

ADVISORY COMMITTEE
Probate Law Revision

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

Dates) 1:30 p.m., Friday, December 16, 1966
and: and
Times) 9:00 a.m., Saturday, December 17, 1966
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland

Suggested Agenda

1. Approval of minutes of November meeting.
2. Reports on miscellaneous matters.
3. Chapter 117 continued, Periodic Accounting and Distribution (A draft prepared by Mr. Tassock, Mr. Richardson and Mr. Keller was sent to all committee members prior to the November meeting).
4. Probate Code Outline. (A draft prepared by Judge Dickson, Miss Lisbakken and Mr. Richardson was sent to all committee members prior to the April, 1966 meeting. A draft is to be prepared by a subcommittee consisting of Judge Thalhofer, Mr. Gooding and Mr. Copenhaver, and a third draft is to be prepared by a subcommittee consisting of Judge Warden, Mr. Frohnmayer and Professor Mapp. (A draft prepared by Professor Mapp will be sent to committee members prior to the December meeting)
5. Sale or other disposition of estate property (ORS 116.705 to 116.900, draft by Mr. Zollinger and Mr. Lovett).
6. Unauthorized administration of personal estate of a decedent (ORS 116.990).
7. Ancillary administration (Draft by Professor Mapp and Mr. Riddlesbarger).
8. Next meeting.

ADVISORY COMMITTEE
Probate Law Revision

Thirty-First Meeting, December 16 and 17, 1966
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The thirty-first 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, December 16, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Frohnmayer (arrived 3:10 p.m.), Gooding, Husband (arrived 2:00 p.m.), Jaureguy, Mapp (arrived 2:30 p.m.). Carson, Lisbakken and Riddlesbarger were absent.

The following members of the Bar committee were present: Gilley, Krause, Biggs, Braun, Krammer, Lovett, McKenna, Meyers, Pendergrass, Piazza, Silven, Thalhofer and Thomas. McKay and Mosser were absent.

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

Minutes of November Meeting

There being no objection, the minutes of the last meeting (November 18 and 19, 1966) were approved as submitted.

Miscellaneous Matters

Bar Committee on Probate Law and Procedure. Chairman Gilley of the Bar committee told the advisory committee that the Bar committee would, if agreeable, continue to work in conjunction with the advisory committee, and at the completion of the Probate Code revision would assist in explaining and encouraging the adoption of the revised code by the Bar at large. Dickson welcomed their assistance and offered his courtroom as a meeting place for the Bar committee to meet either preceding or following the future joint committee sessions.

Approval and time schedule of final draft of revised probate code. In reply to a question by Gilley, Lundy proposed that the first rough drafts of approved segments of the code together with questions encountered in drafting would be submitted to the individuals or subcommittees who had been primarily responsible for drafting of a particular segment prior to distribution to the committees. In that way some of the ambiguities could be resolved prior to the time they would be considered by the committees. When all segments had been approved, they could be assembled in one document to again be brought before the entire group. Gilley asked if Lundy could suggest a tentative time schedule and was told that hopefully the entire document would be ready for consideration before the end of the summer of 1967.

Secretarial assistance. Sorte reported that Legislative Counsel was receiving applications for replacement of the current reporter and would arrange to have someone available in time for the January meeting.

Recovery of preferential payments in bankruptcy. Gilley indicated that Judge Estes Snedecor, Referee in Bankruptcy, had requested him to advise the committees that Judge Snedecor was serving on a committee of referees who were considering the problem of unlawful preference as it related to decedent's estates and asked if the committees would consider setting up a procedure in the probate code for recovery of preferential payments. Dickson commented that Gooding had done considerable research on creditors' rights and appointed Gooding, Gilley and Pendergrass to meet with Judge Snedecor to discuss the problem. He directed that creditors' rights and insolvent estates be placed on the February agenda.

Arrangement of Proposed Revised Probate Code

An outline of the proposed revised probate code prepared by Dickson, Lisbakken and Richardson had been forwarded to members of the committees in May, 1966. An outline prepared by Mapp had been mailed on December 5, 1966, and the outline prepared by Gooding, McKay and Thalhofer dated December 14, 1966, was distributed to those present at the meeting. [Note: This latter outline constitutes Appendix A to these minutes.]

The committees considered the three outlines and decided to use the outline prepared by Dickson, Lisbakken and Richardson as a reference for discussion.

Zollinger was of the opinion that the pleading and procedure should be placed with the specific sections to which the proceedings referred. Krause suggested that provisions which were the same in various proceedings be placed together under general provisions.

Disposition of the remains of a decedent was discussed and Dickson pointed out that this was the first thing facing a personal representative and should appear early in the code. After further discussion, the committees agreed with Zollinger's suggestion that "Proceedings Prior to Administration" should precede "Devolution of Property."

Allison objected to including "Estates of Persons Presumed Dead": in chapter 112 because it was so seldom used. He suggested that subject be placed at the end of the code and Dickson agreed that it was not actually a proceeding prior to administration. Zollinger recommended that the cross reference to "Reopening Estates" be deleted from chapter 112 and treated in chapter 114.

Dickson noted that Mapp's outline included will contests under "Initiation of Administration", and commented that a will contest might be held at the beginning of the proceeding, and that chapter 113 would be a more logical place for that proceeding than in chapter 116.

Zollinger commented that he was not convinced it was necessary that "Proceedings Prior to Administration" be set forth in a separate chapter and suggested that it be combined in the chapter with "Administration of Estates Generally" by breaking the chapter into the following subheadings:

- (a) Initiation of Administration
- (b) Support of Spouse and Children
- (c) Powers and Duties of Personal Representatives

Dickson remarked that the committees were agreed that this was the proper order but were not in agreement that they should all be included in one chapter. Allison expressed approval of a separate chapter for "Proceedings Prior to Administration."

The Small Estates Act and Independent Administration were discussed and it was the concensus of the committees that these proceedings should be included at the beginning of the code preceding the chapter on "Devolution of Property".

Lundy pointed out that when the revised probate code appeared in the form of a bill it would not contain chapter numbers. Zollinger suggested that when the proposed code was presented to lawyers for their consideration it should contain ORS chapter and section numbers. Gilley and Piazza were of the opinion that such a procedure would invite confusion because the bill would undoubtedly be revised by the legislature and the numbering system would necessarily have to be revamped after the

bill was passed. After further discussion it was agreed that it would be advisable to number the chapters consecutively beginning with number one, with section numbers within the chapters in consecutive order.

Dickson pointed out that Mapp's outline contained a separate chapter for ancillary procedures and it was decided that this should be included under "Administration of Estates Generally."

Authority to Bring or Defend Suits and Actions

Zollinger advised the committees that he had studied ORS 116.105 and compared it with section 857.03 of the proposed Wisconsin probate code. He concluded that the Wisconsin section was better than ORS 116.105 and had amended the Wisconsin section to read:

"The personal representative shall collect and possess all of the decedent's estate; inventory all of the decedent's estate and property subject to inheritance tax and have appraised such as is required by law; collect all income and rent from decedent's estate; manage the estate and, when reasonable, maintain in force or purchase casualty and liability insurance; contest all claims except claims which he believes are valid [and which are not objected to by a person interested]; prosecute or defend such suits and actions as he shall deem justified in the interest of creditors, heirs, devisees and distributees; pay and discharge out of such estate all expenses of administration, taxes, charges and claims [allowed by the court, or such payments on claims as directed by the court]; render accurate accounts; make distribution; and do such other things as shall be directed by the court or required by law."

Sorte distributed the following memorandum dated December 14, 1966, dealing with title and possession of decedent's property:

"The section below is similar to section 24 of the memorandum dated November 14, 1966, prepared by Campbell Richardson, William Keller and William Tassock. The section below was approved by the committees in 1965. (See Minutes of the 9/18, 19/65 meeting at page 2). Perhaps the committees, at the December 1966 meeting, can combine the provisions of the section below and section 24 of the memorandum dated December 12, 1966."

Proposal #1

TITLE AND POSSESSION OF DECEDENT'S PROPERTY

Sec. 1. When a person dies intestate, title to his real

and personal property passes at his death to his heirs; if a decedent dies testate, title to his real and personal property passes at his death to those to whom it is given by his will. The title of the heirs or beneficiaries to the real and personal property of the deceased owner is subject to the rights of his surviving spouse and minor children and any claims for which the estate is liable. During administration, the personal representative shall be entitled to possession of the real and personal property and shall have power to sell, mortgage, lease or otherwise dispose of the same as provided in this title.

"NOTE: ORS 116.105 and ORS 117.320 are to be repealed."

The committees discussed the two proposals after which Zollinger moved approval of section 1 of Proposal #1 on the memorandum dated December 14, 1966, together with the repeal of ORS 116.105 and 117.320, and approval in substance of section 857.03 of the proposed Wisconsin probate code with the following two amendments in addition to those set forth above:

" . . . inventory all of the decedent's estate [and property subject to inheritance tax] and have appraised . . . pay and discharge out of such estate all expenses of administration, taxes, charges and claims approved by him and allowed by the court . . ."

Krause seconded the motion and it carried unanimously.

Sale, Mortgage and Lease of Property (Chapter 860, Proposed 1966 Wisconsin Probate Code)

Zollinger explained that he and Lovett had prepared a draft covering unauthorized administration of personal estates of a decedent (i.e., ORS 116.990) but had decided that chapter 860 of the proposed Wisconsin code entitled "Sale, Mortgage and Lease of Property" was superior to the draft they had prepared. He distributed Xerox copies of chapter 860 of the proposed Wisconsin code for the committees' consideration and noted that the drafts of the American Bar Association Committee on Probate Law and the Uniform Committee on Probate Law contained substantially the same provisions. [Note: A copy of chapter 180 of the proposed Wisconsin probate code is attached to these minutes as Appendix B]

Zollinger read section 860.01 together with the comment thereunder and moved, seconded by Piazza, that it be approved. After a brief discussion, the committees decided to consider the entire chapter before voting on individual sections. Zollinger withdrew his motion and Piazza withdrew his second.

Zollinger read section 860.03 and suggested adding the following language after the first sentence:

"At least ten days prior to each sale, mortgage or lease for a consideration in excess of X dollars, the personal representative shall make and file a written report thereof. The court may require that such sale, mortgage or lease be postponed until the personal representative files a bond or supplementary bond satisfactory to the court in the amount specified in the order."

Gilley asked Zollinger if he had considered the possibility of imposing penalties for contempt for violation of the restrictions in a will and was told that the penalty section would provide for contempt. Zollinger noted that he would have no objection to adding such a provision. Gilley observed that this penalty could be added to subsection (3) of section 860.11.

Gilley suggested that it might be advantageous to the estate to allow the personal representative to make a sale without prior notice to the court and proposed that an immediate report to the court after the sale be required rather than a report prior to sale. Zollinger expressed approval of the suggestion. Husband expressed the view that such a report would accomplish very little. Dickson objected to giving the personal representative an opportunity to "pass the buck" by receiving an order of confirmation of sale to provide interested parties with notice that a sale had been made. Dickson expressed the view that the report of sale would serve no useful purpose, and others agreed.

After further discussion, Zollinger read Wisconsin section 858.03, cross referenced to under section 860.03, and explained that the purpose of the section was that people interested in the estate were entitled to know the nature and value of the assets of the estate as soon as they became known. He suggested when that information was made available by the filing of an inventory, interested parties should have notice. He added that the cross reference to section 858.03 was the appropriate manner in which to handle the section and proposed that section 858.03 be incorporated into the Oregon code, but not in the sections having to do with sales. Dickson was of the opinion that 858.03 was not needed and that interested parties should be sent a notice of sale rather than an inventory. Gooding agreed and suggested elimination of the section. Allison expressed the view that if the committees were going to allow a sale by a personal representative without court order, the heirs and devisees in whom property was vested were legally entitled to a notice of a proposed sale of their property.

Dickson suggested that if the committees were concerned

about the question, they could subject the title in whom the property vested to the right to be sold by the personal representative by amending Proposal #1 which the committees had approved earlier. [Note: See page 5 of these minutes.]

Zollinger read the balance of chapter 860 and moved the adoption of section 860.01. The motion was seconded by Frohnmayer and carried in both committees.

Zollinger moved that section 860.03 not be adopted as a part of the proposed Oregon probate code. Frohnmayer seconded and the motion carried.

Piazza moved that there be a requirement that the personal representative file with the county clerk a report of the sale, describing the amount of the sale, the description of the property and information as to whom it was sold. Motion was seconded but failed to carry. Advisory committee voted 2 yes; 4 no. Bar committee voted 7 yes; 5 no.

Zollinger moved, seconded by Butler, that section 860.05 be approved with the following amendments:

"If property in an estate is [sold,] mortgaged or leased by a personal representative, [title passes] the transfer is effective subject to the rights of creditors having secured a interest in the property [sold] but free and clear . . ."

Motion carried.

The meeting recessed at 5:15 p.m.

The meeting was reconvened at 9:00 a.m., Saturday, December 17, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Butler, Carson, Frohnmayer, Gooding, Husband, Jaureguy and Mapp. The following members of the Bar committee were present: Gilley, Krause, Biggs, Braun, Kraemer, Lovett, McKenna, Meyers, Piazza and Thomas. Also present was James Sorte.

Sale, Mortgage and Lease of Property (Chapter 860, Proposed 1966 Wisconsin Probate Code (Cont'd))

The committees discussed the problem of an improper sale of estate property which resulted in damage that would be difficult

or impossible to establish. It was suggested that one way to prevent this would be to require a bond of the personal representative for the total value of the estate in the first instance. This would make the bonding company responsible for the personal representative's actions. They also discussed the injury that could be done to an attorney-client relationship by the attorney having to suggest to his client that he would have to be bonded even though the will provided that bond was not required. Dickson and Frohnmayer were of the opinion that a bond would be a better safeguard to the estate than requiring a report of sale to the court either before or after the sale. Gilley again advocated an explicit power and duty of the court to find the personal representative in contempt if a sale were made which was not allowed by a provision in the will.

Zollinger suggested that the committees take action on the balance of the sections in chapter 860 which had not been voted on the previous day and then attempt to crystallize their views concerning the consequences of a wrongful sale. Zollinger moved, seconded by Braun, that section 860.09 be approved. Motion carried.

Gilley commented that if the personal representative was to be left free to give a personal warranty, "himself personally or on" should be eliminated from Wisconsin section 860.07. Zollinger remarked that the section should express the intended purpose that a personal representative's sale of goods would be without warranty, express or implied, and the personal representative should not be in the position of binding himself or the estate.

After further discussion, Frohnmayer moved, seconded by Gilley, that section 860.07 be adopted with the deletion of "which are binding on himself personally or on the estate of the decedent." Zollinger expressed concern over the word "give" and suggested substitution of the following:

"Except as provided in section _____, any sale, mortgage or lease of property by a personal representative shall be without express or implied warranties."

He explained that the intent was that the personal representative could give no express or implied warranties in his capacity as personal representative. Frohnmayer withdrew his motion and Gilley withdrew his second. Zollinger moved, seconded by Frohnmayer, the adoption of the language he had just suggested. Motion carried.

Zollinger read section 860.11 and section 879.05. Piazza

contended, and Zollinger agreed, that it was not necessary to give notice to creditors. Zollinger moved, seconded by Braun, that the following language be substituted for the last two lines of section 860.11 (4):

" . . . notice given in accordance with section _____ to the person who would receive the property affected upon distribution in the absence of such sale, mortgage or lease."

In reply to a question by Krause, Zollinger explained that the intent was that there should be no sale in any situation without the consent of the specific beneficiary or notice to him. Piazza indicated that the section should clearly state that it was intended to apply to the persons receiving the property in the situation where the will prohibited the sale, but not in a case where the property had to be sold because the estate was insolvent. Motion carried.

Zollinger moved, seconded by Frohnmayer, that section 860.11 be approved as amended. Motion carried.

Frohnmayer suggested that the following be added to subsection (4) of 860.11: "unless the beneficiary joins in such lease, mortgage or sale." Zollinger indicated it would be more clear to include a subsection (5) to state:

"(5) If a personal representative shall threaten to make a sale in breach of duty, it may be enjoined at the suit of any party adversely affected thereby. If the personal representative shall sell any property of the estate in breach of duty, he shall be punished as for contempt. Any party adversely affected by a sale in breach of duty by the personal representative shall be entitled to recover from him all damages resulting therefrom together with such punitive damages, not exceeding twice the value of the property affected, as may be allowed by the court or jury. A sale shall not be deemed made in breach of duty if made with the consent of parties affected thereby."

Frohnmayer commented that the above subsection should include language to the effect that breach of duty would deprive the personal representative of his fee and be grounds for his removal. The committee decided that when the subsection was prepared in final form, it should include a provision that the personal representative who sells, mortgages or leases property in breach of duty shall not be entitled to compensation for his services and shall be grounds for removal of a personal representative.

Frohnmayr asked if punitive damages should be limited to twice the value of the property. There followed a discussion concerning methods of reimbursing the beneficiary for loss of an heirloom or a homestead which was wrongfully sold. Piazza urged inclusion of punitive damages irrespective of actual damages. Zollinger expressed the view that this would be too radical a departure from present practice and would establish a precedent for allowing punitive damages in cases where there were no actual damages.

Zollinger moved that the subsection be referred to Legislative Counsel for preliminary drafting and placed on the agenda for the January meeting. Gilley moved to further amend the motion to include an instruction to Legislative Counsel that provision be made for punitive damages whether or not there are actual damages. Butler seconded. Vote was taken on Zollinger's motion to refer subsection (5) to Legislative Counsel for drafting with the addition requested by Gilley and including a provision that the personal representative who sells, mortgages or leases property in breach of duty shall not be entitled to compensation for his services and shall be removed from acting in the capacity of personal representative. Motion carried.

Husband asked if the personal representative might find a loophole by saying, "I called the devisee or legatee and he said I could sell." Kraemer suggested that the provision for consent of the beneficiaries be placed in a separate subsection (6) where it would be more conspicuous and others agreed that this would be advisable.

After further discussion, Zollinger moved that subsections (4), (5) and (6) of section 860.11 be referred to Legislative Counsel for drafting, that copies be sent to all members of the committees and that it be placed on the January agenda. Frohnmayr seconded the motion, and it carried unanimously.

Carson pointed out that if section 860.13 were adopted, the committees would be abandoning provisions placed in the probate code some years ago, and which he considered to be highly desirable, which permitted the surviving partner to act as administrator for the deceased partner. Dickson pointed out that the committees had discussed self-dealing at the November meeting and agreed that it was all right if authorized. He expressed the view that section 860.13 was unnecessary. Zollinger agreed and moved, seconded by Gilley, that section 860.13 be omitted from the revised probate code. Motion carried.

Periodic Accounting and Distribution

Dickson reported that he had contacted Richardson and had

excused him from attending the meeting. Dickson asked that the remaining discussion on accounting and distribution be placed on the agenda for January 20, 1967, at 1:30 p.m., and Richardson would finish his discussion at that time.

Ancillary Administration

Dickson explained that Riddlesbarger had done a considerable amount of work on ancillary administration and wished to be present when this item was discussed. It was therefore added to the January agenda.

Unauthorized Administration of Personal Estate of a Decedent (ORS 116.990)

Zollinger commented that ORS 116.990 was bad law and moved that it be repealed without any attempt to offer any substitution in its place. Frohnmayer seconded and the motion carried unanimously.

Inheritance Tax Statutes (ORS 118.005 to 118.840)

Carson distributed the recommendations of the subcommittee with respect to inheritance tax statutes [See Appendix C of these minutes] and pointed out that it did not represent the unanimous opinion of the subcommittee on all subjects but was the first step in the preparation of a general outline.

Braun read the recommendations of the subcommittee concerning ORS 118.005 and 118.010. Husband asked why those sections were amended in 1965. Butler explained that prior to 1965 there was no tax on a general power of appointment unless the power was exercised. The husband, for example, could leave property in trust for the benefit of his wife, with a general power of appointment, and if the power was not exercised, the property would go to collateral relatives. In many instances the wife would not exercise the power and it would then pass to collateral relatives without tax. In 1965 the law was amended and the power of appointment is taxed whether exercised or not.

Carson explained the inconsistency in the law under ORS 118.020 as set forth in the subcommittee's recommendations and Dickson agreed that it should be corrected. McKenna indicated that the State Treasurer had taken the position that if a corporation is existing and a bequest is left to it, the bequest's exemption from taxation will turn upon the question of whether or not the corporation is "actually engaged" as stated in ORS 118.020 (1)(a). He suggested that the subcommittee consider

a clarification or definition of this language in view of the difficulty that had been encountered with it in the past. He pointed out that some codes say "organized and existing within the state" rather than "actually engaged." He explained that a corporation might be formed, but pending receiving more money, it was not "actually engaged."

Husband pointed out that he had encountered tax difficulties when a bequest was left to a lodge for building purposes. If the bequest was to carry on benevolent work, it was tax exempt, but if it was left for a building, it was not. He suggested that this point also be considered by the subcommittee.

Carson enlarged upon the problem set forth in the recommendations with respect to ORS 118.050. Husband noted that when the exemptions under the Federal Internal Revenue Code were adopted, they were adopted as of that moment and Carson commented that it would be helpful if the section stated this specifically.

The subcommittee recommended that elimination of the collateral tax under ORS 118.110 be considered. Frohnmayer commented that if the committees decided to parallel the state tax with the federal, the first thing they would have to do would be to eliminate the collateral tax. He suggested they might coordinate their efforts with the State Bar Committee on Taxation and abolish the collateral tax. Butler pointed out that it was an expensive tax to administer and caused estates to be held open for many years. Gooding inquired as to the amount of revenue produced from the collateral tax and it was agreed that the committees would need this information in order to know how much income would need to be recovered from another source to restore the revenue lost through abolition of the collateral tax. Zollinger remarked that it would also be helpful to have an adjustment of the lineal descendant rates that would produce the same recovery.

Dickson asked for a show of hands on a proposal to eliminate the collateral tax on both gift and inheritance taxes providing funds were recouped from some other source. The suggestion was favored unanimously. Carson indicated that he would meet with the Bar Committee on Taxation, determine whether or not it would be possible to work in conjunction with them, and report to the probate committees at the February meeting.

With respect to ORS 118.640 Braun pointed out that the committees had not covered appraisal problems in nonprobate estates and Carson said he assumed present practice would be continued.

Frohmayer asked if it would be advisable to bring Oregon law into conformity with Federal law by granting an alternate valuation date. The committee decided to discuss this at a later time.

The provisions of ORS 118.690 were discussed and it was generally agreed that the notice requirement was both cumbersome and unnecessary.

Dickson asked if the matter of apportionment had been covered and Carson remarked that Wisconsin had a provision to the effect that all succession taxes should be chargeable against the residual estate unless the will expressly provided otherwise. Gooding suggested that the law should not be changed in this respect.

After further discussion, Dickson asked that the discussion of inheritance tax statutes be continued at the February meeting.

January Meeting of Committees

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

Periodic Accounting and Distribution (ORS chapter 117)
(Richardson)

Allocation of income
(McMurchie)

Subsections (4), (5) and (6) of section 860.11, Proposed 1966
Wisconsin Probate Code

Ancillary administration
(Mapp and Riddlesbarger)

February Meeting of Committees

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

Creditors' rights and insolvent estates (Gooding, Gilley and Pendergrass to meet with Judge Snedecor)

Inheritance tax statutes (Carson, Braun and Lisbakken)
Elimination of collateral tax

The meeting was adjourned at 12:00 noon.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, 12/16, 17/66)

REPORT

December 14, 1966

To: Advisory Committee on Probate Law Revision and Bar
Committee on Probate Law and Procedure

From: R. Thomas Gooding, Duncan L. McKay and Judge Joseph J.
Thalhofer

Subject: Proposed Outline, Revised Oregon Probate Code.

Chapter 111 GENERAL PROVISIONS

Definitions
Jurisdiction and powers
Proceedings, pleadings and process
Persons feloniously causing death of another
Inheritance by nonresident aliens
Uniform simultaneous death act (ORS Chap. 112)
Penalties
Validating Acts

Chapter 112 INTESTATE SUCCESSION (mostly from ORS Chap. 111)

Intestate succession
Advancements
Effects of adoption and illegitimacy
Abolition of dower and curtesy

Chapter 113 WILLS (mostly from ORS Chap. 114)

Execution
Revocation
Rules of construction
Election against will
Effect of particular legacies and devises
Testamentary additions to trusts
Pretermitted children
Witnesses as beneficiaries

Chapter 114 INITIATION OF ESTATE PROCEEDINGS

Commencing estate proceedings (ORS 115.110 et seq)

Qualification and removal of personal representatives
(ORS 115.410 et seq)
Powers and duties of personal representatives generally
(ORS 116.105 et seq)

Chapter 115 ADMINISTRATION OF ESTATES GENERALLY (mostly from
ORS Chap. 116)

Support of surviving spouse and minor children
Discovery of assets
Inventory and appraisal
Processing claims against the estate
Payment of claims against the estate (ORS 117.110-180)
Sale or lease of property
Ancillary proceedings

Chapter 116 ACCOUNTING, SETTLEMENT AND DISTRIBUTION (ORS Chap. 117)

Periodic accounting
Partial distributions
Determination of heirship
Final account
Distribution to legatees, devisees and heirs
Reopening estates

Chapter 117 SUMMARY PROCEEDINGS

Small estates
Independent administration

Chapter 118 INHERITANCE TAX

Chapter 119 GIFT TAX

Chapter 120 ESCHEAT; ESTATES OF PERSONS PRESUMED TO BE DEAD

Chapter 121 ACTIONS AND SUITS AFFECTING ESTATES

Chapters 122 - 125

(Reserved for expansion)

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, 12/16, 17/66)

CHAPTER 860

SALE, MORTGAGE AND LEASE OF PROPERTY

- 860.01 Power of personal representative to sell mortgage and lease.
- 860.03 Inventory to be filed.
- 860.05 Free of creditor's claims.
- 860.07 No warranties.
- 860.09 Contract of decedent to sell or lease.
- 860.11 Special provisions in will; personal representative's duty to persons interested.
- 860.13 Who not to be purchaser, mortgagee or lessee without court approval.

SUMMARY OF CHAPTER

This chapter replaces chapter 316.

860.01 Power of personal representative to sell, mortgage and lease. A personal representative to whom letters have been issued by the probate court and whose letters are in effect has complete power to sell, mortgage or lease any property in the estate without notice, hearing or court order. The rights and title of any purchaser, mortgagee or lessee from such personal representative are in no way affected by any provision in a will of the decedent or any procedural irregularity or jurisdictional defect in the administration of the decedent's estate. A transfer agent or a corporation transferring its own securities incurs no liability to any person by making a transfer of securities in an estate as requested or directed by a personal representative.

COMMENT: This section gives to all personal representatives the power that is given to executors in most wills. It is the power which all personal representatives have always had over personal property in Wisconsin. Though a personal representative is given unrestricted power to sell, mortgage or lease property he will be held financially responsible to the persons interested if he acts carelessly or unreasonably. He "must act, not only honestly or with good faith in the narrow sense but must also exercise the duty of loyalty toward the beneficiary for whose benefit the power of sale is to be exercised and with such care and skill as a man of ordinary prudence would exercise in dealing with his own property." Estate of Scheibe, 30 Wis.2d 116, 140 N. W. 2d 196 (1966).

In conjunction with this section 72.05 (1) is amended and 72.05 (4) is created as follows:

"72.05 Lien

"(1) Personal liability. All taxes imposed by ss. 72.01 to 72.24 shall be due and payable at the time of the decedent's death, except as hereinafter provided; and except as provided in subsection (4) every such tax shall be and remain a lien upon the property transferred until paid, and the person to whom the property is transferred and the administrators, executors and trustees of every estate so transferred shall be personally liable for such tax until its payment . . . (4). The lien described in sub. (1) is transferred to the proceeds of the sale and the property passes from the estate free of any such lien when any property is sold from an estate by a personal representative, and the person to whom the property is transferred has no liability for such tax."

860.03 Inventory to be filed. Before any sale, mortgage or lease of property, except where the sale mortgage or lease is one which would have been in the ordinary course of business if made by the decedent prior to his death, the personal representative shall file with the court his inventory showing the value of all such property. Failure of the personal representative to comply with this requirement shall in no way affect the rights or title of the purchaser, mortgagee or lessee, but is prima facie evidence of breach of duty on the part of the personal representative.

Cross Reference: See Section 858.03 as to informing persons interested.

860.05 Free of creditor's claims . If property in an estate is sold, mortgaged or leased by a personal representative, title passes subject to the rights of creditors having a secured interest in the property sold but free and clear of any right in creditors which is based on the filing and allowances of a claim in the estate. The filing and allowance of a claim in an estate does not make one a secured creditor.

Cross Reference: Section 72.05 (4) provides that property sold from an estate by a personal representative passes free of any inheritance tax lien.

860.07 No warranties. Except as provided in s. 860.09 (2), a personal representative has no power to give warranties in any sale, mortgage or lease of property which are binding on himself personally or on the estate of the decedent.

860.09 Contract of decedent to sell or lease land. (1) Generally. When any person legally bound to make a conveyance or lease dies

before making the same and the personal representative fails or refuses to perform in accordance with the decedent's contract, any person claiming to be entitled to such conveyance or lease may petition the probate court for specific performance of the contract. Upon satisfactory proof the court may order the personal representative to make a conveyance or lease or may by its own order make a conveyance or lease to the person entitled there- to upon the performance of the contract.

(2) Warranties. If the contract for a conveyance required the decedent to give warranties, any instrument given by the personal representative or order by the court shall contain the warranties required. Such warranties are binding on the estate as though made by the decedent during his lifetime but do not bind the personal representative personally.

COMMENT: The purpose of this section is to provide a forum and procedure for the purchaser or lessee who seeks to specifically enforce a contract which he had with the decedent. If the decedent's contract required him to give a warranty deed, the purchaser's right to the warranties which the decedent agreed to give should not be cut off by the decedent's death.

860.11 Special provisions in will; personal representative's duty to persons interested. (1) Restriction. If the will of the decedent contains provisions which restrict the freedom of the personal representative to sell, mortgage or lease property, the personal representative breaches his duty to the persons interested if he sells, mortgages or leases such property other than in accordance with such restrictions, except in the situation covered in sub. (4).

(2) Specific bequest. If the will of the decedent contains a specific bequest of property, the personal representative breaches his duty to the specific beneficiary if he makes a lease of such property for a period which exceeds one year or mortgages or sells such property unless the specific beneficiary joins in such lease, mortgage or sale, except in the situation covered in sub. (4).

(3) Prohibition. If the will of the decedent contains provisions which prohibit the sale, mortgage or lease of property by the personal representative, the personal representative breaches his duty to the persons interested if he sells, mortgages or leases such property, except in the situation covered in sub. (4).

(4) Court may order sale, mortgage or lease. If the will of the decedent contains limitations described in subs. (1), (2) or (3) and the personal representative is unable to pay the allowances, expenses of administration and claims while complying with such limitations in the will, the court shall order the personal representative to sell, mortgage or lease such property in accordance with the appropriate terms and conditions of an order made after petition and hearing on notice given in accordance with s. 879.05 to all persons interested and all creditors of the estate.

COMMENT: Subsection (4) establishes a simple procedure for securing court authority to sell, mortgage or lease contrary to the provisions of the will when the proceeds are required to pay allowances, expenses of administration and claims. Compliance with this subsection protects the personal representative from liability to the persons interested. It is irrelevant to the rights and title of the purchaser, mortgagee or lessee.

860.13 Who not to be purchaser, mortgagee or lessee without court approval. The personal representative may not be interested as a purchaser, mortgagee or lessee of any property in the estate unless such purchase, mortgage or lease is made with the written consent of the persons interested and of the guardian ad litem for minors and incompetents and with the approval of the court after petition and hearing on notice given in accordance with s. 879.05 to all persons interested, or unless the will of the decedent specifically authorizes the personal representative to be interested as a purchaser, mortgagee or lessee.

APPENDIX C

(Minutes, Probate Advisory Committee Meeting, 12/16, 17/66)

To: ADVISORY COMMITTEE ON PROBATE LAW REVISION AND BAR
COMMITTEE ON PROBATE LAW AND PROCEDURE

From: SUBCOMMITTEE (Wallace P. Carson, Patricia Y. Braun and
Patricia A. Lisbakken) ON INHERITANCE TAX STATUTES
(ORS 118.005 to 118.840)

RECOMMENDATIONS

(1) 118.005 Definitions for ORS 118.005 to 118.840.
No alteration presently is recommended. May be deleted if
estate tax scheme, without inheritance tax feature, is recom-
mended.

(2) 118.010 Property, transfers and interests subject
to tax. Consider whether section(s) should, or should not, be
amended to the extent of restoring the provisions relating to
general powers of appointment to those that existed before the
1965 amendment of this section was made. It may be presumed that
the State Inheritance and Gift Tax Division would oppose an
amendment of that kind.

If estate tax scheme recommended, definition of gross estate
might better be cast in terms similar to Federal gross estate laws.

(3) 118.020 Taxability of transfers to governmental units
and certain private institutions. Amend this section in such
manner as to allow exemption of bequests and devises in trust
to an Oregon resident trustee under subsection (c) of section
(1) whether or not use thereof be made within Oregon.

(4) 118.030 Taxes upon devises and bequests in lieu of
commissions. No alteration presently is recommended. If estate
tax scheme recommended, then revise to provide a limitation on
deduction, rather than tax on inheritance.

(5) 118.040 Insurance included or exempt from taxation,
when: Consider adopting a greater basic exemption, rather than
restricting the exemptions which have substance to decedents who
were insurable, and who owned property in tenancy by the entirety.

(6) 118.050 Pension, retirement and social security bene-
fits exempt from taxation. Consider whether adoption of "exemp-
tions under the Federal Internal Revenue Code:" constitutes an

unconstitutional delegation of authority by the Legislative Assembly of Oregon.

Consider complete exemption of Social Security and Railroad Retirement benefits.

(7) 118.060 Reciprocal exemption of intangible personal property of nonresident decedent. No alteration is presently recommended.

(8) 118.070 Deductions from gross value of taxable estate. Consider whether to extend the provisions of section (2) "In unprobated estates," subsection (a), to permit deduction of "debts" therein mentioned to debts of the decedent paid by the surviving tenant by the entirety of real property or by the surviving holder(s) of personal property held jointly by the decedent and another, or others, with rights of survivorship.

Consider greater basic exemption in lieu of homestead deduction.

(9) 118.075 Cooperative housing unit as "homestead" under ORS 118.070. No alteration presently is recommended.

If homestead deduction is deleted, this section may be omitted.

(10) 118.080 Exemption of property previously taxed within five years. Consider graduated exemption over greater period.

(11) 118.090 Deductions in case of foreign estate liable to pay tax. No alteration presently is recommended.

(12) 118.100 Rates of tax and 118.110 Tax rate applicable to net estate after allowing deductions; apportionment. Consider elimination of collateral tax, with the understanding that the estate tax rates would be raised in order to achieve the same revenue.

(13) 118.210 to 118.390, inclusive, Lien; payment; compromise of tax. No alteration of the substance of any of these sections is presently recommended.

118.250 (3) should be revised to delete "a final accounting of an estate" and to substitute "approval of his final account of the administration of an estate." If estate tax scheme recommended, appropriate alterations would be required.

(14) 118.420 Notice to State Treasurer of administration of estates; determination of value; application by treasurer for letters. Could be omitted. If a release is required before an estate can be distributed, the PR can be counted upon to notify the Treasurer.

(15) 118.460 Reports by county clerks and custodians of deeds. Could be omitted.

(16) 118.480 Representative to notify State Treasurer of passage of real estate in trust. Could be omitted. Duplicates general filing requirements.

(17) 118.500 Appeals. Could be omitted. Appeal procedure covered in 118.700.

(18) 118.610 to 118.700 (Relating to inventory and appraisement). Recommendations of subcommittee composed of Herbert E. Butler and Wallace P. Carson presented and considered at October, 1966, joint meeting of the two principal committees. For results, see minutes of that meeting.

(19) 118.610 Duty of representative; filing inventory and appraisement; 118.620 Extension of time to file appraisement. Duplicate and are inconsistent with previous action on appraisals.

(20) 118.640 Immediate appriaisal; evaluating particular interests. Matter before semicolon: Should be made clearer that the taxable values are date of death values, whether or not the estate is "appraised . . . immediately upon the death of the decedent or as soon thereafter as may be practicable."

(21) 118.650 Fixing time and place of appraisement; notice; attendance of witnesses; report of appraisers; limitation on fees. Could be omitted.

(22) 118.660 Delivery to State Treasurer a copy of inventory and appraisement and other information. Consider omission of last sentence, include "heir of decedent, acceptable to the State Treasurer" in first sentence: e.g. "Every PR, or, if the estate is not probated or administered, an heir or trustee of decedent acceptable to the ST..."

(23) 118.670 Court's duty to determine tax; 118.680 Court may act on first inventory; and 118.690 Court to give notice on determination of value. Omit if the principal of extra-judicial determination of tax acceptable. However, provision for notice to persons whose taxes are being determined should be included, unless estate tax system adopted. Such notice could come from ST on receipt of report, and the giving of the notice could be the starting date for a period of objections.

(24) 118.700 Reappraisal; appeal. Consider establishing period for objection; upon whom should duty of objection be placed (i.e.: if the State Treasurer doesn't agree with the return, must he file or shall he issue notice of deficiency, binding if personal representative fails to file for judicial review); provide for appeal.

Chapter 112 Devolution of Property (Testate and Intestate)

Intestate Succession
Wills
Advancements
Effect of Adoption and Illegitimacy
Felonious Deaths
Escheat
Uniform Simultaneous Death Act
Residue of Dower and Curtesy
Cross reference to Inheritance Rights of Nonresident
Aliens; Estates of Persons Presumed Dead

Chapter 113 Proceedings Prior to Administration; Personal
Representatives; Initiation of Administration;
Estates of Persons Presumed Dead

Proceedings Prior to Administration
Incorporation of ORS 97.110 to 97.230
(Disposition of Human Bodies)
Delivery of Body for Scientific or
Medical Purposes (ORS 116.115)
Funeral Charges (ORS 117.150)
Special Administrator
Personal Representatives
Initiation of Administration
Estates of Persons Presumed Dead
Cross reference to Reopening Estates;
Notices; etc.

Chapter 114 Administration of Estates Generally

Support of Spouse and Minor Children
Homestead
Election Against Will
Powers and Duties of Personal Representative
Discovery of Assets
Inventory and Appraisal
Sale and Lease of Property
Borrowing
Continuing Business
Application of Revised Uniform Principal and Income Act
Interim Accountings
Partial Distributions

Chapter 115 Creditors' Claims and Rights; Actions and
Suits Affecting Decedent's Estate

Filing Claims Against Estate
Determination of Contested Claims
Actions (ORS 121.020 to 121.100)
Suits (ORS 121.210 to 121.370)

Chapter 116 Determination of Rights, Estates and
Beneficiaries

Determination of Heirship
Will Contests
Inheritance Rights of Nonresident Aliens

Chapter 117 Settlement and Distribution; Reopening Estates

Right of Retainer
Final Account
Distribution to Legatees, Devisees and Heirs
(ORS 117.310 to 117.390)
Reopening Estates

Chapter 118 Inheritance Tax

Chapter 119 Gift Tax

Chapter 120 Small Estates

Chapter 121 to 125 /Reserved for Expansion/

Chapter 113 Initiation of Administration

Venue

Special Administrator

Probate of Will

Will Contests

Appointment of Personal Representative

Bond of Personal Representative

Chapter 114 Administration of Estates

Support of Spouse and Children

Powers and Duties of Personal Representatives (Generally)

Resignation or Removal of Personal Representatives

Inventory and Appraisal

Collection and Management of Estates

Sale, Mortgage and Lease of Property

Claims

Accounting

Distribution and Discharge

 Partial Distribution

 Final Distribution

 Determination of Heirship

Reopening Administration

Chapter 115 Summary Procedures

Small Estates Act

Independent Administration

Chapter 116 Ancillary Procedures

Uniform Probate of Foreign Wills Act

Uniform Ancillary Administration of Estates Act

**Chapter 117 Liability of Beneficiaries of Estate
for Decedent's Debts**

(ORS 121.230 - 370)

See Article 12 of 1966 Revised New York Code
(Substantive).

Chapter 118 Inheritance Tax

Chapter 119 Gift Tax

Chapters 120 - 125 (Reserved for Expansion)