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PROBATE ADVISORY COMMITTEE
Probate Law Revision

Forty-second Meeting
(Joint meeting with Bar Committee on Probate Law and Procedure)

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| Dates) | 1:30 p.m., Friday, November 24, 1967 |
| and: | and |
| Times) | 9:00 a.m., Saturday, November 25, 1967 |
| Place: | Judge Dickson's courtroom<br>244 Multnomah County Courthouse<br>Portland, Oregon |

SUGGESTED AGENDA

1. Minutes of the October meeting.

2. Miscellaneous matters.

3. Claims, Section 23 to end. Discussion to be led by Mr. Gooding.

4. Actions and suits. Discussion to be led by Mr. Gooding.

5. Suggested changes in intestate succession draft. Discussion led by Mr. Allison.

6. Restriction of access to filed wills and inventories.

7. Elective share of surviving spouse. Discussion to be led by Mr. Richardson.

8. Discharge of encumbrances. Discussion to be led by Mr. Riddlesbarger and Professor Mapp.

9. Next meeting.

PLEASE NOTE:

The meeting will be held in JUDGE DICKSON'S COURTROOM. Nov. 24-25

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ADVISORY COMMITTEE
Probate Law Revision

Forty-second Meeting, November 24 and 25, 1967
(Joint Meeting with Bar Committee on Probate Law and Procedure)

## Minutes

The forty-second 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 24, 1967, in Judge Dickson's Courtroom, Multnomah County Courthouse, Portland, Oregon, by Chairman Dickson.

The following members of the advisory committee were present: Allison, Butler, Dickson, Mapp and Zollinger. Carson Frohnmayer, Gooding, Husband, Jaureguy, Lisbakken and Riddlesbarger were absent. (Senator Husband did attend the meeting on Saturday morning.)

The following members of the Bar Committee were present: Buhlinger, Heisler, Krause, Lovett, Mayer, Meyers, Rhoten Smith, Thalhofer and Thomas. Anderson, Field, Kraemer, McKay, Pendergrass, Piazza, Shetterly and Warden were absent. (Shetterly did attend the Saturday morning session.)

Also present were former Bar Committee members Gilley, Richardson and Bettis.

Others present were Robert W. Lundy, Legislative Counsel and James Sorte from the staff of Legislative Counsel.

### Fiscal Report by Mr. Lundy

Lundy informed the committee of the budget reduction for Legislative Counsel, which is approximately $13,000, and that money would not be available to pay Allison's salary past December. He asked the committee what their plans were with respect to completion of the proposed probate code revision and suggested that a meeting might be held with the Legislative Counsel Committee when it is appointed by Senator Mahoney.

Zollinger and Allison both agreed that the work should be completed by the end of April.

Lundy further advised the committee that the Legislative Counsel Committee will have to act on the appointment of

Allison because the original authorization for his employment was for six months.

Zollinger moved, seconded by Thalhofer, that the Chairman be authorized and requested to arrange for a meeting with the Legislative Counsel Committee, if possible either jointly with the Law Improvement Committee or alone, to explore the possibility of continuing Mr. Allison's employment for as long as necessary to complete the drafting. The motion carried.

Allison advised the committee that he has submitted a redraft and comments to Legislative Counsel on the chapter on jurisdiction and powers of the probate court. The claims section is partially drafted and will be completed after the current meeting. A full agenda is planned for December, which will include discussions of much of the material that has not yet been covered and there will have to be a meeting in January to take care of carryovers from the December meeting. Allowing a month and a half for drafting any changes it would probably extend through March or April. Allison felt checking sections, definitions, arrangment into bill form, etc., could be done in Salem.

New Members of the Bar Committee

Chairman Dickson requested Krause to introduce the new members of the Bar committee. They are: Ernest J. Buhlinger, Donald E. Heisler, J. Ray Rhoten, Kenneth E. Shetterly, Herman F. Smith and Frank D. Mayer.

Research Committee Appointments

Dickson announced the appointment of Robert Gilley and Campbell Richardson as members of a research committee to work with the committees.

Miscellaneous Matters

Sorte advised the committee that the Judiciary Committee in Wisconsin legislature voted their bill, the new probate code, out with a "Do Pass" recommendation.

Lundy outlined for the committee the proposals he suggested for printing the final draft for distribution. There will be two printings, one to be distributed to the legal profession, and one in bill form, to be distributed to the legislators. Mr. Lundy said that he has in his budget $2,000 for the cost

of the printing and that he felt this would cover it. He did suggest that the committee prepare comments to accompany the bill to the legislators, similar to the comments on the draft distributed to the legal profession.

The members of the committees felt that perhaps West Publishing Company would print the draft for them as a public service. Lundy indicated that this should be taken up with the Law Improvement Committee, which will also review the draft before it is published.

Tab 18 - Claims - Section 23

Zollinger led the discussion on claims in the absence of Gooding. Allison felt that sections 23, 24, 25, 26, 27 and 28, should be put in the chapter on Actions and Suits and Allison agreed.

Zollinger questioned the use of the words "and the cause of action survives" in subsection (1) of section 23, because he did not know of any cuase of action that does not survive under present law. Zollinger moved approval of subsection (1) with the deletion of the words "and the cause of action survives." The motion was seconded by Krause and carried.

Zollinger moved approval of subsection (2) as proposed. The motion was seconded by Meyers and carried.

Section 24. Extension of statute of limitations

Zollinger moved approval of section 24. The motion was seconded by Krause and carried.

Section 25. Claim barred when personal representative appointed

Zollinger moved to delete section 25. The motion was seconded by Krause and carried.

Section 26. Nonabatement of action or suit by death, disability or transfer; continuing proceedings

Zollinger questioned the use of the words "if the cause of action survives or continues" in subsection (1) of section 26, and moved its deletion. The motion was seconded by Thalhofer and carried.

Discussion on whether or not there should be two separate sections relating to suits against representatives in the case of death or disability, resulted in the deletion of the words "death or" in subsection (2) on motion of Thalhofer, second by

Lovett. Zollinger then moved "death and disability" be treated separately. The motion carried.

Zollinger objected to a time limitation on the substitution of the personal representative in any suit, as provided in subsection (3) (a).

A motion was made and carried that the word "legal" be inserted at the top of page 19 and the "s" be deleted from the word "representatives."

Zollinger requested substitute language for "disability" and Allison suggested "appointment of a guardian or conservator." Zollinger moved this wording be accepted. The motion was seconded by Gilley and carried.

Allison felt that subsection (3) should be deleted because he did not feel it was necessary since such a provision is in present law. Thalhofer said he felt it was intended to force somebody to do something within four months after the first publication. Zollinger agreed and moved adoption of subsection (3). The motion was seconded by Thalhofer and carried.

Discussion was held on Mapp's position that subsection (2) was unnecessary because those claims would not abate. The general feeling was that this was to allow the personal representative to be appointed and substituted for the decedent.

Mapp moved deletion of subsection (2), seconded by Thalhofer. No vote was taken on this motion.

Discussion continued on the substitution of the personal representative of the decedent in a suit and whether it should be handled as a claim against the estate. The consensus seemed to be that it should be continued as a suit by the personal representative.

Section 27. Continuation of action or suit without claim presentation.

Zollinger moved approval of section 27. The motion was seconded by Thalhofer and carried.

Mapp expressed his belief that section 27 should be placed under the presentation of claims section, as in the Uniform Probate Code.

Section 28. Enforcement of encumbrances

Zollinger moved adoption of section 28. The motion was

seconded by Krause and carried.

Section 29. Repeal of existing statutes

Zollinger moved adoption of section 29. Allison seconded the motion but said that the section would be checked and possibly revised at a later date. The motion carried.

Tab 20 - Actions and Suits

Section 1. What causes of action survive; parties

Butler commented on the use of the singular and the plural on personal representative and felt that perhaps this should be singular in all places the words appeared. He also pointed out that the first sentence of section 1 referred to "actions and suits" and later to "actions" only.

Bettis questioned whether the wording ". .but the personal representative may maintain action there . . ." was a duplication of the material in ORS 13.080, which was covered in Tab 18. Zollinger suggested this be corrected by Legislative Counsel.

Zollinger moved that section 1 be amended to read as follows:

"All causes of action or suit by one person against another survive to the personal representative of the former and against the personal representative of the latter.";

Deletion of the second sentence and deletion of "in equity" and "whether arising on contract or otherwise," in the first sentence. The motion was seconded by Butler and carried.

Section 2. Several representatives regarded as one person

Discussion on the appointment of more than one personal representative raised the question of whether this would be two different decedents, but it was resolved that it would not. Zollinger did not like the word "several" and Gilley suggested saying "one or more". Lovett questioned whether all the personal representatives should be served, and Dickson pointed out that this was a good requirement. As a result, Zollinger moved deletion of section 2 and repeal of ORS 121.030. The motion was seconded by Allison and carried.

Mapp suggested that there should be a provision in the new code to provide service of process, and recommended sections 3-417, 3-418 and 3-419 of the Uniform Probate Code. Allison pointed out that section 3-417 is now section 13,

subsection (4) of the draft on initiation of probate which has not yet been circulated to all members.

In considering section 3-418, Zollinger felt the court should rule on any delegation of duty when there are corepresentatives, and suggested a new paragraph (v) as follows: "When the Court shall otherwise direct. . ." Mapp moved for adoption of section 3-418 as amended by Zollinger. The motion was seconded by Meyers and carried.

After reading section 3-419, Mapp moved adoption. The motion was seconded by Butler and carried.

Allison asked for consideration of a draft of amendments to ORS 13.010, Tab 20, which he felt tied in with the above discussion, but there was no motion to reconsider the committee's previous action.

Uniform Probate Code Section 3-509

Mapp brought up the question of when the personal representative would be held personally liable for his actions in behalf of the estate in connection with contracts and trusts, outside his fiduciary responsibility to the estate. The Uniform Probate Code, in section 3-509, takes the position that the personal representative is an agent for a disclosed principal, the estate; relieves the personal representative of responsibility to persons with whom he contracts on behalf of the estate, without having it in writing in the contract. The personal representative is not personally responsible for obligations arising from his possession or control of the property unless he is personally at fault; and then proceeds to outline the manner in which claims may be brought. Mapp moved adoption.

Zollinger did not like the idea of having the personal representative appear in the same action both on his behalf and for the estate, primarily because it was the reverse of the present law. Mapp did not agree. Allison expressed the opinion that there was not a provision in the draft for such an action to be brought in the probate court. He further indicated that his understanding of prior committee action was that when a personal representative was being sued for personal liability, he would resign and a substitute representative would be appointed to represent the estate.

Because of his disagreement with some of the provisions of section 3-509, Zollinger moved adoption of paragraphs (a) (b), (c) and (d) of section 3-509 of the Uniform Probate Code. The motion was seconded by Krause and carried.

Elective Share of Surviving Spouse

Discussion of this chapter was led by Richardson, who pointed out that this chapter was similar to the Wisconsin Code, 860.107.

Because all sections of this chapter were so closely related, they were read first and then there was discussion of the entire chapter.

Discussion centered around whether there would be a partial distribution in an estate, since the value of the estate could not be determined until after the claims against the estate were known.

Zollinger moved to amend section 5 by deletion of the words "guardian ad litem." The motion was seconded by Allison and carried.

The question of including a provision for the appointment of a conservator was discussed, but Dickson pointed out that normally if there is a conservator, the conservatorship is merely continued.

Lovett pointed out that the language in ORS 126.300, is in conflict with the proposed draft. Allison said that he will add a section repealing ORS 126.300.

Butler raised a question on the provision for transfers within two years of death. After discussion, Zollinger moved deletion of "two years" and insertion of "three years" in the second line of page 3 and 8 lines from the bottom page 2. The motion was seconded by Allison and carried.

Butler moved the following amendments to subsection (2) of section 2: Delete "life" and "as to which" and before "decedent" insert "on the life of" and after "decedent" insert "whether or not he". This would then read: "proceeds of insurance on the life of decedent whether or not he had any of the incidents of ownership at the time of his death,". The motion was seconded by Mapp and carried.

Mapp discussed the problems of section 6 regarding an assignment of the elective share. He outlined the idea in the Uniform Probate Code which provides the shares of the wife and pretermitted heirs should be made up by everyone receiving property, in a proportionate share, rather than having it come out of the residue. Following this idea, the committee agreed to have Allison prepare wording in line with the pretermitted

heir statute and omitting subsections (2) and (3) of section 6. Richardson moved that this be done, seconded by Zollinger and the motion carried after an amendment was made to include a reference in this section as well as in the pretermitted heir statute, substantially as follows: "except that persons to whom the will gives tangible personal property...".

Thomas questioned that part of section 2 that would authorize property settlement agreements after marriage. He said that to authorize postmarriage agreements would encourage one party to badger the other to force such an agreement. Following discussion it was agreed that if one party coerced the postmarriage agreement the court would void the agreement.

Zollinger then moved that sections 1 to 6, inclusive, be approved as amended. The motion was seconded by Butler and carried.

On motion of Allison the meeting recessed from 4:30 p.m. until 9 a.m., November 25, 1967.

The meeting was reconvened at 9 a.m., Saturday, November 25, 1967, by Chairman Dickson, in his courtroom in the Multnomah County Courthouse, Portland.

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

The following members of the Bar committee were present: Gilley, Krause, Lovett, Meyers, Thalhofer, Thomas, Bettis, Heisler, Buhlinger, Smith, Mayer and Shetterly.

Also present was James Sorte.

Miscellaneous Matters

Dickson asked that all members of the committee accept all available speaking dates to discuss the proposed code. An outline will be prepared by Legislative Counsel and Allison for each member to use and also to submit to the Law Improvement Committee to show the committee's present problems.

Intestate Succession

Allison explained what had transpired up to this point for the new members of the committee. He outlined the provisions of section 5 and compared them with the Uniform Probate Code, section 2-103. Allison also pointed out that the way the

committee had decided previously, it would permit inheritance on only one side of the family if a maternal grandparent were living and no paternal grandparents were living. The Uniform Probate Code permits inheritance from both sides, regardless of living grandparents, by representation. In addition, the committee limited inheritance to the 5th degree of kinship, while the Uniform Probate Code has no limitation.

Allison moved adoption of the language of the Uniform Probate Code in lieu of subsections (4), (5) and (6). There was a second by Zollinger, with an amendment deleting the reference to "those of more remote degree" where it appears.

ORS 111.020 (5)

Allison discussed subsection (5), which provides for the estate of any child who dies under the age of 21 to pass to the heirs of the ancestor from which the real property descended. He mentioned that Frohmayer had suggested that in lieu thereof, section 2-104 of the Uniform Probate Code be considered, which requires that the heir survive the decedent for five days, or he is presumed to have predeceased the testator. This also brought the suggestion that section 2-601 be considered in regard to devisees.

Zollinger expressed opposition to the term "deemed to have predeceased," as it referred to devisees, and to section 2-601. Mapp suggested that the reason this was included might be because such a statement is often in a will and this would eliminate the necessity of a statute.

Allison moved adoption of section 2-104 of the Uniform Probate Code, in lieu of the present ORS section. The motion was seconded by Thalhofer. Zollinger asked amendment to delete the last sentence and Allison concurred. The amendment will read as follows:

"Any person who fails to survive the decedent by five days is deemed to have predeceased the decedent for purposes of intestate succession, and the decedent's heirs are determined accordingly." The motion carried.

Allison then moved adoption of section 2-601 in regard to devisees. Zollinger expressed opposition because it expressed a proposition that might not be in harmony with decedent's purposes, that he is deemed to have predeceased the testator is not an appropriate way to say the devisee shall not take and that the presumption is not an appropriate one, rather it is in each instance a question of fact. Mapp felt it was good, and

if the testator didn't want it that way, he could change it in the will.

Gilley suggested an amendment as follows: "If a devisee fails to survive the testator by five days, the testator's property passes as though the devisee had predeceased the testator. . . ." Thalhofer disagreed because he felt this could be provided for in the will.

Dickson asked for a division of the vote on the motion to adopt section 2-601. The advisory committee voted 3 for and 3 against. The Bar Committee voted 3 for and 4 opposed. The chair then ruled the motion failed to pass.

Restriction of access to filed wills and inventories

Dickson advised the committee that Frohnmayer had been the primary sponsor of restriction of access to probate files, and, since he was not present, the matter was moved to the December meeting. Allison indicated he would notify him and let him know that no one else on the committee expressed any interest in such a provision, because it is rightly a matter of public record. Allison read the sections on restriction of access in the adoption and competency statutes for the benefit of the committee.

Tab 19. Discharge of Encumbrances

Mapp led the discussion in the absence of Riddlesbarger, who was the original author.

Mapp advised the committee that he felt the shorter proposal in the Uniform Probate Code was better and referred them to section 3-516. The Uniform Probate Code takes the position that the paying off of encumbrances falls into two categories: (1) Whether or not the distributee is entitled to exoneration, and (2) What the rights and duties are of the personal representative in terms of paying off an encumbrance. He then referred the members to section 2-607 entitled "Exoneration." The Uniform Probate Code reverses the common law rule under which the devisee would take the property, subject to the encumbrance if the encumbrance was in existence at the time of execution of the will, but if the security interest was created after the execution of the will, the devisee would be entitled to exoneration.

Dickson mentioned that Riddlesbarger had wanted to change the rule of exoneration as it presently exists.

Mapp led a discussion on the draft by Riddlesbarger. There was discussion as to what constituted a voluntary encumbrance

and involuntary encumbrance as they relate to the right of exoneration. This draft also would require court approval to redeem a mortgage, whereas the Uniform Probate Code provides that the personal representative can do this without prior approval. Zollinger questioned where the title would be if the personal representative used estate money to convert a latent title to full title. Dickson thought that perhaps these provisions should be covered in substantive law and then they would fall under the enumeration of the powers of the personal representative. Mapp pointed out that exoneration is placed in the chapter on wills in the Uniform Probate Code. Sorte advised the members that Lundy had felt exoneration should be separated from the chapter on wills and be a separate chapter.

Dickson suggested that further discussion of this chapter might be put off until the January meeting to allow Mr. Riddlesbarger to appear to lead the discussion in connection with abatement and exoneration.

Zollinger moved that the matter be tabled until Riddlesbarger can discuss it and to adopt the provisions of the Uniform Probate Code, in substance, section 2-607. Krause seconded the motion. Zollinger then moved for deferral of action until the committee could hear Riddlesbarger. The motion carried.

Allison advised the committee that he had prepared a final draft of the chapter on wills. Dickson announced that the subject of exoneration, antilapse statute, after-acquired property, acquisitions, redemption, abatement, etc., would be the first item on the January agenda to give Mapp and Riddlesbarger time to compare the proposed draft with the Uniform Probate Code.

Approval of Minutes of the October Meeting

The minutes of the October meeting were approved.

Tab 2 - Powers of the Probate Court

Thalhofer reported on a request made to him at the last meeting with regard to the proposed second section 3, which was deleted by committee action. He advised the committee that there is a provision in the county court statutes that the court must be open for business at all times, but nothing in the circuit court statutes. However, by reference, this section is in the circuit court statute whenever the probate power has been transferred to the circuit court. After

discussion the committee decided to leave the draft the way it is, deleting the second section 5.

Next Meeting

Dickson announced that the December meeting would be held in the Director's Room at the Lloyd Center, Portland, on December 15 and 16, 1967.

Dickson advised the committee that Sorte will request the return of all books and material from the members of the Bar committee who are no longer serving in that capacity, so that they may be given to the new members, with the exception of those former members who will be scheduled for speaking engagements on behalf of the proposed code.

Butler moved the meeting adjourn. The meeting adjourned at 11:30 a.m.

SUPPLEMENTAL MEMORANDUM
November 7, 1967

To: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: Stanton W. Allison

Subject: INTESTATE SUCCESSION

Under date of October 25, 1967, you were furnished with a proposed rewrite of section 5 of the Intestate Succession draft, as well as two additional proposed sections. In view of some questions raised about the proposed amendment to incorporate the language of section 2-103 of the 1967 Uniform Code, it now seems preferable to adopt verbatim the language of section 2-103 with the one addition of the language previously adopted vesting title in married parents or grandparents as tenants by the entirety or joint owners of personal property with the right of survivorship. A comparison of the Uniform Code section with that previously circulated will indicate that there is no change in content. However, in view of this it seems advisable that we adopt verbatim the Uniform Code language.

Section 5. Share of others than surviving spouse. The part of the net intestate estate not passing to the surviving spouse shall pass:

(1) To the issue of the decedent; if they are all in the same degree of kinship to the decedent they shall take equally, but if of unequal degree, then those of more remote degrees take by representation.

(2) If there is no surviving issue, to his parent or parents equally.

(3) If there is no surviving issue or parent, to the brothers and sisters and the issue of any deceased brother or sister by representation; if there is no surviving brother or

sister, the issue of brothers and sisters take equally if they are all of the same degree of kinship to the decedent, but if of unequal degree then those of more remote degrees take by representation.

(4) If there is no surviving issue, parent or issue of a parent, to the grandparents and the issue of any deceased grandparent by representation; if there is no surviving grandparent, their issue take equally if they are all of the same degree of kinship, but if of unequal degree then those of more remote degrees take by representation.

(5) If at the time of taking surviving parents or grandparents are married to each other they shall take real property as tenants by the entirety and personal property as joint owners with the right of survivorship.

MEMORANDUM
October 25, 1967

To: Members of the
Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: Stanton W. Allison

Subject: INTESTATE SUCCESSION

Enclosed find a proposed redraft of Section 5 of the second draft of Descent and Distribution of Real and Personal Property, and two sections taken from the 1967 Uniform Code which would eliminate probate requirements where heirs or devisees died within five (5) days of the death of the parents or the testator.

I have redrafted the Intestate Succession section to conform to Section 2-103 (d) of the 1967 Uniform Code. The changes from the draft we previously adopted are indicated by the deletion of some present language and the underlined portion would be the new language required to conform to the Uniform Code.

The comment by the Reporters is as follows:

> This section provides for inheritance by lineal descendants of the decedent, parents and their descendants, and grandparents and collateral relatives descended from grandparents; in line with modern policy, it eliminates more remote relatives tracing through great-grandparents.
>
> In general the principle of representation (which is defined in section 2-106) is adopted as the pattern which most decedents would prefer.

> If the pattern of this section is not desired, it may be avoided by a properly executed will or, after the decedent's death, by renunciation by particular heirs under section 2-801.

I quote from Mr. Frohnmayer's letter of September 7, 1967:

> First, I have noted that the legislative draft of the proposed Wisconsin Probate Code (Assembly Bill 280) section 852.01(g) at page 22 differs from the proposed Wisconsin Probate Code (study draft), section 852.01(2). Under the study draft collateral kindred under either the parents or grandparents have to be related within the fourth degree of kindred. You will recall that we have selected the fifth degree of kindred as a limitation, but have deceded to impose that limitation only on takers under the grandparents. It now appears that Wisconsin has eliminated any limitation on takers as long as they claim under the grandparents.
>
> I have also noted that the 1967 Uniform Probate Code (Boulder Draft) in section 2-103(d) has deviated from earlier tentative draft of the Uniform Probate Code in two respects. First, as in the new draft of the Wisconsin Probate Code, the new Uniform Code places no limitation in degree on the issue of takers under the grandparents. Secondly, it provides that issue of the grandparents take by representation rather than as in the Oregon proposal, per capita. In light of these recent developments, I wonder if we might be well advised to reconsider our limitation to the fifth degree imposed on issue of deceased grandparents of the intestate.

In my reply to Mr. Frohnmayer's suggestion, I wrote in part as follows:

> I have taken a new look at the fact that every person has not one but two sets of grandparents, two grandparents on the paternal side and two on the maternal side. I visualize the not uncommon situation where an intestate would be survived by one or both grandparents on the maternal side and no grandparents on the paternal side. Our present proposal would disinherit all of the uncles and aunts, or their issue,

> on the paternal side, purely because both grandparents on the paternal side had predeceased the intestate while a maternal grandparent survived. This now strikes me as not only unjust but perhaps entirely opposite to the intention of the intestate. The aunts and uncles or cousins on the paternal side might be much closer than the issue of the grandparents on the maternal side. It seems more fair than provision be made for the relatives on the maternal as well as on the paternal side as provided in the Uniform Code. I prefer this approach to that of the Washington Code which requires equal inheritance by the maternal and paternal relatives.

I did not realize the full implication of the proposal we previously adopted until I assumed that I was an only child and died intestate without leaving children of my own. In this case my heirs would be my living first cousins both on my father's and my mother's side. If in this case my cousins on my father's side, all of whom are old were deceased, the cousins on my mother's side would take to the exclusion of all the first cousins once removed on my father's side. Of the cousins on my mother's side, of nine cousins six are deceased, leaving children, and three are living. The children of the deceased cousins are the ones who would really be entitled to inherit on a basis of need, rather than the three surviving cousins.

My letter continues:

> I assume the limitation of inheritance to those of the fifth degree was adopted for two reasons: First, to eliminate relatives so remote that they would be beyond the comprehension or intention of the intestate; and, second, to ease the task of determining who might be the heirs in an intestate situation. I have expressed my own reaction in regard to the first

> concept. These relatives in the sixth degree I refer to include several children whom I have met and known personally. They don't seem nearly as remote to me as the chart would indicate. In regard to the second reason, all of the relatives of my paternal grandparents live on the East Coast. There are many whom I have never met and some with whom I have lost contact over the years. As to those relatives, equal inquiry would have to be made under the proposal we have adopted or under the language of the Uniform Code. In either case, the personal representative would have to determine which of these relatives were alive, which were dead, and which had left children surviving them.
>
> It seems to me that the drafters of the new Washington, Wisconsin, and Uniform Codes were well advised to drop the limitation of inheritance to those within any particular degree of relationship. I agree with you that serious consideration should be given as to whether we should not change our thinking in this matter.

If the proposed approach of the 1967 Uniform Code is adopted, Section 7, headed Degree of Kinship could be eliminated.

I have had extensive correspondence with Mr. Frohnmayer regarding the elimination and repeal of ORS 111.020(5) which provides:

> (5) When any child dies under the age of 21 years and leaves no surviving spouse or children, any real estate which descended to such child shall descend to the heirs of the ancestor from which such real property descended the same as if such child died before the death of such ancestor.

Mr. Frohnmayer has suggested that it might be well for the committee to consider Section 852.01(2) of the Wisconsin draft and also Section 2-104 of the new 1967 Uniform Code. The attached contains a proposed section embodying the

Uniform Code provision. The reporter's comment is as follows:

> This section is a limited version of the type of clause frequently found in wills to take care of the common accident situation, in which several members of the same family are injured and die within a few days of each other. The Uniform Simultaneous Death Act provides only a partial solution, since it applies only if there is no proof that the parties died otherwise than simultaneously. This section requires an heir to survive by five days in order to succeed to decedent's intestate property; for a comparable provision as to wills, see section 2-601. This section avoids multiple administration and in some instances prevents the property from passing to persons not desired by the decedent. The five day period should in no case hold up any proceedings relating to a decedent's property.

It is my suggestion that the committee also consider adoption of the similar provision with regard to devisees as set out on the attached.

If we are to apply an anti-lapse statute to a devisee who dies one-half hour before a testator, it would seem equally advisable to apply a similar provision to a devisee who dies one-half hour after a testator. It would seem that enactment of these two sections would be of value in many simultaneous death situations which would not be covered by the simultaneous death chapter.