ADVISORY COMMITTEE
Probate Law Revision

Ninth Meeting

Date: Saturday, December 12, 1964
Time: 9 a.m.
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland

Suggested Agenda

[Note: The rough minutes of the November 14 meeting have not yet been edited. Lundy will endeavor to do so and distribute copies later this month.]

1. Activities of advisory committee from now through 1965 legislative session.

[Note: Lundy will not be available to assist the committee during this period. Mrs. Carpenter will not be available to take minutes of meetings of the committee during this period.

The committee probably will wish to consider the nature of its activities during this period and the necessity and availability of staff-type services to assist it in carrying on those activities. For example, if the committee plans to hold meetings during this period and wishes minutes of such meetings prepared and distributed as in the past, it will be necessary to make provision for taking the minutes and editing and distributing them.]

2. Dower and curtesy.

Pending for committee consideration are sections 4 through 20 of the rough draft on "Changing Dower and Curtesy" (dated October 9, 1964).

The rough minutes of the November 14 meeting indicate that the committee approved, with some changes, the revised rough draft on "Protecting Property Right During Marriage" (report by Allison, dated October 8, 1964), and the first three sections of the rough draft on "Changing Dower and Curtesy" (dated October 9, 1964).

3. Guardianship and conservatorship.

Pending for committee consideration are sections 4 through 12 of the rough draft on "Guardianship and Conservatorship" (dated July 18, 1964).

The rough minutes of the November 14 meeting indicate that the committee concluded with approval of section 3 of the rough draft.

4. Small estates.

5. 1964 proposals of Bar Committee on Probate Law and Procedure.

The rough minutes of the November 14 meeting indicate that the committee approved, with some changes, the 1st, 2nd, 6th and 7th legislative proposals of the Bar Committee. Postponed, and apparently pending, are the 4th and 5th proposals (i.e., (a) waiver by probate court of appointment of appraisers of estates of decedents, and (b) clarification of procedure when power of sale given under terms of wills).

6. Next meeting of advisory committee.

ADVISORY COMMITTEE
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Ninth Meeting, December 12, 1964

Minutes

The ninth meeting of the advisory committee was convened at 9:05 a.m., Saturday, December 12, 1964, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland. All members, except Gooding, were present.

Dickson noted that the minutes of the last meeting (November 14, 1964) had not yet been prepared for distribution, but that Lundy (Robert W. Lundy, Chief Deputy Legislative Counsel) had indicated he would do so as soon as possible. Dickson indicated that he would ask Lundy also to prepare for distribution the minutes of this December meeting.

The committee was informed that the Legislative Counsel's office would be unable to furnish professional or secretarial assistance to the committee during the 1965 legislative session, and that other arrangements for secretarial assistance with respect to committee meetings and the minutes thereof during that period would have to be made.

Butler indicated that the Oregon State Bar Committee on Probate Law and Procedure was meeting that morning in Portland. He noted that legislation proposed by the Bar committee and approved by the Oregon State Bar at its annual meeting in October had been considered by the advisory committee at its last meeting. He commented that the Bar committee was concerned with the matter of its responsibility with respect to that proposed legislation, particularly the presentation thereof to the Law Improvement Committee.

Dickson informed the members that a meeting of the Law Improvement Committee was scheduled for Friday, January 8, 1964, in Salem. He commented that representatives of the advisory committee, at least Allison and, if possible, other members, should attend the meeting of the Law Improvement Committee and present the report of the advisory committee. Dickson indicated that he would ask Lundy to send notices of the time and place of the Law Improvement Committee meeting to members of the advisory committee. He requested that Allison, in the latter's liaison capacity, contact the Bar committee and invite members thereof to attend the meeting of the Law Improvement Committee. Allison referred to the procedure approved by the Bar for handling the legislation proposed by the Bar committee (i.e., referral to the Law Improvement Committee and the advisory committee for study and consideration in the course of the probate law revision project, rather than direct presentation to the legislature).

Later in the meeting Allison contacted Duncan L. McKay, Chairman of the Bar committee, and reported on his conversation with McKay. He stated that McKay had expressed some uncertainty as to the role of the Bar committee in the probate law revision project, but had indicated that he (McKay) and perhaps other members of the Bar committee would endeavor to attend the meeting of the Law Improvement Committee on January 8.

1. Dower and Curtesy. Allison referred to the latest rough draft of proposed legislation entitled "Changing Dower and Curtesy" (dated October 9, 1964).

He pointed out that the committee had considered sections 1 to 3 of the draft at the last meeting and, with certain changes, had approved them. He noted that the balance of the sections of the draft remained to be considered and approved.

Riddlesbarger referred to the amendment of ORS 5.040 by section 4 of the draft, deleting the authority of the probate court to "direct the admeasurement of dower," and questioned the deletion. Allison commented that one of the purposes of section 3 of the draft was to preserve, temporarily as needed, the provisions of law relating to dower and curtesy notwithstanding deletion from the statutes of those provisions, but expressed some doubt that section 3 would fill the gap left by deletion of subsection (8) of ORS 5.040. Zollinger commented, and Carson and Riddlesbarger agreed, that the express authority of the probate court to direct the admeasurement of dower should be retained. Carson moved, seconded by Butler, that subsection (8) of ORS 5.040 be amended to read: "Direct the admeasurement of dower <u>or curtesy of the surviving spouse of any person who died before the effective date of this Act.</u>" Motion carried.

Allison referred to the amendment of ORS 68.420 by section 5 of the draft, deleting a reference to dower and curtesy in paragraph (e) of subsection (2) of the ORS section and, noting that the committee previously had approved the proposed legislation entitled "Protecting Property Right During Marriage," suggested that "claim of marital right" be inserted in paragraph (e). He commented that it should be made clear that a partner's right in specific partnership property was not subject to a claim of marital right established by a filed declaration. Zollinger noted that paragraph (e) referred to "allowances" to "heirs, or next of kin," pointed out that Oregon law made no provision for allowances to such persons and suggested, and Allison and Frohnmayer agreed, that "heirs, or next of kin" should be deleted and the reference be to allowances to "widows and minor children." Carson pointed out that "heirs, or next of kin" probably was used in the section of the Uniform Partnership Act from which ORS 68.420 was derived, and suggested that, since paragraph (e) was phrased in negative terms, it would do no harm to retain the reference to dower and curtesy while adding the reference to the claim of marital right. He also suggested that, in the context of the Uniform Act, "allowances" might have a broader meaning than that customarily given to the word under the Oregon probate statutes, perhaps even including inheritance rights. After further discussion, Allison moved, seconded by Butler, that paragraph (e) be amended to read: "A partner's right in specific partnership property is not subject to dower, curtesy, <u>claim of marital right,</u> or allowances to widows [, heirs, or next of kin] <u>and minor children.</u>" Motion carried unanimously.

Allison referred to the amendment of ORS 93.240 by section 8 of the draft, deleting the wording relating to dower and curtesy in subsection (2) of the ORS section, and suggested that a reference to a claim of marital right established by a filed declaration should be inserted in subsection (2). He expressed the view that, if it were not for the claim of marital right, subsection (2) might be deleted, since the nonowner spouse, without that claim, would have no interest in the real property. Zollinger indicated disagreement with that view, pointing out that subsection (2) dealt with an interest in or right to the purchase price of the real property. Allison questioned the deletion of "unless a contrary purpose is expressed in the contract." Zollinger suggested that the draftsman probably relied upon the wording "except to the extent specifically prescribed therein," which had been retained, to perform the same function as the deleted

wording. Frohnmayer moved, seconded by Zollinger, that subsection (2) be amended to read: "If immediately preceding the execution of any such contract one or more of the sellers held no right or estate in the real property covered thereby other than [an inchoate estate of or right to dower or curtesy] under a recorded declaration claiming marital right, then, unless a contrary purpose is expressed in the contract, the joinder of such party or parties shall be deemed to have been for the sole purpose of [barring dower or curtesy only and, except to the extent specifically prescribed therein,] releasing the marital right and such person or persons shall have no interest in or right to any portion of the unpaid balance of the purchase price of [said] the real property except to the extent specifically provided in the contract." Motion carried unanimously.

Riddlesbarger referred to subsection (3) of ORS 93.240, and suggested the substitution of "the" for "such" in the seventh line thereof. Zollinger suggested that the first sentence of subsection (4) of ORS 93.240 be deleted, commenting that the Oregon Supreme Court, on one occasion, had expressed disapproval of such a provision stating that a statute was declaratory of existing law and, on another, had held that such a statute did not apply to prior transactions. Riddlesbarger moved, seconded by Zollinger, that his and Zollinger's suggestions be approved and that changes in subsections (3) and (4) of ORS 93.240 be made pursuant thereto. Motion carried unanimously.

Allison referred to the amendment of ORS 94.105 by section 9 of the draft, deleting the authority of the court to bar dower and curtesy rights in a proceeding under the Torrens title registration statutes, and questioned whether the deletion should be made. After a brief discussion of the current use and effect of the Torrens system, Allison moved, seconded by Zollinger, that section 9 be deleted from the draft. Motion carried unanimously.

Allison referred to the amendment of ORS 94.330 by section 10 of the draft, pointing out that the ORS section dealt with the transfer or mortgage of property registered under the Torrens system and that the amendment would delete the reference to dower and right of dower. He suggested that the reference to dower and right of dower be retained and that a reference to the proposed claim of marital right established by a filed declaration be added. Frohnmayer moved, seconded by Allison, that the number of the section be changed from 10 to 9, and that the wording of the pertinent portion of ORS 94.330 be as follows: "* * * and that the dower, right of dower, marital right and estate of homestead, if any, have been * * *." Motion carried.

Allison expressed the view that the amendment of ORS 94.445 (relating to final distribution of property registered under the Torrens system upon the death of the owner) by section 11 of the draft was not necessary, that references to dower in the ORS section should be retained and that, in view of the existing references to "rights" in the ORS section, it was not necessary to add a specific reference to the proposed claim of marital right established by a filed declaration. Allison moved, seconded by Zollinger, that section 11 be deleted from the draft. Motion carried.

Allison questioned the necessity of the amendment of ORS 105.050 by section 12 of the draft to delete that portion of the ORS section relating to proof of ouster in actions for the recovery of dower before admeasurement, commenting that the portion in question should be available with respect to dower vested

before the effective date of the proposed legislation. Zollinger moved, seconded by Allison, that section 12 be deleted from the draft. Motion carried.

For reasons given and discussed with respect to the deletion of sections previously, Allison moved, seconded by Zollinger, that section 13 (amending ORS 105.220, relating to parties defendant in partition suits, to delete a reference to tenants in dower and by the curtesy) be deleted from the draft. Motion carried.

Allison referred to the amendment of ORS 105.330 (relating to the valuation of certain estates for purposes of determining disposition of partition sale proceeds) by section 14 of the draft, and expressed the view that the portion of the ORS section pertaining to estates in dower or curtesy should be retained for use with respect to dower or curtesy vested before the effective date of the proposed legislation. He moved, seconded by Zollinger, that section 14 be deleted from the draft. Motion carried.

Allison commented that the amendment of ORS 105.340 (relating to provision for inchoate or future rights or interests in the case of partition sales) by section 15 of the draft was necessary to delete references to inchoate dower, but suggested that the deletions be limited to the word "inchoate" appearing twice in the ORS section. It was suggested that "married woman" also should be deleted. Allison moved, seconded by Butler, that the number of the section be changed from 15 to 10, and that the wording of the pertinent portion of ORS 105.340 be as follows: "* * * when it appears that <u>there is</u> a [married woman has an inchoate] right of dower in any of the property sold, or that any person * * *." Motion carried.

Allison referred to the amendment of ORS 107.280 (relating to property awards and extinguishment in separation from bed and board cases) by section 16 of the draft, and suggested that, for reasons given and discussed with respect to previous sections of the draft, the reference in the ORS section to dower and curtesy be retained and a reference to the proposed claim of marital right established by a filed declaration be added. Zollinger commented that vested dower or curtesy would not be involved in a separation from bed and board case. Jaureguy pointed out a typing error in the fourth line of section 16, that "an" should be "in." After further discussion, Allison moved, seconded by Butler, that the number of the section be changed from 16 to 11, and that the wording of ORS 107.280 be as follows: "* * * the party at whose prayer [such] <u>the</u> decree was granted shall be awarded in individual right * * * as tenants by the entirety at the time of [such] <u>the</u> decree * * *. The court may, in making [such] <u>the</u> award, decree that [dower and curtesy, as well as] <u>marital rights,</u> homestead rights * * *." Motion carried.

Riddlesbarger referred to ORS 111.130 (relating to the effect of advancements to issue on the part to be given to the widow), as amended by section 17 of the draft, and questioned the meaning of the reference in the ORS section to "part to be given to" the widow. After discussion, it was agreed that "share" should be used instead of "part." Frohnmayer questioned the reference to the "value" of the advancement, and suggested that the reference should be to the "amount" of the advancement. Jaureguy expressed some doubt as to the necessity of the ORS section. Butler noted that the ORS section had been on the books for a long time, and commented that elimination thereof at this time might create confusion. Jaureguy moved, seconded by Butler, that the number of the section

be changed from 17 to 12, and that the ORS section be amended to read as follows: "If the intestate leaves a [widow] surviving spouse and issue, and any of [such] the issue has received an advancement from the intestate in his lifetime, the [value of such] advancement shall not be taken in consideration in computing the [part to be given to the widow, but the widow shall only be entitled to receive one-half of the residue, after deducting the value of the advancement] share to which the surviving spouse is entitled." Motion carried unanimously.

Allison expressed approval of the amendment of ORS 114.020 (relating to who may make a will) by section 18 of the draft. Frohnmayer suggested that the ORS section be revised to simplify the description of who may make a will. After further discussion, Riddlesbarger moved, seconded by Jaureguy, that the number of the section be changed from 18 to 13, and that the ORS section be amended to read as follows: "[Every] Any person [of 21 years of age and upward, or] who has attained the age of majority [as provided in ORS 109.520, of sound mind, may, by will, devise and bequeath all his or her estate, real and personal, saving to the widow, if any, her dower, and to the widower, if any, his curtesy] and is of sound mind may make his will." Motion carried. Frohnmayer suggested that at some point the committee should consider reducing the age qualification for making a will, and commented that in some states persons who are 18, 19 or 20 years old are considered competent to make their wills. Zollinger commented that if a married person less than 21 years old [Note: See ORS 109.520.] was considered competent to make his will, it was difficult to argue that an unmarried person of the same age was not so competent.

Frohnmayer suggested, and Allison agreed, that the deletion of the reference to dower and curtesy from subsection (1) of ORS 118.010 (relating to the subjects of inheritance tax) by the amendment of the ORS section by section 19 of the draft was unnecessary. Frohnmayer moved, seconded by Allison, that section 19 be deleted from the draft. Motion carried.

Allison moved, seconded by Carson, that the number of section 20 of the draft be changed to 14, and that the section (repealing a considerable number of ORS sections relating wholly to dower and curtesy) be approved. Motion carried.

Riddlesbarger suggested that someone should review the entire draft, with the changes therein approved by the committee. Dickson asked Allison to undertake this review and the preparation of a revised draft to be distributed to members and considered by them. Allison agreed to undertake the preparation of a revised draft, and indicated that he would consult with Lundy on the project. Dickson offered the facilities of his office to assist Allison.

2. 1964 Proposals of Bar Committee on Probate Law and Procedure. Zollinger suggested, and Dickson agreed, that the committee should turn to a consideration of the two items of legislation proposed by the Bar Committee on Probate Law and Procedure, approved by the Bar and referred to the advisory committee, on which action had not been completed by the advisory committee at its last meeting. [Note: See Exhibits D and E, Minutes, Probate Advisory Committee Meeting, 11/14/64, Appendix A.]

a. Waiver of appraisal of estates of decedents (Exhibit D). Butler suggested

that responsibility for having the estate of a decedent appraised might be imposed upon the executor or administrator, leaving it to him to do the appraisal himself or to employ expert appraisers, subject to approval of the appraisal for inheritance tax purposes by the State Treasurer. Zollinger commented that this approach would require amendment of ORS 118.630 as well as ORS 116.420.

Allison suggested, and Dickson agreed, that it might be desirable to amend ORS 116.420 to permit the court to appoint "one or more" appraisers in the case of any estate and to delete the present requirement of three appraisers and the exception as to one appraiser where the value of the estate did not exceed $10,000. Dickson commented that a maximum limit on the number of appraisers to be appointed by the court might be imposed. Zollinger stated that he saw no reason for such a limit.

Zollinger expressed the view that in the case of an estate consisting solely of cash, the court should have the authority to waive the appointment of all appraisers. He commented that the portion of subsection (1) of ORS 116.420, as amended by Exhibit D, relating to waiver by the court of the appointment of appraisers need not be conditioned as set forth therein. He suggested that the wording might be, simply, that "the court in its discretion may waive the appointment of any appraisers," noting that the court was unlikely to waive the appointment in the event of any uncertainty as to the value of the estate or if the estate was subject to tax.

Jaureguy suggested, and Dickson and Zollinger agreed, that some provision should be made authorizing the court to appoint an appraiser for a specific item of property. Jaureguy noted that it was presently customary for the three appraisers to sign the appraisal and all receive the same compensation for the work of appraising, regardless of whether all participated in the work of appraising all property of the estate. Dickson and Zollinger commented that appraisers should be compensated only on the basis of the work of appraising they actually did, and that there should be a single inventory listing all property of the estate at its appraised value, but with appraisers' certificates limited to the property actually appraised by each appraiser.

Allison expressed the view that subsection (2) of ORS 116.420, as amended by Exhibit D, should be deleted. Zollinger suggested, and Dickson agreed, that there was no need for subsection (3) of ORS 116.420, as amended by Exhibit D.

After further discussion, Zollinger moved, seconded by Carson, that Exhibit D be revised to amend ORS 116.420 and 116.425 to read as follows: "116.420. Before the inventory is filed, the property therein described shall be appraised at its true cash value by [three] <u>one or more</u> disinterested and competent persons, who shall be appointed by the court. [; provided, that the court may * * * certified copy of the order of appointment shall be filed with the inventory.] <u>The court may direct that specific property shall be appraised by a person or persons designated by the court. The court may waive the appointment of any appraisers with respect to any of the property described in the inventory.</u>"; and "116.425. (1) [Each appraiser is entitled to receive compensation not in excess of the following rates:] <u>An appraiser designated by order of the court to appraise a property or properties is entitled to receive compensation not in excess of the following rates for the property or properties appraised by him:</u> * * *." Motion carried.

b. Sale of property of decedent under power in will (Exhibit E). Carson suggested that the words "produced from a well drilled" in ORS 116.825, as amended by Exhibit E, be deleted, and that "produced from the premises" or "produced pursuant to the lease" be used instead of the deleted words.

The committee agreed that the reference to an administrator with the will annexed, deleted from ORS 116.825 by the amendment thereof by Exhibit E, should be restored.

Zollinger expressed the view, with which Carson agreed, that there should be court confirmation of the sale of real property under a power granted in a will. Dickson noted that if the reference to ORS 116.805 was deleted, the court could act to confirm such a sale without the waiting period for the filing of objections required by that ORS section. After further discussion, the committee agreed that Exhibit E should be revised to amend ORS 116.825 to read as follows: "When a testator makes provision in his will for * * * which may be produced [from a well drilled] pursuant to [such] the lease, or other disposition * * * as directed, by the executor or administrator with the will annexed, [without an order of the court * * * in which case he is governed by such direction in such respects] without regard to any statutory requirements or procedure except that in the case of the sale of real property a return of sale shall be filed and the sale shall be confirmed by order of the court in the manner required by ORS 116.805 and 116.810."

Allison indicated that he would consult with Lundy on the redrafting of Exhibits D and E with the revisions thereof approved by the committee.

3. Court Confirming Sale of Real Property by Executor or Administrator. Butler again raised the matter of conforming the provision of the probate statutes relating to court confirmation or vacation of the sale of real property by an executor or administrator (i.e., ORS 116.810) with the comparable provision of the guardianship statutes (i.e., ORS 126.456). After brief discussion, Zollinger moved, seconded by Butler, that the committee propose legislation to amend ORS 116.810 to conform its wording to that of ORS 126.456. Motion carried. Allison indicated that he would consult with Lundy on the drafting of this proposed legislation.

4. Next Meeting of Advisory Committee. Frohnmayer suggested, and the committee agreed, that the next meeting of the advisory committee should be scheduled for Friday, January 8, at 2 p.m., in Salem, so that as many members as possible could be in Salem for the meeting of the Law Improvement Committee to be held that day. Dickson indicated that he would ask Lundy to reserve a room in the capitol building for the advisory committee meeting, to have a notice of the meeting and its place posted near the entrance to the capitol building or inform the capitol guide service of the meeting and its place, and to report to Dickson on the room reserved for the meeting so that Dickson could notify the members of the advisory committee and the Bar Committee on Probate Law and Procedure. Allison commented that McKay, Chairman of the Bar committee, with whom he had conferred earlier, had indicated that he (McKay) would try to arrange for the Bar committee to meet with the advisory committee on January 8 in Salem.

Zollinger suggested that the legislation proposed by the Bar committee,

approved by the Bar and referred to the advisory committee should be the first order of business for consideration by the two committees at its joint meeting on January 8. It was pointed out that other items that should be on the agenda for the January 8 meeting were the proposed legislation relating to guardianship and conservatorship and small estates.

Noting that the Legislative Counsel's office would be unable to furnish secretarial assistance for advisory committee meetings during the 1965 legislative session, Dickson commented that he could provide secretarial assistance from his staff for the January 8 meeting, but that other arrangements should be made for subsequent meetings. Zollinger suggested that Lundy be asked whether moneys for the law improvement program were available for the purpose of securing secretarial assistance for the advisory committee. Allison volunteered to ask Lundy about this financing matter.

Riddlesbarger suggested that the committee should give some thought to its future program, and possible participation therein by the Bar committee. Dickson remarked that the Bar committee might be asked whether it was willing to undertake some research work in connection with the probate law revision project. Zollinger commented that the notices to members of the advisory committee on the January 8 meeting should include a reminder to be considering the role the Bar committee might play.

Frohnmayer extended an invitation to the committee to hold one of its regular meetings next summer in Medford. He suggested that members might be accompanied by their wives, and offered the use of his home as the place of the meeting. Dickson, on behalf of the committee, accepted Frohnmayer's invitation.

The meeting was adjourned at 1 p.m.