoption of the provision which no longer vested title in the personal representative. McMurchie answered that it was his understanding that there was no particular law on the subject and in the administration of an asset of the type Husband had outlined, the personal representative probably would be required to convert all assets into cash prior to distribution.

Zollinger proposed that wording similar to the following might simplify the Act:

"Income received during administration, including income for the payment of debts, taxes and expenses, shall be distributed as follows:

"(a) If the decedent died intestate, to the beneficiaries of his estate in the proportion in which they receive principal.

"(b) If the decedent died testate, leaving property specifically bequeathed or devised to the legatees or devisees, there shall be distributed the income received from such property.

"(c) If the decedent died testate leaving legatees of pecuniary bequests in trust or legatees of pecuniary bequests which are not in trust but which qualify for the marital deduction, if the income shall exceed \$10,000 during the period of administration."

Zollinger further suggested that the above language be followed by most of section (2) of McMurchie's draft which would end with a semicolon to be followed by: "but if the income shall not exceed \$10,000, then in the proportion in which principal is distributed." He added that his subsection (b) should also contain the language in section (2) of the draft which dealt with income and expenses incident to the production of such income.

Zollinger called attention to the fact that he had omitted the statement with reference to income which had accrued at the death of the decedent because the test of when the income was received was sufficient to accomplish justice and much easier to apply. McMurchie expressed disagreement with the latter statement and explained that it had been established that income which had accrued at the date of the decedent's death was not income for purposes of trust accounting or for purposes of estate accounting.

Husband noted that the \$10,000 exemption would make the Act applicable only to estate in excess of \$200,000 and expressed approval of such an exemption. Dickson commented that the banks handle the vast majority of large estates and suggested that since they were the ones who deal with this problem, they should be the ones to solve it. He asked McMurchie if it would be agreeable with him if the draft were returned to him in order that he could confer with the respective legal staff of banks handling trusts and estates, and McMurchie agreed to do so.

Zollinger moved, seconded by Husband, that the consensus of the committees should be understood to be that they would eliminate from the Act estates with income during administration of less than \$10,000. Motion carried.

Dickson then requested McMurchie to prepare the necessary draft in cooperation with trust officers or legal staff of the banks engaged in handling trusts and estates for presentation at the January meeting. He also requested that intestate situations be included in the Act and that those preparing the Act should bear in mind that the committees had adopted the concept that property would vest, immediately upon death, in the persons entitled to receive it. In this latter connection Dickson noted that McMurchie might wish to recommend that the committees reconsider their stand and adopt the Wisconsin approach.

The meeting recessed at 5:30 p.m.

The meeting was reconvened at 9:00 a.m., Saturday, November 19, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison (left at 10:15 a.m.), Carson, Husband, Jaureguy and Mapp. The following members of the Bar committee were present: Biggs, Gilley, Meyers, McKenna and Thomas. Also present were James Sorte, Campbell Richardson, J. Ray Rhoten and William Tassock.

Proposed Probate Provisions Relating to Accounting (Cont'd)

Section 2. The committees resumed discussion of the draft prepared by Richardson, Keller and Tassock dated November 14, 1966. Richardson reviewed the discussion of the previous day and explained that the committees apparently concurred that the matter of tax clearances should not hinder the filing of the final account and probably should follow the order of final distribution. He read subsection (3) (a) of section 2 as amended by Allison:

"An affirmative statement that all Oregon income and inheritance taxes either have been paid or will be paid prior to final closing of the estate and that appropriate receipts therefor will be procured and filed prior to such final closing or that such taxes will be secured by bond, deposit or otherwise."

Richardson noted that if this revision were adopted, it would be necessary to amend ORS 316.530 and 118.840 to conform thereto and that ORS 118.250 should also contain an appropriate reference. Dickson asked that Carson make special note of Richardson's recommendation with respect to the aforementioned ORS sections and prepare the necessary amendments at the time his subcommittee considered ORS chapter 118.

Richardson pointed out that the probate code did not contain a reference to the personal property tax and asked if the committees would be in favor of including such reference for the purpose of alerting personal representatives to the possibility that personal property tax might be due. Allison proposed that his suggested language in subsection (3) (a) of section 2 read "An affirmative statement that all Oregon income, inheritance and property taxes, if any, either have been . . ."

Husband questioned the use of "petition" in subsection (3) (b) of section 2 and Gilley suggested that "prayer" would be more appropriate than "petition." Carson concurred and noted that if "prayer" were not used, the reference should be to "final account and petition for distribution." Zollinger noted that references were made to the petition for an order of distribution in the following sections and was of the opinion, with the majority apparently concurring, that "petition" was the proper word.

Dickson suggested the addition of a subsection (1) (f) of section 2 to include a provision for a supplemental accounting. Carson voiced objection and said that a supplemental accounting should not be required in every instance, and other members agreed.

Allison raised a question concerning the advisability of including "Receipts and vouchers" in subsection (2) (c) of section 2. Gilley read the definition of "voucher" from CJS and noted that the term was broad enough to include everything inherent in the meaning of "receipts."

Allison moved, seconded by Gilley, that "vouchers" be substituted for "receipts" in subsection (2) (c) of section 2. Motion carried.

Zollinger commented that subsection (1) (b) of section 2 contemplated an accounting at the time the personal representative's petition to resign was filed and prior to acceptance of his resignation by the court. He said the original personal representative would then continue to serve pending appointment of a successor and it would be necessary for him to make a second accounting upon such appointment. Zollinger was of the opinion that one accounting should suffice and the better time for the accounting was at the time of the successor's appointment. Allison pointed out that the question on which the court acted was the personal representative's discharge from liability rather than acceptance of his resignation.

After further discussion, Zollinger moved, seconded by Gilley, that the following language be substituted for subsections (1) (b) and (1) (c) of section 2:

"Upon the appointment of a successor personal representative after the resignation, death or removal of the incumbent representative." Motion carried.

Gilley noted that ORS 115.520 should be repealed.

Allison moved, seconded by Zollinger, that subsection (1) (d) of section 2 be amended to read: "When the estate is ready for settlement and distribution." Motion carried.

Allison moved, seconded by Zollinger, that subsection (3) of section 2 be amended to read: "When the estate is ready for settlement and distribution, the account shall also include:". Motion carried.

Allison moved, and the motion was seconded, that subsection (3) (a) of section 2 be adopted to read:

"An affirmative statement that all Oregon income, inheritance and personal property taxes, if any, either have been paid or will be paid prior to final closing of the estate and that appropriate receipts, releases or clearances therefor will be procured and filed prior to such closing or that such taxes will be secured by bond, deposit or otherwise." Motion carried.

Section 3. Jaureguy suggested that subsection (1) (c) read "To creditors not theretofore having received payment." Richardson explained that the subsection was seeking to abolish the existing situation where a creditor could file a claim, have it rejected and then file his objection at the time of the final accounting. He stated the purpose was to force the creditor to file his objections prior to that time. Zollinger agreed that the language was satisfactory as written.

Dickson expressed objection to subsection (1) (d) of section 3 and Zollinger suggested: "To any other person known to the personal representative to have or who may claim an interest in the estate being distributed." Gilley suggested ". . . to have or to claim . . ." and Zollinger concurred.

Mapp called attention to the organization of the Model Probate Code and the Proposed 1966 Wisconsin Probate Code which set forth in one place persons who should receive notice and the manner in which such notice was given. Thereafter, throughout the code, he explained, when notice was required, reference was made to that single notice section. He advised that this might be an appropriate manner in which to handle notice situations in the Oregon revised probate code.

Zollinger pointed out that thus far no other place requiring this particular type of notice under discussion had been considered by the committees. If others were found he said that he agreed it might be appropriate to adopt Mapp's suggestion. Dickson asked that a special note be placed in the minutes to refer to Mapp's proposal after all sections had been assembled to determine whether it would be feasible to follow such a procedure.

The matter of the court fixing the date for hearing of objections to the final account was discussed and it was decided to provide that the personal representative fix a date for "filing" rather than "hearing" and if objections were filed, a hearing date could then be set by the court.

Zollinger moved, and the motion was seconded, that section 3 be amended to read:

"(1) Upon the filing of the final account and petition for order of distribution, the personal representative shall fix a time within which objections thereto must be filed and shall, not less than 20 days before the expiration of the time fixed for such filing, cause notice thereof to be mailed:

"(a), (b) and (c) - No change.

"(d) To any other person known to the personal representative to have or to claim an interest in the estate being distributed.

"(2) Such notice need not be mailed to the personal representative.

"(3) Proof of such mailing shall be made by affidavit and filed at or before approval of the final account."
Motion carried.

Sections 4, 5 and 8. Tassock called attention to the policy considerations involved in determining the effect of orders approving final accounts and directing distribution and outlined the three choices set forth in the caveat under section 4.

Mapp referred with approval to subsection (3) of section 8, and there was a lengthy discussion concerning its

intent. Zollinger objected to the inclusion of the last clause beginning "but no transfer before or after . . ." and Dickson agreed that the clause accomplished nothing.

After further discussion, Zollinger moved, seconded by Jaureguy, that the committees adopt section 5 and section 8, subsection (3) of section 8, with the deletion of the concluding clause of subsection (3): "but no transfer before or after the decedent's death by an heir or devisee shall affect the decree, nor shall the decree affect any rights so acquired by grantees from the heirs or devisees." Motion carried. [Note: This action was subsequently revoked. See pages 19 & 20 of these minutes.]

Mapp suggested that the decree of final distribution be recorded rather than the several documents which are presently required to be recorded. There was a lengthy discussion concerning the advisability of such a revision at the termination of which Dickson asked that Mapp and Allison review the recommendations adopted by the committees in this connection and report their conclusions at the February meeting.

Richardson suggested that the second sentence of subsection (1) of section 8, be stricken as well as the third sentence through "otherwise." Zollinger indicated that the decree should not "state" but rather should "find" and proposed that "find" be substituted where used in that connection. He inquired as to the meaning of "adjudicated compromise" as used in the first sentence of section 8, subsection (1), and Richardson commented that there were many compromise situations of settlement among distributees which were not in the court record. Rhoten asked if it would be advisable to bind the Inheritance Tax Division to the terms of the ultimate distribution and Carson agreed that this point should be made clear in the law. He said that in a will contest if the will were sustained, the tax would be a certain amount whereas if the will were set aside, the tax would be a different amount. In the past, Carson stated, the Inheritance Tax Division had been on both sides of that question depending on which would produce the most revenue and expressed the view that they should be bound by the decree of final distribution in determining the tax due. Zollinger remarked that this situation could be corrected in the sections assigned to Carson dealing with inheritance tax statutes.

After further discussion, Zollinger moved, seconded by Gilley, that the first sentence of section 8, subsection (1), read:

"In its decree of final distribution, the court shall designate the persons to whom distribution is to be made, and the proportions or parts of the estate, or the amounts, to which each is entitled under the will or by agreement approved by the court or pursuant to the provisions of this Code, including the provisions regarding advancements, election by the surviving spouse, lapse, renunciation and retainer." Motion carried.

Richardson moved, and the motion was seconded, that the second sentence of section 8, subsection (1), be eliminated; that the third sentence be eliminated through "otherwise" and that it begin: "The decree shall find that all claims . . ."; that the balance of subsection (1) remain unchanged except for the substitution of "find" wherever "state" appears; and that the last clause be eliminated: "and state specifically what modifications are made." Motion carried.

Zollinger remarked that the provisions of section 8, subsection (4), had been taken care of in another place in the proposed code and moved, seconded by Richardson, that it be deleted. Motion carried.

Sections 6 and 7. The committees concurred that sections 6 and 7 should be deleted.

The meeting recessed at 12:15 p.m.

The meeting was reconvened at 1:30 p.m. The following members of the Advisory committee were present: Dickson, Zollinger, Carson, Jaureguy, Lisbakken and Mapp. The following members of the Bar committee were present: Biggs, Braun, Gilley, Meyers, McKenna and Thomas. Also present were Richardson and Sorte.

Dickson listed the expiration dates of the Bar committee appointments:

Biggs	1967
Braun	1967
Gilley	1967
Krause	1968
Lovett	1968
Meyers	1968
Kraemer	1969
McKay	1969
Mosser	1969
McKenna	1967
Silven	1967
Piazza	1968
Thalhofer	1968
Pendergrass	1969
Thomas	1969

Proposed Probate Provisions Relating to Accounting (Cont'd)

Section 4. Richardson suggested section 4 read:

"An heir, creditor whose claim is not otherwise barred, or other person interested in the estate may, within the time appointed for such filing, file his objections to the account or petition or any part thereof specifying the particulars of such objection. In such event the court shall designate a time for hearing of such objections."

Mapp questioned the aptness of "creditor whose claim is not otherwise barred" and was told by Richardson that it was intended to refer to creditors whose claims were approved but unpaid. Zollinger proposed "An heir, creditor whose claim has been approved but not paid or other person interested in the estate . . ." Braun asked what would happen to a creditor, under Zollinger's proposal, who presented his claim the day before the final account was filed if the claim had been neither approved nor paid. Dickson commented that the language as suggested by Richardson would take care of such a situation and recommended that it be retained.

Carson commented that "otherwise" was inappropriate and Mapp suggested that "Any interested person" would cover everyone and noted that this was the language of the Proposed Wisconsin Probate Code. Gilley proposed "Any person entitled to notice under section 3," and others agreed that this would be satisfactory.

Richardson moved, seconded by McKenna, that section 4 be amended to read:

"Any person entitled to notice under section 3 may, within the time appointed for such filing, file his objections to the account and petition or to any part thereof specifying the particulars of such objections. In such event the court shall designate the time for hearing of such objections." Motion carried.

Section 5. Richardson noted that the last sentence of section 5 was out of place and after discussing revision of the section, Gilley moved, seconded by Braun, that the committees' previous action approving section 5 be reconsidered and that the last sentence of section 5 be adopted to read:

"Section 5. Order settling account. The court may disapprove in whole or in part and surcharge the personal representative for any loss caused by any breach of duty. To the extent of approval of his final account . . . including the investment of the assets of the estate." Motion carried.

Section 9. Richardson noted that section 9 was derived from subsection (2) of ORS 117.310. The committee discussed the advantages and disadvantages of turning over unclaimed assets to the county treasurer and Richardson read section 109, 1963 Iowa Probate Code. Zollinger expressed approval of the Iowa provision and suggested it be adopted with an additional provision requiring unclaimed assets to be held by the State Land Board in the same manner as property presumed abandoned.

Richardson moved, seconded by Zollinger, that section 9 be approved to read:

"Inability to distribute assets. Any personal representative having in his possession or under his control any property due or to become due to any other person to whom payment or delivery cannot be made as shown by the report of the personal representative on file may, upon order of the court, pay or deliver such property to the State Land Board and take the receipt of the State Land Board for the same. The receipt shall specifically state from whom said property was received, a description of the property, and the name of the person entitled to the same. Thereafter such property

shall be held and disposed of by the State Land Board in accordance with ORS chapter 98." Motion carried.

Section 10 and ORS 126.555. Richardson indicated that the principle change in section 10 was to raise the amount involved to \$1,001 and others suggested that the increase be even more. Zollinger advised that the increase in amount would not be too significant because money bequeathed to a minor without any supervision or control would often be expended by the parent in household living expenses before the child reached majority. He read ORS 126.555 from the guardianship code and the committees agreed that a cross reference to that section would be a satisfactory solution to the problem. After further discussion, it was agreed that ORS 126.555 be amended to increase the amount to \$1,500 and that section 10 would read:

"Section 10. Personal property to minor under \$1,500. See ORS 126.555."

Biggs stated that there were other sections in the law relating to deposits held for minors by banks and savings and loan associations where the amounts should also be increased. Zollinger remarked that these revisions were outside of the committees' area of responsibility.

Section 11. Zollinger suggested subsection (3) read "A general devise or bequest not charged to a specific property or fund." There was a discussion of the use of "bequeath" or "devise," and Richardson observed that the committees had previously decided to use "give" so as not to be tied down by the former meanings of "bequeath" or "devise." Zollinger remarked that the purpose of section 11 had not been fully expressed unless the last sentence of paragraph (1) of the Proposed 1966 Wisconsin Probate Code, section 863.11, was included and others agreed. Biggs moved, seconded by Braun, that section 11 be adopted with the following amendments:

(a) -- Delete the comma after "abate" in the second line and the comma after "property" in the last line.

"(1) Personal property not disposed of by the will;
"(2) Residuary gifts;

"(3) General gifts not charged on any specific property or fund;

"(4) Specific gifts.

"A general gift charged on any specific property or fund is, for purposes of abatement, deemed property specifically given to the extent of the value of the thing on which it is charged. Upon the failure or insufficiency of the thing on which it is charged, it is deemed a specific gift to the extent of such failure or insufficiency. Abatement within each classification is in proportion to the amounts of such property each of the distributees would have received had full distribution of such property been made in accordance with the terms of the will.

"(b) If the provisions of the will or the testamentary plan or the express or implied purpose of the gift would be defeated by the order of abatement stated in subsection (a) hereof, the shares of distributees shall abate in such other manner as may be found necessary to give effect to the intention of the testator." Motion carried.

Section 12. Sorte called attention to the Minutes of the Probate Advisory Committee, 12/17, 18/65, Appendix A, pages 6 and 7. Zollinger asked that a notation be made in the minutes to consider the substitution of the present section 12 for section 13 of the draft in the Minutes, 12/17, 18/65, Appendix A, pages 6 and 7, and also that section 189 of the Model Probate Code be called to the committees' attention at the time they reviewed exoneration. Dickson noted that the heading of section 12 was inappropriate.

Braun moved, and the motion was seconded, that consideration of section 12 be withheld until the committees reviewed the draft on exoneration. Motion carried.

Section 13. Zollinger called attention to subsection (4) of section 11 which referred to a general gift charged on specific property and the committees agreed that inclusion of "general legacies" in section 13 was inappropriate because a general legacy, being inferior in order of priority, would not require the sale of specifically devised property.

Richardson moved, seconded by Biggs, that section 13 be revised to read:

"When real or personal property which has been specifically given, or charged with a legacy, shall be sold or taken by the personal representative for the payment of claims, the family allowance, the shares . . . in accordance with the provision of section 11 hereof. (No further change.)" Motion carried.

Section 14. Sorte asked if section 14 should be placed with the sections having to do with advancements pertaining to intestate situations and was told by Zollinger that it might be appropriate to include a cross reference in that location and leave section 14 in its present position.

Biggs expressed the opinion that section 14 was redundant in view of the provisions of section 8, subsection (1). He moved, seconded by Braun, that section 14 be deleted. Zollinger spoke in opposition to the motion. Motion carried.

Section 15. Richardson read from the Minutes of the Probate Advisory Committee, 2/18, 19/66, Appendix, page 5, which approved that draft dealing with Retainer. (See Minutes 2/18, 19/66, page 26) Inasmuch as the provisions of section 15 had already been approved in the proposed probate code, Richardson moved, seconded by Zollinger, that it be deleted. Motion carried.

Section 16. There was a discussion of a suitable amount of interest to be required on general legacies and Dickson was of the opinion that 3% after 12 months would represent an average increment on a prudent investment. Thomas and others agreed that the period of time should relate to the period for filing the federal estate tax. Richardson suggested that the committees might want to delete section 16 inasmuch as there had been no litigation on this question in Oregon.

Biggs moved, and the motion was seconded, that section 16 be amended to require interest at the rate of 3 percent per annum beginning 12 months from the filing of the petition for appointment of a personal representative and that the section be approved without further change. Motion carried.

Sections 17 and 18. Richardson explained that section 17 had been included for purposes of discussion and read the comment under section 190 of the Model Probate Code which stated that it is not clear in all jurisdictions that a distributee of personal property can elect to take a general or residuary legacy in any form but cash. The comment in the Model Code went on to say there does not appear to be any reason why the distributee should not be able to take in kind if he so desires. Richardson expressed the view, with which Zollinger agreed, that it was not necessary to codify this common law rule in Oregon. Mapp urged that subsection (a) of section 17 be codified rather than leave it to common law. Zollinger moved, seconded by Richardson, that sections 17 and 18 be deleted. Motion carried. Mapp voted no.

Section 863.19, Proposed 1966 Wisconsin Probate Code. Richardson called attention to and read section 863.19, Proposed 1966 Wisconsin Probate Code.

The committees commented on this section being adopted to satisfy the requirements of the Internal Revenue Service.

McKenna moved, and the motion was seconded, that section 863.19 of the Proposed 1966 Wisconsin Probate Code be placed immediately following section 16. That section provides:

"863.19 Valuation used in distribution of estate assets. If a general bequest of estate assets, including a pecuniary bequest, in a dollar amount fixed by formula or otherwise is satisfied by a distribution in kind, the distribution shall be made at current fair market values unless the will expressly provides that another value may be used. If the will requires or permits a different value to be used all assets available for distribution, including cash, shall unless otherwise expressly provided be so distributed that the assets, including cash, distributed in satisfaction of the bequest will be fairly representative of the net appreciation or depreciation in the value of the available property on the date or dates of distribution. A provision in a will that the personal representative may fix values for the purpose of distribution does not of itself constitute authorization to fix a value other than current fair market value.

Comment: This section was adopted by the 1965 Legislature to meet problems involved in securing the marital deduction under federal estate tax rules." Motion carried.

The committees discussed the urgency of introduction of a bill in the 1967 legislature which would accomplish the purpose of the section just adopted. Because the committees recognized it was too late for the Oregon State Bar Committee on Taxation to introduce such a bill, Dickson requested Meyers to ask Senator Willner to introduce the bill and she agreed to do so.

Oregon State Bar Committee on Taxation. Preparation of an appropriate statute dealing with apportionment of federal and state inheritance tax statutes was discussed and Richardson suggested that the Chairman express to the Bar Committee on Taxation the committees' hopes that such a statute would be considered. Zollinger indicated that if the statutes fell within the scope of the probate committees' jurisdiction, it would be more appropriate for the Bar committee to make their recommendations to the probate committees in order that the material could be submitted as a part of the proposed probate code. Dickson agreed to write to the Bar Committee on Taxation requesting that they recommend to the probate committees matters which they considered important for incorporation in the probate code including the apportionment of state and federal inheritance taxes.

Section 19. Richardson recommended the first sentence of section 19 read: "Upon the filing of receipts, releases or clearances and upon filing of other evidence satisfactory . . ." He noted that his subcommittee had not understood why the order of discharge should be held in abeyance for two years as required by the second sentence of section 19. He remarked that the general provisions pertaining to fraud had a cut off period of one year. Carson indicated that there was an unlimited right to re-open decrees and Zollinger suggested that the time should be limited to one year with specific reference to the order of discharge. McKenna believed one year was too long and was of the opinion that when the final account was approved, the personal representative was entitled to be relieved of responsibility. After further discussion, Zollinger suggested the section remain as stated in the Model Probate Code and if experience proved the time to be too long or too short, it could easily be amended. Carson remarked that the surety companies would in all probability be happy to see even a two year limitation in the code inasmuch as a question existed in Oregon as to whether or not a surety company was ever relieved of responsibility.

Zollinger read section 19 as amended by the committees:
"Upon the filing of receipts, releases and clearances for Oregon income and inheritance taxes and for personal property taxes on all taxable personal property, and upon the filing of receipts or other evidence satisfactory to the court that distribution . . . (No further change)".

December Meeting of Committees

Dickson asked Richardson if he could attend the December meeting in order to complete the discussion of the draft under consideration and he agreed to do so.

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

Completion of draft on provisions relating to accounting
(Richardson)

Arrangement of proposed revised probate code

Completion of November agenda

Inheritance tax (ORS chapter 118)
"Draft by Carson, Braun and Lisbakken)

January Meeting of Committees

Allocation of income (McMurchie)

February Meeting of Committees

Report on revision which would require recording of decree of final distribution (Mapp and Allison)

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

DRAFT OF PROPOSED PROBATE PROVISIONS
RELATING TO ACCOUNTING

Section LIABILITY OF PERSONAL REPRESENTATIVE.

(a) Property of Estate. Every personal representative shall be liable for and chargeable in his accounts with all of the estate of the decedent which comes into his possession at any time, including all the income therefrom; but he shall not be accountable for any debts due to the decedent or other assets of the estate which remain uncollected without his fault. He shall not be entitled to any profit by the increase, nor be chargeable with loss by the decrease in value or destruction without his fault, of any part of the estate.

(b) Property Not a Part of Estate. Every personal representative shall be chargeable in his accounts with property not a part of the estate which comes into his hands at any time and shall be liable to the persons entitled thereto, if

(1) The property was received, under a duty imposed on him by law in the capacity of personal representative; or

(2) He has commingled such property with the assets of the estate.

(c) Breach of Duty. Every personal representative shall be liable and chargeable in his accounts for neglect or unreasonable delay in collecting the credits or other assets of the estate or in selling, mortgaging or leasing the property of the estate; for neglect in paying over money or delivering property of the estate he shall have in his hands; for failure to account for or to close the estate within the time provided by this Code; for any loss to the estate arising from his embezzlement or commingling of the assets of the estate with other property; for loss to the estate through self-dealing; for any loss to the estate arising from wrongful acts or omissions of his co-representatives which he could have prevented by the exercise of ordinary care; and for any other negligent or wilful act or nonfeasance in his administration of the estate by which loss to the estate arises.

From §172, Model Probate Code, P. 165 and 166.

Section ACCOUNTING AND DISTRIBUTION. (1) The personal representative shall make and file in the estate proceeding a written verified account of his administration:

(a) Unless the Court orders otherwise, annually within thirty days after the anniversary date of his appointment.

(b) Upon filing his petition to resign and before his resignation is accepted by the Court.

(c) Within thirty days after the date of his removal.

(d) When the estate is fully administered.

(e) At such other times as the Court may order.

(2) Each account made and filed by a personal representative shall include the following information.

(a) The period of time covered by the account.

(b) The amount of the property of the estate according to the inventory, or if there was a previous account, the amount of the balance of the next previous account, and all property and rents, income, issues, profits and proceeds from property received during the period covered by the account.

(c) All disbursements made during the period covered by the account. Receipts for such disbursements shall accompany the account.

(d) The property of the estate on hand.

(e) Such other information as the personal representative considers necessary to show the condition of the affairs of the estate or as the Court may order.

(3) When the estate is fully administered the account shall also include:

(a) An affirmative showing that all personal income taxes and inheritance taxes which have become payable have been paid, and that all such taxes which will become due are secured by bond, deposit or otherwise.

(b) A petition for an order authorizing the personal representative to distribute the estate to the persons and in the proportions specified therein.

Source:

ORS 117.010 (Semiannual accounts); ORS 117.610 (Final Account); and ORS 126.336 (Guardianship Code).

Cross References:

Iowa - 469.470; 413.477. Washington - 11.76.010-020; 11.28.290; 32.060; 76.030; 76.100.

Section NOTICE; HEARING ON SETTLEMENT OF ACCOUNT AND PETITION FOR DISTRIBUTION. (1) Upon the filing of the final account and petition for order of distribution, the court shall fix a day for hearing of objections thereto and the personal representative shall, not less than twenty days before the time fixed for such hearing, cause notice of the time and place thereof to be mailed:

(a) To each heir at his last known address, if such decedent died intestate.

(b) To each legatee and devisee at his last known address, if such decedent died testate.

(c) To creditors not receiving payment in full whose claims have not been otherwise barred.

(d) All other persons who have, or may claim, an interest in the estate being distributed.

(2) Such notice need not be mailed to the personal representative and proof of such mailing shall be made by affidavit and filed at or before approval of the final account.

SOURCE: ORS 117.612

(Note: Subparagraph (c), among other things, permits elimination of ORS 117.615 (the giving of notice to Welfare).

It is thought that due process requires giving actual notice to interested parties if such parties are to be bound by the terms of the order approving the account and directing distribution. If such parties are to get actual notice, there would appear to be no need for published notice; hence, the same is eliminated by the suggested provision.

ORS 117.612 required filing of the affidavit before the time set for hearing on the final account. The foregoing requires filing before the entry of an order approving such account.)

CROSS-REFERENCES: Iowa - 36, 40, 42, 44, 478. Washington - 76.040. Model Code - 178, 177.

Section OBJECTIONS TO FINAL ACCOUNT AND PETITION FOR ORDER OF DISTRIBUTION. An heir, creditor whose claim is not otherwise barred, or other person interested in the estate may, on or before the day appointed for such hearing and settlement, file his objections thereto, or to any particular item thereof, specifying the particulars of such objections.

SOURCE: ORS 117.620

CROSS-REFERENCES: Washington - 77.050. Model Code - 177, 178.

COMMENT: The provision permitting a "creditor whose claim is not otherwise barred" to file an objection by implication prohibits a creditor whose claim is barred from objecting. It is believed that this is consistent with action previously taken with respect to claims procedure.

CAVEAT: A number of policy considerations are involved in determining the effect of ORDERS APPROVING FINAL ACCOUNTS AND DIRECTING DISTRIBUTION. Some of the choices are:

(A) Such orders only provide a basis for exonerating the personal representative as respects claims against him by all persons (having notice of the proceeding);

(B) Such orders are (not) res adjudicata as respects disputes between persons other than the personal representative;

(C) Such orders as respect disputes (between persons other than a personal representative) involving a decedent's estate are prima facie evidence of facts established therein.

See Sections 179 and 183 of the Model Code and Sections 487 and 488 of the Iowa Code set forth below.

Section CONCLUSIVENESS OF ORDER SETTLING ACCOUNT. Upon the approval of his final account, the personal representative and his sureties shall, subject to the right of appeal and to the power of the court to vacate its final orders, be relieved from liability for the administration of his trust during the accounting period, including the investment of the assets of the estate. The court may disapprove the account in whole or in part and surcharge the personal representative for any loss caused by any breach of duty.

SOURCE: §179, Model Probate Code, P. 168.

Section LIMITATION ON RIGHTS. No person, having been served with notice of the hearing upon the final report and accounting of a personal representative or having waived such notice, shall, after the entry of the final order approving the same and discharging the said personal representative, have any right to contest, in any proceeding, other than by appeal, the correctness or the legality of the inventory, the accounting, distribution, or other acts of the personal representative, or the list of the heirs set forth in the final report of the personal representative, provided, however, that nothing contained in this section shall prohibit any action

against the personal representative and his bondsman under the provisions of section one hundred ninety (190) on account of any fraud committed by the personal representative.

SOURCE: §487, Iowa Probate Code, P. 140.

Section REOPENING SETTLEMENT. Whenever a final report has been approved and a final accounting has been settled in the absence of any person adversely affected and without notice to him, the hearing on such report and accounting may be reopened at any time within five years from the entry of the order approving the same, upon the application of such person, and, upon a hearing, after such notice as the court may prescribe to be served upon the personal representative and the distributees, the court may require a new accounting, or a redistribution from the distributees. In no event, however, shall any distributee be liable to account for more than the property distributed to him. If any property of the estate shall have passed into the hands of good faith purchasers for value, the rights of such purchasers shall not, in any way, be affected.

SOURCE: §488, Iowa Probate Code, P. 140.

Section DECREE OF FINAL DISTRIBUTION. (1) In its decree of final distribution, the court shall designate the persons to whom distribution is to be made, and the proportions or parts of the estate, or the amounts, to which each is entitled under the will and the provisions of this Code, including the provisions regarding advancements, election by the surviving spouse, lapse, renunciation, adjudicated compromise of controversies and retainer. Every tract of real property so distributed shall be specifically described therein. The decree shall find that all state and federal inheritance and estate taxes are paid; and if all claims have been paid, it shall so state; otherwise, the decree shall state that all claims except those therein specified are paid and shall describe the claims for the payment of which a special fund is set aside, and the amount of such fund; if any contingent claims which have been duly allowed are still unpaid and have not become absolute, such claims shall be described in the decree, which shall state whether the distributees take subject to them. If a fund is set aside for the payment of contingent claims, the decree shall provide for the distribution of such fund in the event that all or a part of it is not needed to satisfy such contingent claims. If a decree of partial distribution has been previously made, the decree of final distribution shall expressly confirm it, or, for good cause, shall modify said decree and state specifically what modifications are made.

(2) If a distributee dies before distribution to him of his share of the estate, such share may be distributed to the personal representative of his estate, if there be one; or if no administration on his estate is had and none is necessary according to the provisions of sections 86 to 91 inclusive, hereof, the share of such distributee shall be distributed in accordance therewith.

(3) The decree of final distribution shall be a conclusive

determination of the persons who are the successors in interest to the estate of the decedent and of the extent and character of their interests therein, subject only to the right of appeal and the right to reopen the decree. It shall operate as the final adjudication of the transfer of the right, title and interest of the decedent to the distributees therein designated; but no transfer before or after the decedent's death by an heir or devisee shall affect the decree, nor shall the decree affect any rights so acquired by grantees from the heirs or devisees.

(4) Whenever the decree of final distribution includes real property, a certified copy thereof shall be recorded by the personal representative in every county of this state in which any real property distributed by the decree is situated. The cost of recording such decree shall be charged to the estate.

From §183, Model Probate Code. P. 171 and 172.

Section DISPOSITION OF UNCLAIMED ASSETS. If upon such distribution any heir, devisee or other person entitled to any of such proceeds fails to apply for his or her portion of the proceeds, for a period of three months after the making and entering of an order of distribution by the court having probate jurisdiction of the estate, such court may, at any time thereafter, upon a showing to that effect being made, by the executor or administrator, make an order directing such executor or administrator to pay the portion which such person is entitled to receive to the county treasurer of the county. The county treasurer shall keep the same in a special fund, subject to the further order of the court, for the payment of it to the person entitled to receive it, upon application therefor. If no such order is made and the same is not applied for by the person entitled to receive it for a period of one year from the date when the county treasurer receives it, the sum shall be paid by the county treasurer to the State Land Board, and the same shall be placed in the escheat fund of the state. The person entitled thereto may thereafter and within ten years from the date of the payment thereof to the State Land Board, apply for and recover the same as provided for the recovery of escheat funds in ORS 120.130 to 120.150.

SOURCE: ORS 117.310

CROSS-REFERENCES: Iowa 109-111; Model Code §192.

Section DISTRIBUTION OF PERSONAL PROPERTY UNDER \$1,001 TO MINOR WHO HAS NO GUARDIAN. Where a minor child residing in this state or in any other state is entitled to distribution of any personal property, including money, of a value less than \$1,001 from the estate of a decedent and has no guardian of his estate, the personal representative may, with the approval of the court, pay or transfer such personal property to a parent of the child who is entitled to the custody of the child.

SOURCE: ORS 117.315

CROSS-REFERENCES: Iowa §108; Washington 11.76.090-095; Model Code 86-92.

Section _____ ORDER IN WHICH ASSETS APPROPRIATED;
ABATEMENT.

(a) General Rules. Except as provided in subsection (b) hereof, shares of the distributees shall abate, for the payment of claims, legacies, the family allowance, the shares of pretermitted heirs or the share of the surviving spouse who elects to take against the will, without any preference or priority as between real and personal property, in the following order:

- (1) Property not disposed of by the will;
- (2) Property devised to the residuary devisee;
- (3) Property disposed of by the will but not specifically devised and not devised to the residuary devisee;
- (4) Property specifically devised.

A general devise charged on any specific property or fund shall, for purposes of abatement, be deemed property specifically devised to the extent of the value of the thing on which it is charged. Upon the failure or insufficiency of the thing on which it is charged, it shall be deemed property not specifically devised to the extent of such failure or insufficiency.

(b) Contrary Provisions, Plan or Purpose. If the provisions of the will or the testamentary plan or the express or implied purpose of the devise would be defeated by the order of abatement stated in subsection (a) hereof, the shares of distributees shall abate in such other manner as may be found necessary to give effect to the intention of the testator.

From §184, Model Probate Code, P. 172 and 173.

Section _____ EXONERATION OF ENCUMBERED PROPERTY. When any real or personal property subject to a mortgage is specifically devised, the devisee shall take such property so devised subject to such mortgage unless the will provides expressly or by necessary implication that such mortgage be otherwise paid. The term "mortgage" as used in this section shall not include a pledge of personal property.

From §189, Model Probate Code, P. 175.

Section _____ CONTRIBUTION. When real or personal property which has been specifically devised, or charged with a legacy, shall be sold or taken by the personal representative for the payment of claims, general legacies, the family allowance, the shares of pretermitted heirs or the share of a surviving spouse who elects to take against the will, other legatees and devisees shall contribute according to their respective interests to the legatee or devisee whose legacy or devise has been sold or taken, so as to accomplish an abatement in accordance with the provision of section 184 hereof. The court shall, at the time of the hearing on the petition for final distribution, determine the amounts of the respective contributions and whether the same shall be made before distribution or shall constitute a lien on specific property which is distributed.

From §185, Model Probate Code, P. 174.

117.340 Contribution among legatees, devisees and heirs.

When any testator in his will gives any chattel or real estate to any person, and the same is taken in execution for the payment of the testator's debts, then all the other legatees, devisees and heirs shall refund their proportional part of such loss to the person from whom the bequest was taken.

Section _____ DETERMINATION OF ADVANCEMENTS. All questions of advancements made, or alleged to have been made, by an intestate to any heir may be heard and determined by the court at the time of the hearing on the petition for final distribution. The amount of every such advancement shall be specified in the decree of final distribution.

From §186, Model Probate Code, P. 174.

Section _____ RIGHT OF RETAINER. When a distributee of an estate is indebted to the estate, the amount of the indebtedness if due, or the present worth of the indebtedness, if not due, may be treated as an offset by the personal representative against any testate or intestate property, real or personal of the estate to which such distributee is entitled; but such distributee shall be entitled to the benefit of any defense which would be available to him in a direct proceeding for the recovery of such debt.

From §187, Model Probate Code, P. 174.

Section _____ INTEREST ON GENERAL LEGACIES. General legacies shall bear interest at the legal rate for a period beginning nine months from the filing of the petition for the appointment of a personal representative until the payment of such legacies, unless a contrary intent is indicated by the will.

From §188, Model Probate Code, P. 175.

Section _____ PAYMENT TO DISTRIBUTEES IN KIND.

(a) When distributees to take in kind. When the estate is otherwise ready to be distributed, it shall be distributed in kind, unless the terms of the will otherwise provide or unless a partition sale is ordered. Except as provided in subsection (b) hereof, any general legatee may elect to take the value of his legacy in kind, and any distributee, who by the terms of the will is to receive land or any other thing to be purchased by the personal representative, may, if he notifies the personal representative before the thing is purchased, elect to take the purchase price or property of the estate which the personal representative would otherwise sell to obtain such purchase price.

(b) Exception where will directs purchase of annuity. If the terms of the will direct the purchase of an annuity, the person to whom the income thereof shall be directed to be paid shall not have the right to elect to take the capital sum directed to be used for such purchase in lieu of such annuity except to the extent that the will expressly provides that an assignable annuity be purchased. Nothing herein contained shall affect the rights of election by a surviving spouse against a testamentary provision as provided in this Code.

From §190, Model Probate Code, P. 176.

Section PARTITION FOR PURPOSE OF DISTRIBUTION. When two or more distributees are entitled to distribution of undivided interests in any real or personal property of the estate, distribution shall be made of undivided interests therein unless the personal representative or one or more of such distributees shall petition the court not later than the hearing on the petition for final distribution, to make partition thereof. If such petition is filed, the court, after such notice to all interested persons as it shall direct, shall proceed to make partition, allot and divide the property in the same manner as provided by the statutes with respect to civil actions for partition, so that each party receives property of a value proportionate to his interest in the whole, and for that purpose the court may direct the personal representative to sell any property which cannot be partitioned without prejudice to the owners and which cannot conveniently be allotted to any one party. If partition is made in kind, the court may appoint two commissioners to partition said property, who shall have the powers and perform the duties of (commissioners) in civil actions for partition, and the court shall have the same powers with respect to their report as in such actions. In case equal partition cannot be had between the parties without prejudice to the rights or interest of some, partition may be made in unequal shares and by awarding judgment for compensation to be paid by one or more parties to one or more of the others. Any two or more parties may agree to accept undivided interests. Any sale under this section shall be conducted and confirmed in the same manner as other probate sales. The expenses of the partition, including reasonable compensation to the commissioners for their services, shall be equitably apportioned by the court among the parties, but each party must pay his own attorney's fees. The amount charged to each party shall constitute a lien on the property allotted to him.

From §191, Model Probate Code, P. 177 and 178.

Section DISCHARGE OF PERSONAL REPRESENTATIVE. Upon the filing of receipts or other evidence satisfactory to the court that distribution has been made as ordered in the final decree, the court shall enter an order of discharge. The discharge so obtained shall operate as a release from the duties of personal representative and shall operate as a bar to any suit against the personal representative and his sureties unless such suit be commenced within two years from the date of the discharge.

From §193, Model Probate Code, P. 179 and 180.

Section REOPENING ADMINISTRATION. If, after an estate has been settled and the personal representative discharged, other property of the estate shall be discovered, or if it shall appear that any necessary act remains unperformed on the part of the personal representative, or for any other proper cause, the

court, upon the petition of any person interested in the estate and, without notice or upon such notice as it may direct, may order that said estate be reopened. It may reappoint the personal representative or appoint another personal representative to administer such property or perform such acts as may be deemed necessary. Unless the court shall otherwise order, the provisions of this Code as to an original administration shall apply to the proceedings had in the reopened administration so far as may be; but no claim which is already barred can be asserted in the reopened administration.

From §194, Model Probate Code, P. 180.

Section EXPENSES AND COMPENSATION OF REPRESENTATIVE. A personal representative is allowed, in the settlement of his account, all necessary expenses incurred in the care, management and settlement of the estate, including reasonable attorney's fees in any matter requiring legal counsel, and a credit for such sum, if any, as the court, in its discretion, may require him to pay to counsel for any party whose rights had to be resolved in order to properly administer the estate.

SOURCE: ORS 117.660

(Note: ORS 117.660 has been expanded to make clear the court's discretionary power to direct compensation for counsel in those instances where their advocacy has been of assistance to the court in resolving disputes.)

Section COMPENSATION OF REPRESENTATIVE. (1) For his services the personal representative shall receive such compensation as the law provides; but when the deceased, by his Will, has made special provision for the compensation of his executor, such executor is not entitled to any other compensation for his services, unless within ten days after his appointment, he subscribes and files with the clerk a written declaration renouncing the compensation provided by the Will.

(2) The compensation provided by law for a personal representative is a commission upon the whole estate accounted for by him, as follows:

- (a) Seven percent of any sum up to \$1,000.
- (b) Four percent of all above \$1,000 and not exceeding \$10,000.
- (c) Three percent of all above \$10,000 and not exceeding \$50,000.
- (d) Two percent of all above \$50,000.

(3) In all cases, such further compensation as is just and reasonable may be allowed by the court or judge thereof, for any extraordinary and unusual services not ordinarily required of a personal representative in the discharge of his trust.

SOURCE: ORS 117.680

(Note: Paragraph (1) has been lifted from ORS 117.660 and placed in the foregoing section.)

Section **ACCOUNT OF DECEASED OR INCOMPETENT PERSONAL REPRESENTATIVE.** If the personal representative dies or becomes incompetent, his account may be presented by his personal representative or the guardian of his estate to, and settled by, the court in which the estate of which he was personal representative is being administered, and, upon petition of the successor of the deceased or incompetent personal representative, the court shall compel the personal representative or guardian of the deceased or incompetent personal representative to render an account of the administration of the estate of the decedent and the court shall settle the account as in other cases.

From §181, Model Probate Code, P. 169.

Section **WHEN PROPERTY IS DISCHARGED FROM ADMINISTRATION; DISTRIBUTION OF SURPLUS.** The property of the deceased is the property of those to whom it descends by law or is given by Will, subject to the possession of the personal representative and to be applied to the satisfaction of claims against the estate, expenses of administration or sold, as by ORS 116.705 to 116.830 provided; but upon the settlement of the estate, and the termination of the administration thereof, so much of such property as remains unsold or unappropriated is discharged from such possession and liability without any order or decree therefor; but if there is any surplus of the proceeds of the sale of such real property, or any part thereof, the court or judge thereof shall order and direct a distribution of such surplus among those who would have been entitled to the real property if it had not been sold.

SOURCE: ORS 117.320. Expanded to include personal property.

The Subcommittee on Accounting wishes to make note of the fact that a failure to account as provided should be included as a ground for removing a fiduciary and a basis for punishment as a contempt. The Subcommittee feels that this should be included elsewhere in the Revised Code.