

December 1, 1965

To: All Members of the Oregon State Bar Committee on Probate Law and Procedure, and Oregon Probate Law Revision Advisory Committee

MEETING NOTICE

Date and Time: Friday, December 17, 1965, at 1:30 P.M.,
continuing Saturday, December 18, 1965.

Place: Judge Dickson's Courtroom
244 Multnomah County Courthouse
Portland, Oregon

- Agenda:
1. Consideration of Reciprocal Rights of Inheritance - Non-Resident Aliens. (Peter Schwabe and Walter L. Barrie.)
 2. Continuation of November discussion on Wills, as presented by Mr. Riddlesbarger, his paragraph No.6, No.12, and Nos.14 et seq.
 3. Continuation of September discussion concerning Advancements and Retainer. (Mr. Frohnmayer.)
 4. Consideration of Chapter 115, including Proof of Wills, Priority of Right to Administer and Administrator's Bond. (Messrs. Riddlesbarger and Frohnmayer.)

Note: One and one-half day meetings are scheduled through August 1966 for the third Saturday of each month, all day, and the preceding Friday afternoon.

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ADVISORY COMMITTEE
Probate Law Revision

Twentieth Meeting, December 17 and 18, 1965
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The twentieth 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 17, 1965, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger (arrived 4 p.m.), Allison, Butler, Frohnmayer, Gooding, Jaureguy, Lisbakken and Riddlesbarger. Carson and Husband were absent.

The following members of the Bar committee were present: Bettis (arrived 3 p.m.), Gilley, Braun, Field, Krause, Lovett, Rhoten, Tassock and Thalhofer. Boivin, Copenhaver, Hornecker, Luoma, Richardson and Warden were absent.

Also present were Walter L. Barrie, Assistant Attorney General; Peter A. Schwabe, Portland attorney; and Robert W. Lundy, Chief Deputy Legislative Counsel.

1. Inheritance by Nonresident Aliens. Dickson noted that Barrie and Schwabe had been invited to submit their views and recommendations on the matter of inheritance by nonresident aliens and the present Oregon reciprocity statute (i.e., ORS 111.070) governing this matter. He indicated that both Barrie and Schwabe had sent him letters on the subject [Note: Copies of a memorandum, dated December 14, 1965, containing reproductions of these letters were distributed to all members of both committees before the meeting], and that they were present at the meeting to comment orally.

Schwabe recommended repeal of ORS 111.070, expressing the view that it was unfair to Oregon residents who have relatives in foreign countries to deny by Oregon law the right of those residents to leave, by will or intestacy, all or part of their estates to those relatives. He commented that ORS 111.070 had been more strictly applied by the Oregon Supreme Court than a similar California statute by the Supreme Court of that state. He suggested that, if the committees were inclined to favor retention in Oregon law of a principle of not benefiting hostile foreign governments, a statute similar to that of New York (i.e., N.Y. Surr.Ct. Act §269-a), which embodies the so-called "benefit" rule whereby inheritances to nonresident aliens are conditioned

upon their receipt thereof free from confiscation by their governments, might be adopted in lieu of ORS 111.070.

Barrie recommended retention of ORS 111.070, but suggested that the section might be amended to require notice to the State Land Board of circumstances that might result in escheat under the section, to clarify an ambiguity in the wording of the section and, possibly, to provide for recovery of escheated estates by nonresident aliens if the conditions of the statute should be satisfied in the future. He commented that there was at present no federal control on the administration and distribution of estates, and that this circumstance supplied one answer to the absence of federal control on the passing of estates to nonresident aliens. He stated that the basic question was whether Oregon should extend benefits through the distribution of estates to heirs in Communist countries without reciprocal benefits being extended by those countries. He noted that, by the manipulation of rates of exchange for foreign currency, some countries (Czechoslovakia, for instance) are making substantial profit on moneys from the United States going to heirs in those countries. He explained and commented upon the "benefit" rule.

Allison asked whether the Oregon reciprocity statute had been effective in inducing foreign countries to liberalize their laws or practice on inheritance by United States citizens. Schwabe responded that he did not know of a single European country that prohibited inheritance by United States citizens from its own citizens and that in recent year hundreds of American heirs actually had received their inheritances from foreign citizens, but that it was a question whether this policy was in fact a result of state reciprocity statutes in this country or of the recent increase in assets of citizens of foreign countries. In response to questions by Frohnmayer, Schwabe stated that so far as he knew neither Russians nor Poles were prohibited by their governments from accepting inheritances from United States citizens, nor did those governments confiscate any of such inheritances.

In response to a question by Butler, Barrie estimated that perhaps \$100,000 escheated each year under ORS 111.070.

Butler suggested that if Oregon law allowed a bequest to a Russian citizen, it might be next to impossible to obtain guaranteed delivery of the funds to the legatee, and asked whether a custodial arrangement would have to be employed in this circumstance. Schwabe commented that distributions were being made to Russian citizens because of proof of actual delivery. Butler noted that the New York statute applied not only to money but to other property, and that responsibility for custody under the statute was in the probate court. He

suggested that, if the approach of the New York statute were adopted in Oregon, it might be preferable to place custodial responsibility in the State Land Board, which presently handles escheated estates, instead of in the probate court. Schwabe indicated that in New York the liquidation of personal property was usually required, although the sale of securities was not insisted upon, and that money was actually deposited in a bank and the deposit record given to the probate court. He stated that if the committees were disposed to favor a statute similar to that of New York, he would be willing to draft such a statute. He expressed the view that he could improve upon the New York statute, but commented that the committees might prefer a statute almost exactly like that of New York in order to obtain the benefit of the New York court decisions and practices. Barrie noted that the "benefit" rule was a part of the Oregon statute (i.e., ORS 111.070(1)(c)), and to that extent Oregon already had the benefit of the New York decisions.

Dickson stated that he understood that Barrie and Schwabe were willing to furnish additional information on the matter and to assist in drafting a proposed new Oregon statute if the committees decided that the present Oregon law should be changed.

At this point (2:30 p.m.) Barrie and Schwabe let the meeting.

Allison expressed the view, with which Jaureguay agreed, that the effect of ORS 111.070 was unjust to individuals who happened to live in certain European countries; that the apparent aim of the statute was to put pressure on foreign governments, but that in many instances the individual citizens were unable to influence the policies of their governments. He suggested that foreign heirs would be protected if their inheritances were preserved for them until there was some guarantee that they would receive the inheritances.

Lovett and Dickson indicated that they favored the reciprocity approach of the present Oregon statute. Dickson suggested that moneys constituting inheritances of foreign heirs should be held until such time, without limit, as the reciprocal conditions would be satisfied, and that the moneys so held should draw interest to go to the holder rather than the heirs; that this situation would provide an incentive on the part of foreign heirs to press for reciprocity on the part of their governments.

Riddlesbarger expressed the view that the Oregon reciprocity statute did not constitute an invasion of the federal prerogative of handling foreign relations, and that while the

statute might have some such side effect, its primary aim reflected state responsibility to Oregon residents to enable them to inherit from foreign citizens. Frohnmayer commented that the approach of the Oregon statute supported the proposition that all states might adopt any manner of legislation with regard to the matter of inheritance by foreign heirs, but that apparently few states had in fact done so. He stated his opinion that this was a matter that should be left to the federal government and that the Congress might do something about this matter in the near future.

Frohnmayer moved, seconded by Braun, that ORS 111.070 be repealed. Motion failed both committees by a separate vote of each.

Allison moved, seconded by Jaureguy, that the committees approve a "benefit" statute, either one based upon the New York statute or one prepared by a subcommittee, with provision that a custodian should determine whether inheritances should go to foreign heirs immediately or be held until some guarantee was obtained that those heirs would actually receive the inheritances, but with no reciprocity requirement. Braun noted that the motion contemplated removal of the present escheat factor, and suggested a separate vote on this matter. Dickson expressed the view that the purpose of the motion was to obtain the general opinion of the committees, and that specifics could be worked out by a subcommittee and then submitted to the committees for consideration and final approval. Motion carried both committees by a separate vote of each.

Dickson appointed a subcommittee, consisting of Allison, Lisbakken, Lovett, Barrie and Schwabe, to prepare and submit to the committees at their joint meeting in February proposed legislation in accordance with the adopted motion.

Frohnmayer remarked that there had been mention of accumulating indefinitely the income of inheritances held in custody for foreign heirs and noted that such accumulation would be contrary to trust principles. He suggested, and Dickson agreed, that provision should be made for termination of the custody at some point.

2. Wills. The committees returned to consideration of a draft of a proposed chapter on wills, which had been distributed by Riddlesbarger at the meeting on November 19, 1965, and portions of which had been discussed and acted upon by the committees at the meeting on November 19 and 20. [Note: A copy of this draft, as it existed before revision of portions thereof at the November 19 and 20 meeting, constitutes Appendix A to these minutes.]

a. Testamentary additions to trusts (sections 6, 7 and 8). Riddlesbarger referred to sections 6, 7 and 8 of the wills draft, noting that these sections were derived

from sections 275, 276 and 277, 1963 Iowa Probate Code, which in turn had been adapted from the Uniform Testamentary Additions to Trusts Act (approved in 1960 by the National Conference of Commissioners on Uniform State Laws). He remarked that these sections were intended to replace ORS 114.070.

Riddlesbarger commented that at the last meeting Richardson had called his attention to an article on the Uniform Act in the August 1965 issue of "Trusts and Estates," and that action by the committees had been postponed pending his study of the article. [Note: A copy of this article constitutes Appendix B to these minutes.] He stated that the article had convinced him that a provision similar to that of New Jersey (i.e., New Jersey Statutes Anno. (1962) § 3A:3-16.4) should be added to the draft, as follows: "This Act shall not be construed as providing an exclusive method for making devises or bequests to trustees of trusts created otherwise than by the will of the testator making such devise or bequest."

The committees discussed at some length the phrase "the validity of which is determinable by the law of this state" in section 6. Riddlesbarger called attention to the explanation for this phrase set forth in the "Trusts and Estates" article. There was a difference of opinion among the members of the committees as to the meaning of the phrase, as well as to the necessity or desirability thereof. Some members took the view that the phrase meant that if the validity of a devise or bequest was not determinable by the law of Oregon, but rather by the law of some other state, then the pour-over would not be valid in Oregon. Others were of the opinion that if such validity was determinable by the law of some other state, then the section would merely be inapplicable, and the law of the other state would be applied in Oregon to determine the validity of the pour-over. To the suggestion that the phrase might be deleted, Dickson and Tassock pointed out that the phrase was a part of the Uniform Act and that there were advantages, such as the decisions in other states that had adopted the Uniform Act, in adhering to the wording of the Uniform Act. Dickson suggested, and the committees agreed, that action on the phrase should be postponed until more information on its meaning had been obtained. Riddlesbarger was requested to study this matter further and report thereon to the committees at their joint meeting in February.

Butler referred to the phrase "may be made by a will to the trustee of a trust established, or to be established" in section 6, and suggested that "by a will" was superfluous.

Riddlesbarger called attention to the wording of

ORS 114.070 requiring that the devise or bequest be to a trust "established by written instrument executed prior to the execution of such will," and indicated his preference for the provision of section 6 specifying that the devise or bequest would not be invalid "because the trust was amended after the execution of the will or after the death of the testator," pointing out that the latter wording was the same as that of the Uniform Act, the 1963 Iowa Probate Code (section 275) and the 1965 Washington Probate Code (section 11.12.250).

Allison remarked that the wording "not be invalid because the trust was amended after the execution of the will or after the death of the testator" in section 6 appeared inconsistent with the subsequent wording "shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator***." He suggested that, to eliminate what appeared to him to be a contradiction, there be inserted a provision that the devise or bequest would not be invalid because the trust was amendable or revocable, or both. Frohnmayer and Butler expressed their opinions that there was no inconsistency between the two phrases referred to by Allison because these phrases dealt with different aspects of the matter. Butler commented that the first phrase concerned the validity of the devise or bequest, while the second concerned administration of the property devised or bequeathed. Frohnmayer noted, however, that the Uniform Act contained the provision suggested by Allison.

Butler moved, seconded by Riddlesbarger, that the committee approve the Uniform Act, with the addition of the New Jersey provision suggested by Riddlesbarger. Motion carried. [Note: The adopted motion is subject to the report by Riddlesbarger on the phrase "the validity of which is determinable by the law of this state," and action thereon by the committees at their joint meeting in February.]

b. Bond or agreement to convey property devised as a revocation (section 12). Riddlesbarger referred to section 12 of the wills draft, pointing out that it was the same as ORS 114.140. He suggested deletion of "the" in the phrase "for the specific performance or otherwise," and "by law" in the phrase "as might be had by law against the heirs of the testator or his next of kin." Allison suggested that "executory contract of sale" be substituted for "bond, covenant or agreement" in section 12.

Allison moved, seconded by Riddlesbarger, that Lundy redraft section 12, with the aim of simplifying and improving the wording thereof to the extent possible, but retaining the present meaning. Motion carried unanimously.

c. Testator's intent (section 14). Riddlesbarger noted that section 14 of the wills draft was the same as ORS 114.210. He also pointed out that Jaureguy and Love (see 1 Jaureguy & Love, Oregon Probate Law and Practice § 436 (1958)) had questioned the necessity, as well as the literal accuracy, of ORS 114.210.

Field moved, seconded by Braun, that section 14 be deleted. Motion carried unanimously.

Dickson questioned the accuracy of the division heading "Rules of Construction" preceding section 14. Lundy commented that the heading did not have the status of law, but rather was merely an editorial aid.

d. Construction of devise for life with remainder in fee to children (section 15). It was pointed out that section 15 of the wills draft was the same as ORS 114.220. The committees agreed that "effect" should be substituted for "construction" in the leadline of the section.

Zollinger called attention to the provision of the 1965 Washington Probate Code (section 11.12.180) similar to section 15. The Washington statute reads as follows: "If any person, by last will, devise any real estate to any person for the term of such person's life, such devise vests in the devisee an estate for life, and unless the remainder is specially devised, it shall revert to the heirs at law of the testator."

After further brief discussion, it was decided to postpone consideration of section 15 until the following day.

The meeting was recessed at 5:10 p.m.

The meeting was reconvened at 9 a.m., Saturday, December 18, 1965, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

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

The following members of the Bar committee were present: Bettis, Gilley, Braun, Field, Hornecker, Krause, Lovett, Rhoten, Tassock and Thalhofer.

Also present was Lundy.

d. Construction of devise for life with remainder in fee to children (section 15). The committees continued

consideration of section 15 of the wills draft, which had been begun the preceding day.

Allison, noting that the application of section 15 and ORS 114.220 was limited to real property, raise the question of extending this application to personal property. He referred to a passage on this matter in Jaureguy & Love (see 1 Jaureguy & Love, Oregon Probate Law and Practice § 414, at p. 403 (1958)), which reads as follows:

"The Oregon statute applies only to devises of real estate. Personal property is not mentioned. It seems rather clear, however, that the rule in Shelley's case applies to personalty, at least by analogy, as well as to real property. The statue here does not change the law."

Allison suggested and Frohnmayer agreed, that the application of section 15 should be extended to personal property by substitution of "property" for "real estate" in the section.

Zollinger suggested that the words "in fee" and "in fee simple" be deleted from section 15, commenting that these words of limitation were not necessary for accomplishment of the purpose of the section and that the application of the section should not be so limited. Gilley commented that the quoted words would be inappropriate if the application of the section was extended to personal property.

Riddlesbarger raised the question of the meaning of the words "right heirs" in section 15. Gilley expressed his opinion, with which Dickson agreed, that right heirs were heirs of the blood. Dickson elaborated that an adopted child, for example, would not be a right heir. Frohnmayer suggested that "right heirs" be deleted from section 15, so that the remaining pertinent wording of the section would be "children or heirs." Allison noted that Jaureguy & Love (see 1 Jaureguy & Love, Oregon Probate Law and Practice § 414, at p. 403 (1958)) referred to and commented upon an Oregon Supreme Court decision (see Jerman v. Nelson, (1931) 135 Or. 126) which drew a distinction between remainders to children (vested estates, subject to later divestment) and remainders to heirs (contingent estates), and questioned whether a distinction between children and heirs should be preserved in section 15 by specification of both, or whether only heirs should be referred to in the section.

Braun moved, seconded by Zollinger, that section 15 be revised to read as follows: "A devise of property to any person for the term of the person's life, and after his death, to his children or heirs, shall vest an estate for life

only in the devisee, and remainder in the children or heirs." Jaureguay commented that with the wording "devise of property" there would be a tendency to consider the meaning of "property" as limited to real property. He suggested, and Allison agreed, that the words "any real or personal property" should be used. Frohnmayer and Zollinger objected to this specification of the two categories of property in this instance, on the ground of the previous decision by the committees to avoid this specification and rely instead upon a general definition of property as including both real and personal. Gilley suggested, and Carson agreed, that "bequest" should be used in addition to "devise"; that this would make unnecessary the specification of "real or personal" property; that a general definition of devise as including bequest would not be a satisfactory solution in every instance. Gilley moved, seconded by Jaureguay, that the main motion be amended by inserting "or bequest" after "devise" in the revision of section 15 proposed by the main motion. Amendment to main motion accepted. Main motion, as amended, carried. Jaureguay moved, seconded by Allison, that "or legatee" be inserted after "devisee" in revised section 15, in order to conform with "devise or bequest." Motion carried.

e. Presumption of devise of fee; passing of interest acquired after making of will; effect of conveyance by testator after will made (section 16). Riddlesbarger noted that section 16 of the wills draft was the same as ORS 114.230, and commented that he recommended no substantive changes in the ORS section.

Zollinger suggested that section 16 should be made applicable to personal property as well as real property; that the rules set forth in the three subsections of section 16 were as appropriate with respect to personal as to real property; that limiting the application of the section to real property implied that some other rules were applicable to personal property. He expressed the view that affirmative statement that the rules set forth in section 16 were applicable to personal property was appropriate in the light of what he considered to be the objectives of the probate law revision project. He commented that he approved a statement he had seen that the objectives of the revision program that had produced the 1965 Washington Probate Code were "to present a comprehensive Probate Code which reflects current business practice, provides adequately for realities of administration of decedents' estates, simplifies and states more clearly rules of procedure, and eliminates that which is archaic, unrealistic, outmoded or unnecessarily expensive," and would like to see similar statement of objectives adopted for the Oregon revision program. Frohnmayer expressed agreement with Zollinger's

suggestion on extending the application of section 16 to personal property, and proposed substitution of "property" for "real property" in the section.

In response to a question by Riddlesbarger, Carson expressed his opinion that the phrase "subject to his disposal" in subsection (1) of section 16 meant subject to the testator's right of testamentary disposition.

Zollinger proposed that subsection (1) of section 16 be revised to read as follows: "A testamentary disposition of property disposes of all the interest of the testator therein at his death unless the will discloses a purpose to dispose of a lesser estate or interest."

Braun suggested that subsection (1) be revised to read as follows: "A devise of property shall pass of the interest of the testator therein at his death unless the will discloses an intention to dispose of a lesser estate or interest." Zollinger moved, seconded by Frohnmayer, that the revision of subsection (1) suggested by Braun be approved. Motion carried.

Braun expressed her opinion that revised subsection (1) made subsections (2) and (3) unnecessary. Gilley agreed, and moved, seconded by Butler, that subsections (2) and (3) of section 16 be deleted. Allison, Zollinger and Riddlesbarger spoke in opposition to the motion. Allison remarked that revised subsection (1) dealt with the disposition of property owned by a testator at the time of making his will, while the emphasis of subsection (2) was on property acquired by a testator after making his will. Gilley commented that a testamentary disposition of "all my property" would include property acquired after the making of the will, and that revised subsection (1) would presumably apply to such a disposition. Allison suggested that subsection (2) was designed more to cover the situation of testamentary dispositions of specifically described property than the situation referred to by Gilley. Motion to delete subsections (2) and (3) failed the advisory committee, but carried the Bar committee, by a separate vote of each. Dickson announced the ruling of the chair that the vote of the advisory committee prevailed in this instance and that the motion had failed.

Frohnmayer moved, seconded by Thalsofer, that subsection (2) of section 16 be revised to read as follows: "An estate or interest in property acquired by a testator after he makes his will shall pass thereby unless it appears therefrom that he did not so intend." Motion carried.

Frohnmayer proposed that subsection (3) of section 16 be

revised to read as follows: "No disposition of property by a testator after he makes his will shall prevent or affect the operation of the will upon the estate or interest therein subject to the disposal of the testator." Gilley commented that the revised wording proposed by Frohnmayer appeared to convey the impression that a testamentary disposition of particular property would prevail over a subsequent conveyance of the property by the testator, although such a result was not the aim of subsection (3).

Zollinger moved, seconded by Krause, that subsection (3) be revised to read as follows: "No encumbrance or disposition of property by a testator after he makes his will shall affect the operation of the will upon a remaining estate or interest therein which is subject to the disposal of the testator at his death." Motion carried unanimously.

Carson asked whether "estate or" should be deleted from the phrase "estate or interest" in revised subsections (2) and (3). Zollinger indicated he favored deletion of "estate or" in subsections (2) and (3), but retention thereof in subsection (1). After further brief discussion, Zollinger expressed approval of deletion of "estate or" in subsection (1), as well as in subsections (2) and (3). Carson moved, seconded by Thalhofer, that "estate or" in revised subsections (1), (2) and (3) of section 16 be deleted. Motion carried.

f. When issue of deceased devisee or legatee takes estate (section 17). Riddlesbarger noted that, while similar to ORS 114.240, section 17 of the wills draft was based upon the wording of a provision of the 1965 Washington Probate Code (section 11.12.110). As a possible alternative to section 17, he referred to two sections (sections 273 and 274) of the 1963 Iowa Probate Code, which read as follows:

"§ 273. If a devisee die before the testator, his heirs shall inherit the property devised to him, unless from the terms of the will, the intent is clear and explicit to the contrary.

§ 274. The devise to a spouse of the testator, where the spouse does not survive the testator, shall lapse notwithstanding the provisions of section two hundred seventy-three (273), unless from the terms of the will, the intent is clear and explicit to the contrary."

Riddlesbarger pointed out that the Oregon and Washington statutes were applicable with respect to "lineal descendants" of "any child, grandchild or other relative of the testator," while the application of the Iowa statute was broader (i.e.,

with respect to "heirs" of "a devisee"). He moved, seconded by Carson, that the present application of the Oregon statute, embodied in section 17, be retained. Zollinger suggested, and it was agreed, that a vote should first be taken on whether to approve the concept of the Iowa statutes. The proposition to approve the Iowa concept failed unanimously.

Zollinger suggested that the operation of the anti-lapse statute should be limited to devises or bequests to a testator's lineal descendants, brothers, sisters, nephews or nieces. He commented that the aim of the statute was to approximate as closely as possible the wishes of a testator. Butler indicated he saw no reason to change the present application of the Oregon statute. Carson expressed concern about the effect of a change in the present application of the Oregon statute on the many existing wills prepared in reliance upon existing statutes. Riddlesbarger suggested that a savings clause as to existing wills would resolve Carson's concern.

Butler moved, seconded by Jaureguy, that the present application of the Oregon statute, embodied in section 17, be retained. Motion carried the advisory committee, but failed the Bar committee. On the basis of his previous ruling, Dickson ruled that the motion had carried.

Zollinger moved, seconded by Allison, that the last sentence of section 17 be deleted and that the first sentence be revised to read as follows: "When property is devised to any person related by blood or adoption to the testator who dies before the testator leaving lineal descendants, the descendants shall take the property which the devisee would have taken if he had survived the testator's (with the understanding that "devised" included "bequeathed" and "devisee" included "legatee"). Motion carried.

Thalhofer moved, seconded by Butler, that the second sentence of section 17 be revised to read as follows: "If the descendants are all in the same degree of kinship to the predeceased devisee, they shall take equally, or, if of unequal degree, they shall take by representation" (with the understanding that "devisee" included "legatee"). Motion carried.

Braun suggested the inclusion in revised section 17 of a specific exception for the circumstance in which a will provided otherwise. Allison expressed the view that such a specific exception was not necessary.

g. Pretermitted heirs to have portion of estate (section 18). Riddlesbarger pointed out that section 18

of the wills draft was similar to ORS 114.250, but was based upon the wording of a provision of the 1965 Washington Probate Code (section 11.12.090). Butler noted, and Riddlesbarger agreed, that the wording of section 18 followed that of section 11.12.090 of the 1965 Washington Probate Code in the bill as introduced, but that the section had been amended by the Washington legislature before enactment.

Dickson asked whether section 18 applied to illegitimate children that were pretermitted.

Riddlesbarger raised the question of the application of section 18 to adopted children that were pretermitted. Field moved, seconded by Thalsofer, that the application of section 18 be extended to children adopted after the making of a will. Allison suggested that a definition of "children" generally applicable throughout the probate code might include legally adopted children who under the laws would otherwise be entitled to inherit with natural children. Riddlesbarger commented that, whether or not such a general definition was approved, the application of section 18 to adopted children should be stated specifically in the section. Motion carried.

Tassock commented that the phrase "named or provided for in such will" in section 18, and also in ORS 114.250, had an uncertain meaning as applied to some situations. Rhoten suggested, and Zollinger agreed, that the meaning of the phrase might be clarified by the addition of "mentioned as a class." Carson remarked that the Oregon Supreme Court had decided that a provision in a testator's will giving \$5 to any person claiming to be a legal heir who should legally establish such claim did not name or provide for a child of the testator who contested the will (see *Wadsworth v. Brigham*, (1928) 125 Or. 428). He suggested that "named or designated" might be preferable to "named or provided for."

Braun raised the question of whether section 18 should apply to grandchildren of a testator. Zollinger and Dickson expressed the view that the application of section 18 should be limited to children.

Braun moved, seconded by Gooding, that the clause "unless it appears from the will that such omission was intentional" in section 18 be deleted. Braun commented, and Allison agreed, that the description of a pretermitted child in the section should be broad enough to cover the purpose of the quoted clause. Riddlesbarger indicated that he favored deletion of the quoted clause, and that, if retained, it might generate a considerable amount of litigation. Motion carried.

Allison questioned the desirability of the clause "unless when the will was executed the testator had one or more children known to him to be living and devised substantially all his estate to his surviving spouse" in section 18. Frohnmayer commented that the quoted clause required knowledge on the part of a testator of a particular child and that this requirement would give rise to difficult problems of proof of such knowledge. He noted that the enacted version of section 11.12.090, 1965 Washington Probate Code, did not contain the quoted clause, and suggested that it be deleted from section 18. Allison remarked that the description of a pretermitted child in the section, particularly if this description included "as mentioned as a class," would sufficiently cover the purpose of the quoted clause. He moved, seconded by Zollinger, that the quoted clause in section 18 be deleted. Motion carried.

Zollinger suggested that the last "unless" clause in section 18 be revised to read as follows: "but if it appears from the will that the purpose of the testator was to treat his children equally, all of his children shall receive equally." He expressed the view that section 18 should state the effect of pretermission, and noted that the last "unless" clause qualified the preceding statement to the effect that a pretermitted child would take as if no will had been made. Tassock moved, seconded by Gilley, that the last "unless" clause in section 18 be deleted. Motion carried.

Frohnmayer moved, seconded by Field, that Zollinger prepare a redraft of section 18 and submit it to the committees for consideration. Motion carried.

The meeting was recessed at 12:45 p.m.

The meeting was reconvened at 2 p.m. All members of the advisory committee, except Husband, were present. The following members of the Bar committee were present: Gilley, Braun, Field, Hornecker, Lovett and Thalhoffer. Also present was Lundy.

g. Pretermitted heirs to have portion of estate (section 18). Zollinger announced that, during the recess, he had prepared and was submitting to the committees for consideration a redraft of section 18 of the wills draft, which reads as follows:

"A pretermitted child is a child of the testator, whether or not his lawful issue, who is not named, referred to as a member of a class or provided for in the will of the testator, including a child born or adopted after the execution of the will and a

child born after the death of the testator. A pretermitted child or his issue shall take a share of the testator's estate equal to that which he or they would have taken upon the testator's intestate death and only the remainder of the testator's estate shall be subject to his testamentary disposition."

Allison referred to the phrase "whether or not his lawful issue" in redrafted section 18, and asked whether there was not an existing Oregon statute providing for inheritance by illegitimate children. [Note: See ORS 111.231.] Zollinger expressed the view, and Dickson agreed, that the description of a pretermitted child should specify whether an illegitimate child was included.

Allison questioned inclusion of the phrase "and a child born after the death of the testator" in redrafted section 18. Gilley suggested that the phrase "including a child born or adopted after the execution of the will and a child born after the death of the testator" in the section be deleted.

In response to a question by Thalhoffer, Zollinger stated that redrafted section 18 did not apply to pretermitted grandchildren and expressed the view that the section should not so apply. Braun commented that grandchildren should be included in the description of a pretermitted child, and moved, seconded by Butler, that "or a child of the predeceased child of the testator" be inserted after "a pretermitted child is a child of the testator" in the redrafted section. Allison pointed out that ORS 114.250 applied to "descendants" of children of testators, and suggested that the following sentence be added to the redrafted section: "A pretermitted child shall include the descendants of a child who shall have died prior to the death of the testator." Butler moved, seconded by Gooding, that the application of the present Oregon statute (i.e., ORS 114.250) to descendants of children of testators be embodied in the description of a pretermitted child in redrafted section 18. Motion carried. Frohnmayer suggested, and Zollinger agreed, that if descendants of children were to be included, the provision to accomplish this aim should be a separate sentence. Zollinger proposed the following sentence to cover the situation: "The term includes descendants of the testator when the will of the testator does not name or provide for the ancestor or identify the ancestor as a member of a class named or provided for in the will."

Riddlesbarger remarked that some mention had been

made as to the conclusion of a probate proceeding foreclosing later disposition under the pretermitted heir statute, but that such did not appear to be the case. He called attention to a passage in Jaureguy & Love (1 Jaureguy & Love, Oregon Probate Law and Practice § 391, at p. 377 (1958)) on the subject, which reads as follows: "It will be noticed from the wording of the statute that the failure to comply with its requirements does not affect the admissibility of the will to probate, and the claims of the pretermitted children are not asserted in will contest proceedings. While the order of distribution in the probate court would doubtless normally preclude later assertion of rights with respect to personalty, it seems clear that it has no effect upon the rights of such children or other descendants with respect to real property. In fact, it has even been held that a sale of real property by an executor, pursuant to powers granted in the will, is void as to such pretermitted children."

Riddlesbarger suggested that there should be some provision specifying the remedy and procedure whereby pretermitted children or their descendants obtain their shares. He called attention to the provision of ORS 114.250 that the shares to pretermitted children or their descendants "shall be assigned to them, and all the other heirs, devisees and legatees shall refund their proportional part." Frohmayer expressed the view that assignment and refund was not the remedy usually pursued; that the proper remedy was one in the nature of an heirship proceeding.

Allison commented that the proper wording of the pretermitted child statute to be considered and approved by the committees was a matter of some difficulty, and moved, seconded by Butler, that further consideration and final approval be postponed until the joint meeting of the committees in January. It was agreed that the matter should be so postponed. Dickson appointed Zollinger and Braun to prepare and submit to the committees at their joint meeting in January a redraft of sections 18 and 19, the latter section relating to the effect of advancements to pretermitted heirs. He appointed Frohmayer and Riddlesbarger to research the matter of the remedy and procedure whereby pretermitted children obtain their shares and report on this research at the January meeting.

h. Payment and ownership of proceeds of United States bonds (section 20). Riddlesbarger pointed out that subsection (a) of section 20 of the wills draft was the same as ORS 114.270, and that subsection (b) was a new provision designed to answer the question as to whether persons receiving the proceeds of United States bonds payable on death should bear any part of the expenses and charges of probate.

Butler asked whether the principle embodied in subsection (b) of section 20 should be extended to all jointly owned securities. He also questioned the meaning and purpose of the phrase "and such bond is not transferable" in subsection (a), commenting that he was under the impression that most United States bonds were transferable in certain circumstances.

Field moved, seconded by Butler, that section 20 be deleted. Motion carried. Riddlesbarger commented that he had voted against the motion and wished to preserve his right to propose reconsideration of the matter of section 20 at a future time.

i. Presumption attending devise or bequest to spouse (section 21). Riddlesbarger indicated that section 21 of the wills draft was derived from section 268, 1963 Iowa Probate Code. Allison commented that the committees had previously approved provisions that the intestate share of a surviving spouse was in addition to family allowances, homestead rights and exempt property, and that the share of a surviving spouse taken by election against will was in addition to any other statutory right. He suggested that section 21 was covered by these previously approved provisions.

Allison moved, seconded by Field, that section 21 be deleted. Motion carried.

j. Contribution among devisees and legatees (section 22). Riddlesbarger explained that section 22 of the wills draft was derived from sections 11.12.200 and 11.12.210, 1965 Washington Probate Code, but pointed out that subsection (a) of section 22 was similar to ORS 117.340.

At this point (3 p.m.) Field left the meeting.

Frohmayer suggested that consideration of section 22 be postponed until the committees were ready to discuss the general subject of distribution to legatees, devisees and heirs, and ORS 117.340 in particular. Dickson commented that ORS 117.340 was included in the assignment to Gooding and Jaureguy for research and recommendation.

Braun moved, seconded by Thalsofer, that section 22 be deleted from the draft and consideration thereof undertaken at an appropriate future time. Motion carried unanimously.

k. No interest on devise or bequest unless will so provides (section 23). Riddlesbarger noted that section 23 of the wills draft was derived from section 11.12.220,

1965 Washington Probate Code.

Dickson questioned the desirability of prohibiting interest on devises and bequests unless expressly provided for in the wills containing them, pointing out that a reason for allowing interest was to discourage undue delay in distribution by personal representatives. Frohnmayer commented that interest would come from the residue of the estate, rather than be chargeable to the personal representative, if the personal representative was performing properly and the delay was due to no fault on his part. He suggested, and Zollinger agreed, that interest should be allowed after a certain period of time had passed without distribution. Dickson remarked that a year would be too short a period of time, considering the amount of time necessary to calculate federal estate tax.

Butler expressed the view that interest should be allowed only if the probate court was satisfied that there had been delay or neglect on the part of the personal representative. Allison suggested, and Jaureguy agreed, that consideration be given to the requirement that interest be allowed by order of the probate court, so that the court would have some discretion in particular instances whether or not to allow the interest.

Frohnmayer moved, seconded by Butler, that section 23 be deleted from the draft, referred to Gooding and Jaureguy for research and recommendation in connection with the general subject of distribution and considered by the committees at an appropriate future time. Motion carried unanimously.

L. Witnesses as beneficiaries (sections 24, 25, 26 and 27). Riddlesbarger pointed out that sections 24 to 27 of the wills draft were the same as ORS 114.310 to 114.340. He referred to the provisions of the Iowa and Washington probate codes on the same subject, which read as follows:

"No will is invalidated because attested by an interested witness; but any interested witness shall, unless the will is also attested by two competent and disinterested witnesses, forfeit so much of the provisions therein made for him as in the aggregate exceeds in value, as of the date of the decedent's death, that which he would have received had the testator died intestate. No attesting witness is interested unless he is devised or bequeathed some portion of the testator's estate." Section 281, Section 281, 1963 Iowa Probate Code.

"All beneficial devises, legacies, and gifts whatever, made or given in any will to a subscribing

witness thereto, shall be void unless there are two other competent witnesses to the same; but a mere charge on the estate of the testator for the payment of debts shall not prevent his creditors from being competent witnesses to his will. If such witness, to whom any beneficial devise, legacy or gift may have been made or given, would have been entitled to any share in the testator's estate in case the will is not established, then so much of the estate as would have descended or would have been distributed to such witness shall be saved to him as will not exceed the value of the devise or bequest made to him in the will; and he may recover the same from the devisees or legatees named in the will in proportion to and out of the parts devised and bequeathed to him."
Section 11.12.160, 1965 Washington Probate Code.

Riddlesbarger and Dickson indicated they preferred the Iowa provision to sections 24 to 27 and the existing Oregon law. Zollinger stated that he favored the Iowa provision, but expressed an objection, in which Jaureguy joined, to the word "forfeit" therein because the word connoted a penalty on a witness who had done nothing wrong.

Gilley suggested the substitution of section 46(c), Model Probate Code (i.e., "No attesting witness is interested unless the will gives to him some personal and beneficial interest") for the last sentence of the Iowa provision. Zollinger commented that, if the committees so desired, a specific provision that "the appointment of a person as executor does not create a personal and beneficial interest" might be added.

Zollinger suggested that the following revision of the Iowa provision be adopted in lieu of sections 24 to 27: "No will is invalidated because attested by an interested witness; but any interested witness shall, unless the will is also attested by two competent and disinterested witnesses, take only so much of the provisions therein made for him as in the aggregate exceeds in value, as of the date of the decedent's death, that which he would have received had the testator died intestate. No attesting witness is interested unless a personal and beneficial interest in some portion of the testator's estate is bequeathed or devised to him."

Zollinger moved, seconded by Butler, that Zollinger's suggested revision of the Iowa provision be adopted in lieu of sections 24 to 27 and the existing Oregon law. Motion carried.

m. Deposit of wills with county clerk (sections 28, 29, 30 and 31). Riddlesbarger noted that sections 28 to 31 of the wills draft were the same as ORS 114.410 to 114.440, and referred to provisions of the 1963 Iowa Probate Code (sections 286 to 289) concerning the same subject.

Frohnmayr expressed the view that section 289, 1963 Iowa Probate Code, was preferable to section 31 of the draft and ORS 114.440. The Iowa provision reads as follows:

"After being informed of the death of a testator, the clerk shall notify the person, if any, named in the endorsement on the wrapper of said will. If no petition for the probate thereof has been filed within thirty days after the death of the testator, it shall be publicly opened, and the court shall make such orders as it deems appropriate for the disposition of said will. The clerk shall notify the executor named therein and such other persons as the court shall designate of such action. If the proper venue is in another court, the clerk, upon request, shall transmit such will to such court, but before such transmission, he shall make a true copy thereof and retain the same in his files."

Allison remarked that the procedure to be followed under section 31 was not clear; that, for example, the nature of the "notice of the testator's death," after which the will was to be publicly opened in court, should be clarified.

Zollinger questioned the extent of use of the present procedure under ORS 114.410 to 114.440, and expressed doubt that many attorneys, in their search for wills of decedents, made inquiry to the county clerks. Riddlesbarger commented that the procedure had merit regardless of the extent of its use. Frohnmayr asked whether the county clerks in the state should be contacted and consulted regarding the procedure.

Dickson suggested, and it was agreed, that members of the committees should consult the county clerks in their counties on the procedure under ORS 114.410 to 114.440 and submit their findings to the committees at the joint meeting in January. In response to a question by Frohnmayr, Dickson indicated that information to be sought by members should include the number of wills deposited with county clerks, the systems maintained by county clerks for quick identification of wills deposited, the practices, records and forms used by county clerks, any problems encountered by county clerks and any suggestions

they might wish to offer on the procedure.

n. Custodian of will must deliver to proper court; liability (section 32). Riddlesbarger, responding to a question by Zollinger, indicated that section 32 of the wills draft was the same as ORS 115.110. Riddlesbarger noted that a section of the 1963 Iowa Probate Code (section 285) relating to the same subject provided that "every person who willfully refuses or fails to deliver a will after being ordered by the court to do so shall be guilty of contempt of court." It was agreed that the Iowa provision was unnecessary. Dickson pointed out that ORS 115.990 provided a penalty for failure or neglect to produce and deliver a will.

It was apparently agreed that section 32 should be considered when the committees undertook a review of ORS chapter 115.

3. Future Activity by Committees. In response to a question by Riddlesbarger, Dickson affirmed that preliminary work on ORS chapter 115 (Initiation of Probate or Administration) previously had been assigned to Riddlesbarger and Frohnmayer, but indicated that Gilley and Krause of the present Bar committee had replaced two former members of the Bar committee on the assignment. Frohnmayer suggested, and it was agreed, that Gilley and Krause should undertake review and recommended revision of ORS chapter 115, enlisting assistance from other members of the Bar committee for the purpose, and submit their recommended revision to the committees at the joint meeting in January. Gilley commented that the current Oregon statutes on the subject and a copy of the 1965 Washington Probate Code would be of assistance in accomplishment of the assignment to him and Krause. Lundy indicated he would send Gilley a copy of the 1965 Washington Probate Code, and that the 1965 edition of the Oregon statutes, although not yet available, would be provided to all members of both committees as soon as possible.

Frohnmayer noted that there were eight months, and therefore eight meetings, remaining before the committees completed their planned review and recommended revision of most of the Oregon probate law in August 1966, and suggested that this work might be expedited by subcommittee meetings on the various aspects of the probate law remaining to be considered. Zollinger commented that the projected August 1966 deadline would not be a difficult one to meet considering what remained to be done by the committees (i.e., primarily a review and recommended revision of ORS chapters 115, 116 and 117). Dickson noted that ORS chapters 120 and 121 also should be covered. He called attention to the

present assignments with respect to ORS chapters 115 through 121 among members of both committees, and indicated that he would review these assignments and announce his confirmation thereof or changes therein at the joint meeting in January.

Frohnmayr asked whether members of the committees should, as part of their assignments, suggest forms to be used in connection with recommended revision of the statutes, such as the form for a petition for admission of a will to probate. He also suggested that it would be helpful to the committees if reports submitted to them by subcommittees contained the text of Oregon statutes and provisions of the 1963 Iowa Probate Code, 1965 Washington Probate Code, Model Probate Code or other research materials referred to or used in the preparation of those reports.

It was agreed that Lundy should prepare and send to members of the committees lists containing the names and addresses of current members of the committees.

Dickson stated that he would contact John Holloway for the purpose of expressing appreciation for past assistance by the Bar staff in reproducing and distributing minutes of meetings of the committees and indicating that this task would be undertaken henceforth by the Legislative Counsel's office. He commented, in response to a question to a question by Lundy, that the Bar office probably would wish to receive copies of minutes of meetings of the committees prepared by the Legislative Counsel's office.

4. Next Meeting of Committees. The next joint meeting of the committees was scheduled for Friday, January 14, 1966, at 1:30 p.m., and the following Saturday, January 15, in Dickson's courtroom, 244 Multnomah County Courthouse, Portland. The agenda for the next meeting was discussed briefly.

The meeting was adjourned at 4:30 p.m.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, December 17&18, 1965)

The following draft of a proposed statute chapter on wills was distributed by Mr. Riddlesbarger at the meeting of the advisory committee on November 19, 1965. The substance of the draft is set forth as it existed before revision of portions thereof at the meeting of the advisory committee on November 19 and 20, 1965 (see minutes of that meeting for revisions of the draft).

WILLS

Formalities

1. Who may make wills. Every person of 18 years of age and upward, or who has attained the age of majority provided in ORS 109.520, of sound mind may, by will, devise and bequeath all his estate, real and personal, except sufficient to pay the debts and charges against his estate, and subject to the rights of the surviving spouse to elect to take against the will as provided in ORS 113.050.

2. Will to be in writing; execution; attestation. Every will and codicil shall be in writing, signed by the testator, or by some person under his direction, in his presence, and shall be attested by two or more competent witnesses, each subscribing his name thereto, in the presence of the testator; provided, that the validity of the execution of any will or instrument which was executed prior to the effective date of this Code shall be determined by the law in effect immediately prior to the effective date of this Code; and provided that a will or codicil executed without the state in the mode prescribed by law, either of the place where executed or the testator's domicile, shall be deemed to be legally executed and shall be of the same force and effect as if executed in the

in the mode prescribed by the laws of this state, provided said will is in writing and subscribed by the testator.

3. Person signing testator's name to sign his own name as witness.

Any person who signs the testator's name to any will by his direction shall subscribe his own name as a witness to such will, and state that he subscribed the testator's name at his request, provided that such signing and statement shall not be required if the testator evidences approval of the signature so made at his request by making his mark on the will.

4. Competency of witnesses. Any person who is 16 years of age or older, and who is otherwise competent to be a witness generally in this state, may act as an attesting witness to a will.

5. Defect cured by codicil. If a codicil to a defectively executed will is duly executed, and such will is clearly identified in said codicil, the will and the codicil shall be considered as one instrument and the execution of both shall be deemed sufficient.

6. Testamentary additions to trusts. A devise or bequest, the validity of which is determinable by the law of this state, may be made by a will to the trustee of a trust established, or to be established, by the testator, or by the testator and some other person or persons, or by some other person or persons (including a funded or unfunded life insurance trust, although the trustor has reserved some or all rights of ownership of the insurance contracts), if the trust is identified in the testator's will, and

if its terms are set forth in a written instrument (other than a will) executed before or concurrently with the execution of the testator's will, or in the valid last will of a person who has predeceased the testator (regardless of the existence, size, or character of the corpus of the trust). The devise or bequest shall not be invalid because the trust was amended after the execution of the will or after the death of the testator. Unless the testator's will provides otherwise, the property so devised or bequeathed:

(1) shall not be deemed to be held under a testamentary trust of the testator, but shall become a part of the trust to which it is given; and, (2) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator (regardless of whether any such amendment was made before or after the execution of the testator's will), and, if the testator's will so provides, including any amendments to the trust made after the death of the testator. An entire revocation or termination of the trust before the death of the testator shall cause the devise or bequest to lapse.

7. Section 6 shall not invalidate any devise or bequest made by a will executed prior to the effective date of this Act.

8. Section 6 shall be so construed as to effectuate its general purpose to make uniform the law of those states which have adopted a similar provision.

Revocation

9. Express revocation or alteration. A written will cannot be revoked or altered otherwise than by another written will, or another writing of the testator, declaring such revocation or alteration and executed with the same formalities required by law for the will itself; or unless the will is burnt, torn, canceled, obliterated or destroyed, with the intent and for the purpose of revoking the same, by the testator himself, or by another person by his direction and consent; and when so done by another person, the direction and consent of the testator, and the fact of such injury or destruction, shall be proved by at least two witnesses.

10. When cancellation of the will revives prior will. If, after making any will, the testator shall duly make and execute a second will, the destruction, canceling or revocation of such second will shall not revive the first will, unless it appears by the terms of such revocation that it was his intention to revive and give effect to the first will, or unless he shall duly republish his first will.

11. Subsequent marriage or divorce of testator as a revocation.

(a) If after making his will the testator marries and the spouse of the testator is living at the time of his death, the will is revoked unless provision has been made for the surviving spouse by a written antenuptial agreement, or marriage settlement, or unless the will declares the intent of the testator that the will shall not

be revoked by the marriage.

(b) If after making his will the testator is divorced or his marriage is annulled, unless the will provides otherwise, the divorce or annulment revokes all provisions in the will in favor of the former spouse and any provision naming the former spouse as executor, and the effect of the will is the same as though the former spouse had predeceased the testator.

12. Bond or agreement to convey property devised as a revocation. A bond, covenant or agreement made for a valuable consideration by a testator to convey any property devised or bequeathed in any will previously made, is not deemed a revocation of such previous devise or bequest, either in law or equity; but such property shall pass by the devise or bequest, subject to the same remedies on such bond, covenant or agreement, for the specific performance or otherwise, against devisees or legatees as might be had by law against the heirs of the testator or his next of kin, if the same had descended to them.

13. Encumbrance as a revocation of previous will.

Section 1. If real or personal property upon which an encumbrance exists at the death of the testator is specifically devised or bequeathed in a will executed by the testator on or after the effective date of this 1967 Act, the devisee or legatee thereof shall take the property subject to the encumbrance, and the executor or the administrator with the will annexed shall not be required to make any payment on account of the obligation secured by the encumbrance, except in the circumstances set forth in section

3 or section 4, No. 13, of this 1967 Act.

Section 2. For the purposes of this 1967 Act, a voluntary encumbrance is a mortgage, trust deed, security agreement or pledge, or a lien arising from labor or services performed or materials supplied or furnished, or any combination thereof, upon or in respect of the real or personal property, and an involuntary encumbrance is any other encumbrance upon the real or personal property, all irrespective of whether or not the testator was personally liable upon the obligation secured by the encumbrance.

Section 3. The devisee or legatee of real or personal property specifically devised or bequeathed may require that an encumbrance thereon be fully or partially discharged out of other assets of the testator's estate not specifically devised or bequeathed if:

(1) The encumbrance is a voluntary encumbrance; and

(a) The will specifically directs full or partial discharge of the encumbrance out of other assets not specifically devised or bequeathed, but a provision in the will for payment of the debts of the testator shall not, of itself, constitute such direction; or

(b) The executor or the administrator with the will annexed receives rents or profits, or both, from the property and the devisee or legatee requests that he apply all or part of the rents or profits, or both, in full or partial discharge of the obligation secured by the encumbrance, in which event

the executor or the administrator with the will annexed shall apply the rents or profits, or both, upon principal or interest, or both, owing upon the obligation, as requested; or

(c) Any beneficiary under the testator's will requests, in a writing subscribed by the beneficiary and delivered to the executor or the administrator with the will annexed, that the obligation secured by the encumbrance be fully or partially discharged out of personal property, or the proceeds of sale thereof, which otherwise would pass to the beneficiary and which is of a value not less than the amount requested by the beneficiary to be applied in full or partial discharge of the obligation; or

(2) The encumbrance is an involuntary encumbrance.

Section 4. If a claim based upon an obligation secured by a voluntary encumbrance on specifically devised real or personal property is presented and paid pursuant to ORS 116.505 to 116.595, or if specifically devised real property that is subject to a voluntary encumbrance is redeemed pursuant to ORS 116.165, the executor or the administrator with the will annexed shall be subrogated to the rights of the owner and the holder, respectively, of the obligation secured by the voluntary encumbrance against the specifically devised or bequeathed property upon which the encumbrance exists and against the devisee or legatee of the specifically devised or bequeathed property, if, or to the extent, that the devisee or legatee of the specifically devised or bequeathed property may not require that the encumbrance

be fully or partially discharged out of other assets of the testator's estate pursuant to section 3, No. 13, of this 1967 Act.

Section 5. If real or personal property upon which an encumbrance exists at the death of the testator is specifically devised or bequeathed in a will executed by the testator before the effective date of this 1967 Act, the rights of the legatee or devisee of the specifically devised or bequeathed real or personal property in respect of exoneration thereof out of other assets of the testator's estate not specifically devised or bequeathed shall be determined in accordance with the laws of this state in force and effect at the time of the execution of the testator's will.

Rules of Construction

14. Testator's intent. All courts and others concerned in the execution of wills shall have due regard to the directions of will and the true intent and meaning of the testator as revealed in his will in all matters brought before them.

15. Construction of devise for life with remainder in fee to children. If any person by will devises any real estate to any person for the term of such person's life, and after his death, to his children, or heirs, or right heirs in fee, such devise shall vest an estate for life only in such devisee, and remainder in fee simple in such children or in such heirs.

16. Presumption of devise of fee; passing of interest acquired after making of will; effect of conveyance by testator after will made.

(1) A devise of real property is deemed a devise of all the estate or interest of the testator therein subject to his disposal, unless it clearly appears from the will that he intended to devise a less estate or interest.

(2) Any estate or interest in real property acquired by anyone after the making of his will shall pass thereby, unless it clearly appears therefrom that such was not the intention of the testator.

(3) No conveyance or disposition of real property by anyone after the making of his will shall prevent or affect the operation of such will upon any estate or interest therein subject to the disposal of the testator at his death.

17. When issue of deceased devisee or legatee takes estate.

When any property is devised or bequeathed to any child, grandchild or other relative of the testator, and such devisee or legatee dies before the testator, leaving lineal descendants, such descendants shall take the estate, real and personal, as such devisee or legatee would have done if he had survived the testator. If such descendants are all in the same degree of kinship to the predeceased devisee or legatee, they shall take equally, or, if of unequal degree, then those of more remote degree shall take by representation with respect to such predeceased devisee or legatee. A spouse is not a relative within the meaning of this section.

18. Pretermitted heirs to have portion of estate. If any person makes his will and dies leaving a child or children or descendants

of such child or children not named or provided for in such will, although born after the making of such will or the death of the testator, every such testator, as to such child or children not named or provided for, shall be deemed to die intestate, and such child or children or their descendants not named or provided for shall receive a share in the estate of the testator equal in value to that which he would have received if the testator had died intestate, unless it appears from the will that such omission was intentional, or unless when the will was executed the testator had one or more children known to him to be living and devised substantially all his estate to his surviving spouse; or unless it appears from the will that the intention of the testator was to devise to his children equally, in which latter case any child not named in the will shall receive a share in the estate equal in value to that of the other children.

19. Effect of advancement to pretermitted heir. If the child or children, or their descendants, referred to in Section 18 has had an equal proportion of the testator's estate bestowed on him in the testator's lifetime by way of advancement, he shall take nothing by virtue of the provisions of Section 18.

20. Payment and ownership of proceeds of United States bonds.

(a) Where any United States savings bond or United States war savings bond, heretofore or hereafter issued, is payable to a designated person, whether as owner, co-owner or beneficiary, and such bond is not transferable, the right of such person to receive payment of such bond according to its terms, and the ownership of the money

so received, shall not be defeated or impaired by any statute or rule of law governing transfer of property by will or gift or an intestacy. However, nothing in this section shall limit ORS 41.560 or ORS Chapter 95, relating to fraudulent conveyances and transfers.

(b) The person or persons receiving the proceeds of any such bonds shall bear a portion of the expenses and charges of and against the estate of the decedent, making such bond or bonds so payable determined by the proportion which the net funds so received bears to the total estate of the decedent, including such bonds payable to another person or to other persons, unless otherwise provided in the will of the decedent.

21. Presumption attending devise or bequest to spouse.

Where the testator's spouse is named as a devisee or legatee in a will, it shall be presumed, unless the intent is clear and explicit to the contrary, that such devise or bequest is in lieu of the intestate share and homestead rights of the surviving spouse.

22. Contribution among devisees and legatees.

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

(b) When any devisees, legatees or heirs shall be required to refund any part of the estate received by them, for the purpose of making up the share, devise or legacy of any other devisee,

legatee or heir, the court, upon the petition of the person entitled to contribution or distribution of such estate, may order the same to be made and enforce such order.

23. No interest on devise or bequest unless will so provides.

No interest shall be allowed or calculated on any devise or bequest contained in any will unless the will expressly provides for such interest.

Witnesses as Beneficiaries

24. Invalidity of devise or legacy to person attesting will.

Any beneficial devise, legacy, estate, interest, gift, or appointment of or affecting any real or personal estate, except charges in lands, tenements or hereditaments for the payment of any debt, given or made by will to any person who attested the execution of the will is, so far only as concerns such person or any person claiming under him, void; and such person shall be admitted as a witness to the execution of the will.

25. Attesting legatee may take intestate share. If any attesting witness described in Section 24 would be entitled to any share in the testator's estate in case the will should not be established, then so much of the estate as would have descended or been distributed to such witness shall be saved to him as will not exceed the value of the devise or bequest made to him in the will; and he may recover the same from the devisees or legatees named in the will in proportion to and out of the parts devised and bequeathed to him.

26. Result if there are sufficient other witnesses. If the execution of the will described in Section 24 is attested by a sufficient number of other competent witnesses, as required by Section 2 and by Section 4, then such devise, legacy, interest, estate, gift or appointment is valid.

27. Creditor as witness. If by any will any real estate is charged with any debt, and any creditor whose debt is so charged has attested the execution of such will, such creditor shall be admitted as a witness to the execution of such will.

Deposit of Wills with County Clerk

28. Deposit of will with county clerk. A testator may deposit his will for safekeeping in the office of the county clerk for the county in which he resides, upon paying the clerk a fee of \$1. The clerk shall give to the testator a certificate of such deposit and shall safely keep every will so deposited. He shall keep an index of all such wills.

29. Inclosure in sealed wrapper; inscription. Every will deposited pursuant to Section 28 shall be inclosed in a sealed wrapper, having inscribed upon it the name and residence of the testator, the day when and the person by whom it was deposited. The wrapper may also have indorsed upon it the name of a person to whom the will is to be delivered after the death of the testator. The wrapper shall not be opened until it is delivered to a person entitled to receive it, or until it is otherwise disposed of in accordance with Section 30 and Section 31.

30. Delivery to testator during his lifetime; delivery after death. During the lifetime of the testator the will shall be delivered only to him, or in accordance with his order in writing, signed by him and duly acknowledged or with his signature satisfactorily proved to the country clerk. After the death of the testator, it shall be delivered to the person named in the indorsement, if he demands it.

31. Public opening in court; procedure when jurisdiction is in another court. If the will is not called for by the person, if any, named in the indorsement, it shall be publicly opened in court after notice of the testator's death. If the jurisdiction of the case belongs to another court, it shall be delivered to the executors named in the will, or shall be filed in the office of the county clerk of such other court.

Surrender of Will by Custodian

32. Custodian of will must deliver to proper court; liability. Every custodian of a will, within 30 days after receipt of information that the maker thereof is dead, must deliver the same to the court having jurisdiction of the estate or to the executor named therein. Any such custodian who fails or neglects to do so is responsible for any damages sustained by any person injured thereby.

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, December 17 & 18, 1965)

The following article appeared in the August 1965 issue of the periodical "Trusts and Estates":

POUR OVER WILL

Appraisal of Uniform Testamentary Additions to Trusts Act

by H. Davison Osgood Jr.

There is a compelling need for the universal enactment of the Uniform Testamentary Additions to Trusts Act by all of the several states. This is predicted on the belief that the so-called pour-over by will to a pre-existing trust, whether or not amendable or amended, whether or not substantial or significant, and whether inter vivos or testamentary, has become a sound, practical and popular estate planning device in widespread use. A review of the judicial and statutory developments of the last three or four decades, and especially within the last decade when numerous states have enacted their own pour-over statutes, reveals that even today, the use of the pour-over is fraught with confusion and uncertainty about its legal validity and efficacy in many jurisdictions.

Indiana and Connecticut enacted the first pour-over statutes in 1953. Others followed rapidly so that today, there are over twenty states which have enacted their own version of a pour-over statute other than the Uniform Act. While there is notable similarity in the scope and purpose of these statutes, there is by no means the uniformity which is desirable. Some are far more liberal than others. Some retain limitations reminiscent of the traditional doctrines utilized to uphold pour-overs. The result has been that a pour-over valid in one state might not be valid in another. It was this state of affairs, presumably, that led the Commissioners on Uniform State Laws to formulate and adopt the Uniform Testamentary Additions to Trusts Act¹ which was completed in 1960 and approved by the American Bar Association in the same year. To date, at least nineteen states have adopted it.

Analysis of the Act

For anyone who has had the opportunity to analyze the difficult problems which have confronted and confounded the courts in pour-over cases through the years and the various approaches several legislatures have taken in recent years in their efforts to solve them, the significance and meaning of every clause of section I of the Uniform Act, which contains most of the substantive law of

the Act, should be readily apparent. ²In this spirit, there follows an analysis of the text of Section I.

"A devise of bequest,

One Commissioner suggested that the Act be broadened to include specifically the exercise of a power of appointment as some states have done. This suggestion was rejected on the ground that the above language includes the exercise of a power of appointment by will and that any attempt to include other powers of appointment would create additional problems the Act was not intended to solve.

"the validity of which is determinable by the law of this state,

This phrase was included at the suggestion of Professor Bogert to avoid any question in the conflicts of law area as to whether or not a particular state was attempting to reach out into the laws of other states. The phrase as originally suggested used the word "determined" which the Committee replaced with "determinable" so that it was clear that the Act applies not only to accomplished, but also to prospective testamentary dispositions.

"may be made by a will in the trustee or trustees of a trust established or to be established

The phrase "or to be established" would seem to contemplate trusts created after the execution of the will, an apparent inconsistency with language which appears later in the Act. Actually, it has a different meaning and was deliberately included for a different reason. It recognizes any distinction which may exist between trusts established by a written instrument and trusts established when the corpus is added sometime after the trust instrument is written, and is intended to cover both situations.

"by the testator or by the testator and some other person or persons or by some other person or persons

The original draft of the Act contained the phrase "by the testator and/or some other person or persons", which the Committee expanded to its final form, first of all to eliminate the objectionable use of the couplet "and/or" and secondly, to remove any doubt that the receptacle trust can be one established not only by the testator or by the testator and another or others, but also by a person or persons other than the testator.

"(including a funded or unfunded life insurance trust, although the trustor has reserved any or all rights of ownership of the insurance contracts)

At common law, under the doctrine of independent significance, the retention and control of some or all of the ownership rights in the insurance contracts, leaving the trustee with the mere expectancy of receiving the insurance proceeds on the death of the insured, may have been enough to deprive the insurance trust of the significance it needed to support a pour-over. This provision in the act wisely removes any question of the validity of a pour-over to such a trust.

"if the trust is identified in the testator's will and its terms are set forth in a written instrument (other than a will) executed before or concurrently with the execution of the testator's will.

Thus the Act requires that the trust instrument, in the case of a pour-over to an inter vivos trust, actually have been executed either before or contemporaneously with the will. It should be noted that where a trust and a pour-over will are executed at the same time as integral parts of an estate plan, testators and their counsel are relieved of the necessity of making certain that the trust has been executed before the pour-over will. The pour-over is valid as long as the signing of both instruments takes place as part of the same transaction.

"or in the valid last will of a person who has predeceased the testator

This provision validates pour-overs to the testamentary trusts of others, but limits them to trusts contained in the will of a second testator who has predeceased the testator whose will contains the pour-over, thereby eliminating the possibility of a pour-over to a trust contained in an ambulatory will. While it is not clear whether the second testator must have predeceased the testator whose will pours over at the time of the execution of the latter's will or at the time of his death, the sense of the Act would seem to require the first result.

First of all, even though a will has been properly executed by a competent testator, it could be argued that its validity does not become certain until it is admitted to probate without contest. Secondly, if the intent of the Act is to eliminate the possibility of a pour-over to an ambulatory will, the only way this can be achieved is to validate pour-overs only to wills which can never be changed or revoked because the death of the

testator has intervened. Unfortunately, the proceedings of the Commissioners shed no light on this question and it may some day come before a court for interpretation and adjudication.

"(regardless of the existence, size, or character of the corpus of the trust.)"

A potentially troublesome problem in the application of the doctrine of independent significance was just how large, relatively speaking, the corpus of a pour-over trust had to be before it was significant enough to support the pour-over. The Act removes any requirement of testing the independent significance of the corpus of the receptacle trust. In fact, it goes much further. It eliminates the necessity that there be a trust corpus. Professor Hawley has been quite critical of this provision. In his words,

"...a trust without a corpus is nothing at all....By definition a trust is a method of holding property, so that a trust with no assets does not exist. It has no legal significance, much less any independent significance."³

He goes on to ask if the Uniform Act and any other statutes which contain similar language, "create a new kind of institution, a trust without a corpus."⁴ This appears to be exactly what the Act does, but it is submitted to those who might be troubled by this result, that it is better to have resolved the problem in this way than to perpetuate the doubts and uncertainties about exactly what is required to support a pour-over.

"The devise or bequest shall not be invalid because the trust is amendable or revocable, or both, or because the trust was amended after the execution of the will or after the death of the testator."

This is significant. It codifies a position which many courts and even a few legislatures have been unwilling to take. However, this provision is qualified by or at least must be read together with provisions of the Act that follow. All that this provision says is that a pour-over to a revocable, amendable trust is not invalid because the testator amends it during his lifetime or another does so either before or after the testator's death. It does not determine the effect of the amendment on the pour-over.

"Unless the testator's will provides otherwise,

By the inclusion of this clause, the Act reserves to the testator the power to provide by his will for results other than

those contemplated by the provisions which follow it. Without this language, there might have been some doubt as to whether or not the testator was precluded from making other provisions in his will.

"the property so devised or bequeathed (a) shall not be deemed to be held under a testamentary trust of the testator but shall become a part of the trust to which it is given

In brief, there is an actual pour-over and a single, non-testamentary trust results.

"and (b) shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator (regardless of whether made before or after the execution of the testator's will),

This language is consistent with the intent of the Act to codify an exception to the Statue of Wills by validating pour-overs to trusts amended after the execution of the pour-over will.

"and, if the testator's will so provides, including any amendments to the trust made after the death of the testator.

This provision proved to be by far the most troublesome and controversial in the Act. Several commissioners argued forcefully that the pour-over should be complete, not partial, that the burden should be on the testator to provide specifically for a limitation on the pour-over if that was his intention, that this provision might create more confusion than now exists in the law, and that it would certainly create administrative problems in cases where the will was silent and the trust was amended after the death of the testator. For instance, asked one of the commissioners, what happens to the pour-over property when, after the testator's death, another who has the power to amend the trust exercises it for the purpose of replacing the incumbent trustee with another?

The position as adopted is sound. Despite administrative problems which might arise if there were an amendment subsequent to the testator's death, the language of the Act affords him better protection against his failure to give proper consideration to the possibility of subsequent amendments. The testator is presumed to be content with the pour-over trust as it stood at the time of his death, whereas amendments made after

his death might have been displeasing to him. The Act does not close the door on such a testator. It gives him the opportunity to bestow upon another the power to make amendments after his death which may affect the use and disposition of his property. If this is what he wishes, he need only to provide for it in his will.

"A revocation or termination of the trust before the death of the testator shall cause the devise or bequest to lapse."

If nothing more, this provision should operate as a caveat to a testator to make proper provisions in the will for alternative disposition of the pour-over property unless he is content to have the property pass either by intestacy if the residuary clause of the will contains the pour-over, or by the residuary clause if it does not.

The Commissioners had considerable difficulty in arriving at the language in section 2 of this Act, but finally adopted the following:

"This Act shall have no effect upon any devise or bequest made by a will executed prior to the effective date of this Act."

Not only did they not want the Act to have any retroactive effect, but they also did not want to infer that it was declaratory of the existing law in a jurisdiction where it was not the law prior to its enactment or that it changed the law in a jurisdiction where it already was the law. Actually, their difficulty in drafting section 2 stemmed from the fact that in many jurisdictions, no one knew what the law was, so that the Commissioners could not tell what effect any declaration might have. By a vote of 28 to 25, they decided to say nothing more than what appears in the section as finally adopted.

Sections 3, 4, 5, and 6 of the Act are the standard formal sections which were adopted by the Committee without comment or question.

Reception of the Act

Considering the fact that there are many uniform or model acts promulgated by the Commissioners on Uniform State Laws which appear not to have been adopted by any jurisdiction, the Uniform Testamentary Additions to Trusts Act has met with a generally encouraging reception. Since 1961, the first legislative year in which the Uniform Act was available, nineteen states have

enacted it. It has been adopted by Arizona, Arkansas, Connecticut, Idaho, Iowa, Maine, Massachusetts, Michigan, Minnesota, New Hampshire, New Mexico, New Jersey, North Dakota, Oklahoma, South Carolina, South Dakota, Tennessee, Vermont, and West Virginia.⁵ It is also significant to note that 1961 was the last year in which any state enacted its own version of a pour-over statute.

A LingerinD Doubt

One fundamental question is left unanswered by the Uniform Testamentary Additions to Trusts Act. Does the Uniform Act validate pour-overs under certain conditions and by implication, invalidate all others? The State of New Jersey answered this question by adding a section to its version of the Act which reads:

"This Act shall not be construed as providing an exclusive method for making devises or bequests to trustees of trusts created otherwise than by the will of the testator making such devise or bequest."⁶

In a state without the benefit of such a provision, there could very easily be a problem. For example, a testator might write a will which provides that, "If at the time of my death, I have created a revocable, amendable inter vivos trust with the Local Trust Company for the benefit of myself and my wife, then I give, devise and bequeath the rest, residue and remainder of my estate to the Local Trust Company, as trustee, to be added to the said trust and to be governed and disposed of in accordance with its terms and provisions, as they exist at the time of my death; otherwise, I give, devise and bequeath the rest, residue and remainder of my estate to my wife."

Similarly, the wife might provide that her property is to be added to the same trust if it has been created by her husband prior to her death, even though it might not have been in existence at the time of the execution of her will, making alternative provisions for the disposition of her property in the event that no such trust exists. It is difficult to find any basic objections to plans such as these. The pour-overs to the trust, if it exists, should be upheld. However, in a jurisdiction which has the Uniform Act, there might be considerable doubt about their validity. This would be resolved one way or the other by answering the initial question. The courts may have to provide the answer.

This by no means intended to be a criticism of what the Uniform Act actually accomplishes. It is only to suggest that at this junction, the relationship between the Uniform Act, which codifies much of the law of the pour-over, and whatever remains of

the pour-over law at common law has not yet been clearly defined. For this reason, it behooves testators and their attorneys to proceed with caution into areas where they do not have the shelter of the Uniform Act.

The Uniform Testamentary Additions to Trusts Act is fundamentally good, sound legislation which resolves almost all of the doubts and uncertainties about the validity of pour-overs. It fills a critical need by making available to testators and their advisors a useful, practical modern estate planning device which can be used with certainty and safety. For the sake of uniformity, the 31 states which either have their own pour-over statute or no statute at all, should adopt the Uniform Act.⁷

Notes

This article was adapted by the author from his thesis "The Law of Pour-Overs and the Uniform Testamentary Additions to Trusts Act," accepted for library use by Stonier Graduate School of Banking.

¹Uniform Testamentary Additions to Trusts Act, Uniform Laws annotated, 9C, Cumulative Annual Pocket Part, Edward Thompson Company, Brooklyn, New York, 1963, pp. 115, 116.

²For much of the information herein, the author has drawn upon Proceedings in Committee of the Whole, August 20, 1959, and August 25, 1960, The National Conference of Commissioners on Uniform State Laws, 1155 East 60th Street, Chicago, Illinois.

³Joseph W. Hawley, "The 'Statutory Blessing' and Pour-Over Problems," TRUSTS AND ESTATES, Vol. 102, October, 1963, pp. 898,899.

⁴Hawley, supra, n. 3 at p. 899.

⁵Arizona Revised Statutes, Anno. (1961) Title 14, Art. 4, Chap. 1, §§ 14-141-143; Arkansas Statutes (1963) Title 60, Chap. 6, §§ 60-601-604; Connecticut General Statutes Anno. (1961) § 45-173a; Idaho Code (1963) Title 68, Chap. 11, §§ 68-1101-1104; Laws of Iowa (1963) Title 32, Chap. 633, §§ 275-277; Maine, Revised Statutes, Anno. (1964) Title 18, § 7; Massachusetts General Laws Anno. (1963) Chap. 203, § 3B; Michigan, Compiled Laws (1962) §§ 26.78(1)-(4); Minnesota Statutes Anno. (1963) § 525.223; New Hampshire Revised Statutes Anno. (1961) §§ 563-A:1-563-A:4; New Jersey Statutes Anno. (1962) §§ 3A:3-16.1-3A:3-16.5; New Mexico, Ch. 26, Laws of 1965; North Dakota Century Code, Anno. (1961) Title 56-07-01 - 56-07-04; Oklahoma Statutes Anno. (1961) Title 84, §§ 301-304; Laws of South Carolina (1961) Title 19, Chap. 5, §§ 19-295 . 19-298; South Dakota, Session Laws (1963) Chap. 440; Tennessee Code Anno. (1961) Title 32, Chap. 3, Sec. 32-307; Vermont Laws (1961) Title 14, Chap. 105, § 2329; Code of West Virginia (1961) Chap. 41, Art. 3, Secs. 8-11.

⁶New Jersey Statutes Anno. (1962) § 3A:3-16-4.

⁷Several of the states which have enacted the Uniform Act have made relatively insignificant modifications in the original language of the Act. Attorneys and others are therefore advised to compare the version enacted in those states with the text presented in this article. Two states have made significant changes. Connecticut has made it clear that a testator can pour over to the testamentary trust of another, even though the receptable trust is contained in a will that is executed after the testator executes his pour-over will. Massachusetts has changed the language of the statute to codify the position of the minority of Commissioners who felt that a pour-over should be valid even though the receptable trust might be amended after the death of the testator whose will pours over to the trust, without any provision in the will expressly providing for this. It may be that a Massachusetts testator could, in his will, limit the pour-over to the receptacle trust as it existed at the time of his death.

MEMORANDUM
December 14, 1965

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

From: Robert W. Lundy
Chief Deputy Legislative Counsel

Subject: Rights of nonresident aliens to take property by succession or
testamentary disposition (ORS 111.070).

One of the matters scheduled for consideration by the Advisory and Bar
Committees at the meeting to be held Friday, December 17, 1965, pertains to
the rights of nonresident aliens to take property by succession or testamentary
disposition. See ORS 111.070.

In this memorandum are reproduced letters on this subject from Mr. Walter L.
Barrie, Assistant Attorney General, Oregon Department of Justice, and Mr. Peter A.
Schwabe, Portland attorney.

C O P Y

STATE OF OREGON
Department of Justice
Salem 97310

December 8, 1965

Honorable William L. Dickson
Chairman, Oregon Probate Law Revision
Advisory Committee
244 Multnomah County Courthouse
Portland, Oregon 97204

Dear Judge Dickson:

This letter contains my views and recommendations concerning the need for
revising or amending ORS 111.070. As I understand from talks with Peter Schwabe
there will also be an opportunity to present these views in person at 1:30 p.m.
on Friday, December 17, 1965, in your courtroom. My further understanding is
that the scope of the review of ORS 111.070 is centered around whether ORS 111.070
should be repealed or amended in order to do away with the escheat factor.

I am sure that Mr. Schwabe feels that this law should be completely re-
pealed or, at least, amended in such a way that it would conform to what is

generally termed a custodial statute, such as is found in New York. Most of my comments will thus be concerned with the reciprocity rule in Oregon vs. the New York Custodial Law, the distinctions and merits of each. However I have also included two other items which I believe warrant the attention of the committee in amending ORS 111.070, and are underscored for the committee's attention. I apologize for the length of this letter but I believe the material included herein is important and, hopefully, of assistance to the committee in its consideration of this law.

Oregon's Alien Reciprocity Statute (ORS 111.070) vs.

The Benefit and Use Rule of Other Jurisdictions.

Oregon's original alien reciprocity statute was enacted in 1937 as a reflection of legislative hostility towards confiscations by the Nazi government. O.C.L.A., § 61-107. The legislative aims then, as now, were to prevent the flow of U.S. money into the lands of our enemies or potential enemies, to insure a U.S. legatee's receipt of a bequest and to retaliate against confiscatory seizure by certain foreign governments. Today this Act is directed against the iron curtain countries. Among other states which have adopted a comprehensive reciprocity statute are California, Cal. Prob. Code, § 259, and Montana, Rev. Codes Ann., § 91-520.

There is another approach to a foreign alien's right to receive his inheritance which is generally referred to as the "benefit" rule. This type of legislation is in effect, for instance, in New York, N.Y. Surr. Ct. Act, § 269; Mass., Mass. Gen. Laws, chapter 206, § 27B; Pennsylvania, Title 20, Decedents and Trust Estates, § 1155 et seq.

Under the benefit rule there is no attempt to insure, by reciprocal guarantees, an American's right to inherit from a particular foreign country. The only consideration under such a law is to see to it that the foreign alien will receive his inheritance free from confiscation by his government. Under the latter rule if an alien heir establishes that his government will allow him to receive his inheritance in full that is enough to satisfy the statute. Thus, under the benefit and use rule thousands of dollars may be paid to beneficiaries in iron curtain countries although that particular country prohibited, by law or practice, the flow of funds out of the country to alien beneficiaries. For instance in Bulgaria there existed a law, although I believe it has recently been repealed, which prohibited its citizens or residents from disposing by will their property in Bulgaria to a foreign citizen or resident. Section 27 of the Bulgarian Foreign Exchange Regulation of 1952. In August I had the opportunity to confer with Dr. Ivan Sipkov in Washington, D.C. Dr. Sipkov is an expert in Bulgarian law. It was his opinion that the reciprocal laws in effect in several of our states were instrumental in forcing the communist countries to amend their legislation on more favorable terms in regard to an alien's right to inherit.

There have been several law review articles which praise the benefit rule and condemn the reciprocity rule, because of the latter's confiscatory approach. The reciprocity law, however, has withstood a barrage of challenges alleging

that it conflicts with the federal treaty-making powers, violates the due process clause of the Fourteenth Amendment and invades the field of foreign affairs exclusively reserved to the Federal Government. As a matter of fact a case is now pending before the Oregon Supreme Court which raises each of these objections and this case may well reach the United States Supreme Court.

Under the benefit and use statute an alien is not disinherited through escheat. The law is merely custodial in nature. Instead of permanent disinheritance the foreign beneficiary faces what may be only the delayed enjoyment of his property. Only procedural rights are adjudicated under the benefit rule leaving substantive rights unaffected. Therefore a decision by the court to hold a legacy in trust for the beneficiary does not become res judicata. If at a subsequent date the alien heir's representative can prove that the heir will obtain enjoyment and control of the funds, the inheritance is then transmitted to the heir.

It is the opinion of this writer that the benefit and use rule does not go far enough because it does not protect an American's right to inherit from foreign estates--it falls short because it is not reciprocal.

Under Oregon law an alien's right to inherit is forfeited absolutely by a finding of no reciprocity. This is perhaps a harsh rule but, on the other hand, all that is required is a showing of reciprocity. Presumptively if the court finds against reciprocity it is because there is evidence that the country of which the alien is a citizen or resident discriminates against our citizens and residents.

It is recommended that the present reciprocity law be retained. However an amendment to the present law to allow an alien to have the court consider the reciprocity question again at a subsequent date on the grounds that conditions have changed in the particular country may be feasible. For instance a special statute allowing aliens to recover property escheated under ORS 111.070 providing the conditions of that provision could now be established would be a possibility. A time limit should be attached however. Perhaps 10 years, as under the general recovery statute in ORS 120.130. The difficulty, however, with a subsequent proceeding like this is that it would require a retrial of all the questions before the court in the original trial on reciprocity. These cases can be very expensive and difficult to try, entailing securing an expert witness in foreign law, securing documents and translating foreign law and examining all of the foreign countries inheritance and foreign exchange laws. Therefore it is suggested that any provision which allows an alien to petition for another trial on the question of reciprocity should also provide that the alien pay the state its expenses in defending the case, whether the alien is successful or not in recovering the property. For example, ORS 120.130 (4) provides that the state may deduct its costs and expenses in defending a petition for the recovery of escheated property where the claimant prevails. It is true that as far as most aliens are concerned, they could not afford to pay all the expenses of litigation. That is unfortunate but the alternative of requiring the Land Board to expend money from the Common School Fund to defend these cases would be wholly unsatisfactory.

Notice to State When Estate Contains

Alien Beneficiaries

Under the present law there is no requirement that the State Land Board be notified that there is a possibility of escheat under ORS 111.070. It is believed that this is a real gap in the law. It is difficult to know how many estates have slipped out of our hands because the Land Board was not given notice but there are good examples. For instance last year an estate in Grant County involving an heir residing in Communist China was discovered. This estate has been in probate since 1940 and has never been closed.

In order to provide for a more expeditious processing of estates involving aliens and in order to protect the interests of the state under ORS 111.070 it is highly recommended that language similar to the following be added to this statute:

"In any estate where money or property would have vested in any alien person but for the provisions of this statute (ORS 111.070), it shall be the duty of the executor or administrator thereof as soon as he shall have completed and filed the inventory and appraisal in said estate to furnish the Land Board with the following information and file a copy thereof, in the probate proceedings in said estate:

"(1) The names and addresses of the alien heirs, devisees and/or legatees in said estate;

"(2) The appraised value of the estate;

"(3) The names of any citizens or residents of this country, if any, who claim as an heir, legatee or devisee in said estate."

Ambiguity in ORS 111.070 (1)(a)

ORS 111.070 (1)(a) provides that the right of an alien to take property by succession or testamentary devise is dependent in each case:

"Upon the existence of a reciprocal right upon the part of citizens of the United States to take real and personal property and the proceeds thereof upon the same terms and conditions as inhabitants and citizens of the country of which such alien is an inhabitant or citizen."

The ambiguity is inherent in the disjunctive and conjunctive use of the words "inhabitants" and "citizens" in the above provision. In the case of the disjunctive reference at the end of the provision, is this to be interpreted as giving an option to the alien heir to prove reciprocity exists either in the country of which he is a citizen or the country of which he is an inhabitant-- whichever is more favorable to his case? For instance a citizen of Austria who is an inhabitant of Czechoslovakia would of course rely on his citizenship

since there is no reciprocity with Czechoslovakia and since his inheritance rights are at least partially guaranteed under a treaty between this country and Austria. It would appear that the language in this provision should be clarified.

The opportunity to present our views in regard to the alien reciprocity statute is, of course, very much appreciated.

By /s/ Walter L. Barrie
Walter L. Barrie
Assistant

* * * * *

C O P Y

Peter A. Schwabe
Attorney and Counselor at Law
Suite 721 Pacific Building
Portland, Oregon 97204

December 9, 1965

Honorable William L. Dickson
Chairman
Oregon Probate Law Revision
Advisory Committee
Multnomah County Courthouse
Portland, Oregon 97204

Re: Revision of ORS 111.070
[The reciprocal inheritance rights statute]

Dear Judge Dickson:

Pursuant to your kind invitation I am pleased to take this opportunity to submit my views and suggestions for possible legislative action in respect to ORS 111.070. I believe it is now generally recognized that the statute has outlived such purpose as it may have had when originally enacted as Chapter 377, O.L. 1937, and amended by Chapter 519, O.L. 1951, and that its provisions for confiscation by the State through escheat are offensive to present-day sensitivities. It is my understanding that the Attorney General, whose duty it has been to enforce the statute in the name of the State Land Board of Oregon [as the recipient of escheats] will also submit a memorandum setting forth the views and recommendations of the responsible officials of the State of Oregon.

In my opinion, ORS 111.070 is legally and morally indefensible and should be repealed so that rights of inheritance in the State of Oregon may be restored to what they were prior to 1937. Our state, in fact our entire country, was built up and developed to a great extent by the millions of immigrants who came here at our beckoning and to seek a better life during the twenty-five years or so between 1890 and the outbreak of the First World War in August 1914.

These men--and not a few women--were mostly in their twenties when they came and are now in their sunset years. Many came from those regions of the Austro-Hungarian Empire which, upon its dismemberment in 1918, were made parts of Czechoslovakia, Hungary, Poland, Yugoslavia, etc., and from the still existing Eastern European countries such as Bulgaria and Roumania. It is a recognized fact that ORS 111.070 and similar statutes enacted in California, Montana and a few other states have been invoked and enforced primarily against the so-called "Iron Curtain" countries pursuant to what has become commonly known as the "Iron Curtain Rule". As a result the immigrants from the countries included in the "Rule" may not leave their estates, or even a legacy or devise, to their loved ones back home. Most of them have brothers, sisters, nieces and nephews, some have parents, spouses, children and grandchildren over there. Unless there are other blood relatives, so-called "eligible heirs", outside the homeland in territory with which reciprocity is recognized, the State steps in and seizes the estate as an escheat. At best the heirs or beneficiaries in the affected countries are faced with long and costly litigation to prove their rights of inheritance.

Rights of inheritance are as ancient as civilization itself. The denial of such rights by only a few of the fifty American states, Oregon by its ORS 111.070, has given rise to much bitterness and hostility against the United States in the countries whose people have seen their hoped-for inheritances taken away. Certainly the image of the United States has been tarnished in those countries, and there can be no doubt that the relations between the United States and those countries have been adversely affected. This very point is involved in the case of Zschernig v. State Land Board (Estate of Pauline Schrader, deceased, Multnomah County probate No. 91805) presently pending on appeal before our Supreme Court, wherein rights of inheritance were denied to the decedent's heirs in the Russian Zone of occupation of Germany on the ground that reciprocal rights of inheritance do not exist between the United States and that region, which is also commonly called East Germany or the German Democratic Republic, the name given it by the Russian occupiers who set up a puppet regime there. The contention is being made that ORS 111.070 is unconstitutional in that it attempts to invade the exclusive power of the federal government to regulate the foreign relations of the United States. It may be expected that the case will be decided within the next two to three months but the Supreme Court may find it unnecessary to rule on this point as it could be decided on any one of several other points. Also, one side or the other may well decide to take the case to the United States Supreme Court, in which event a final determination of the question may be many months away. And of course it may not be adjudicated at all for one reason or another in this particular case.

Actually, when most of the world was prostrate at the end of World War II there was only one nation (other than the United States of course) with a freely convertible currency, namely Switzerland. Sweden's kroner was almost free, but practically all other currencies of the world were in grave danger. It was in recognition of this that the United States summoned the Bretton Woods Conference in 1944, out of which came the International Monetary Agreement. Thereunder the signatory powers obligated themselves to adopt far-flung and complex systems of foreign funds control for the protection and safeguarding of their currencies. Most countries, not excepting our closest allies such as Great Britain and France, simply did not have dollars which could be applied to sending American citizens

their inheritances out of estates in those countries, yet the courts in the so-called reciprocity states, including Oregon, held that there was no reciprocity of inheritance rights if an American citizen could not on demand receive payment of his foreign inheritance in dollars within the United States. While during the last twenty years the world's finances have improved greatly, the war-born foreign funds controls still exist and even today there are only very few freely convertible currencies. Under the decisions of the Oregon Supreme Court Christoff's Estate, 219 Or. 233, 347 P.2d 57, Stoich's Estate, 220 Or. 448, 349 P.2d 255, Kasendorf's Estate, 222 Or. 463, 353 P.2d 531, Pekarek's Estate, 234 Or. 74, 378 P.2d 734, etc. there can be no reciprocity under ORS 111.070 with any country that exercises foreign exchange controls, unless, of course, reciprocal inheritance rights are guaranteed by treaty. But there are very few such countries in eastern or southern Europe, in fact Yugoslavia is probably the only one. Vide Kolovrat v. Oregon, 366 U.S. 187, 81 S. Ct. 922.

The time has long since come when this State should cease to penalize and discriminate against those of its people who came from those regions of the world and their relatives back home whom they may not accord rights of inheritance, by will or intestacy, much as they might yearn to do so. Forfeitures and escheats are not favored by the law and the State of Oregon need not enrich itself in this manner. I trust therefore that your committee will see fit to recommend the repeal of ORS 111.070.

/s/ Peter A. Schwabe
(Peter A. Schwabe)

P.S. I shall be most pleased and am planning to appear personally before your Committee at 1:30 P.M. on Friday, December 17, 1965.

C O P Y

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December 10, 1965

Honorable William L. Dickson
Chairman
Oregon Probate Law Revision
Advisory Committee
Multnomah County Courthouse
Portland, Oregon 97204

Re: Revision of ORS 111.070
[The reciprocal inheritance rights statute]

Dear Judge Dickson:

I am in receipt of a copy of the Attorney General's letter of December 8th in which he sets forth his views and recommendations for revising or amending

ORS 111.070. These are very much different than I had anticipated and while I understand that it is not desired that this correspondence develop into a debate, I would like to submit an alternative recommendation for consideration, only however if the Committee should not be disposed to favor a recommendation for outright repeal of ORS 111.070.

Three of the most populous eastern states, New York, Pennsylvania and Massachusetts, each with large first and second generation "foreign" populations, have so-called withholding statutes. Thereunder the court may withhold and defer actual distribution and payment of inheritances due non-resident alien heirs or beneficiaries unless and until satisfied that they would receive and have the free use, benefit and control of the money--a requirement which is also in ORS 111.070 as subparagraph 3. A study of these statutes motivates me to recommend the New York statute, Section 269a of the New York Surrogate's Court Act for your Committee's consideration. It provides as follows:

**'DEPOSIT IN COURT FOR BENEFIT OF LEGATEE, DISTRIBUTE
OR BENEFICIARY.**

1. Where it shall appear that a legatee, distributee or beneficiary of a trust would not have the benefit or use or control of the money or other property due him, or where other special circumstances make it appear desirable that such payment should be withheld, the decree may direct that such money or other property be paid into the surrogate's court for the benefit of such legatee, distributee, beneficiary of a trust, or such person or persons who may thereafter appear to be entitled thereto. Such money or other property so paid into court shall be paid out only by the special order of the surrogate or pursuant to the judgment of a court of competent jurisdiction.

"2. In any such proceeding, where it is uncertain that an alien legatee, distributee or beneficiary of a trust, not residing within the United States or its territories, would have the benefit or use or control of the money or other property due him, the burden of proving that such alien legatee, distributee or beneficiary of a trust will receive the benefit or use or control of the money or other property due him shall be upon him or on the person or persons claiming from, through or under him."

It is of course in no sense confiscatory but does protect the foreign heir if his government should in any way seek to infringe upon his receiving the full and free use and benefit of the inheritance. The adoption of the New York statute, or one similar thereto, would yield the further significant advantage that the Oregon courts would have the benefit of the great volume of decisions in respect to the statute handed down by the Surrogate Courts, particularly those in the metropolitan area of New York City where there are large concentrations of practically every foreign nationality. Thus the interpretation and application of the statute by courts having the benefit of close contacts with the foreign countries involved could serve as excellent guidelines for the interpretation and application of a corresponding Oregon statute by our courts.

/s/ Peter A. Schwabe
(Peter A. Schwabe)