

PROBATE ADVISORY COMMITTEE  
Probate Law Revision

Forty-fifth Meeting

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

Dates ) 1:30 p.m., Friday, February 16, 1968  
and )  
Times ) 9:00 a.m., Saturday, February 17, 1968  
Place: Suite 2201 Lloyd Center, Portland  
(This Board Room is at the head of the spiral  
stairway on the Central Plaza, or take  
elevator to the medical section.)

Suggested Agenda

1. Approval of minutes of January meeting.
2. Miscellaneous matters.
3. Report on apportionment of estate taxes. Tab 27.  
Miss Lisbakken and special subcommittee.
4. Report on finality of decree of distribution as  
contained in present draft.  
Mr. Allison.
5. Ancillary administration. Tab 24.  
Professor Mapp, Mr. Riddlesbarger, Mr. Butler.
6. Escheat, Tab 26.  
Mr. Carson.
7. Discussion of proposed section on effect of "pay  
my just debts".  
Mr. Riddlesbarger.

PLEASE NOTE: Meeting Place, Lloyd Center.

ADVISORY COMMITTEE  
Probate Law Revision

Forty-fifth Meeting, February 16 and 17, 1968  
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The forty-fifth 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, February 16, 1968, in Suite 2201, Lloyd Center, Portland, by Chairman Dickson.

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

The following members of the Bar committee were present: Heisler, Krause, Lovett, Kraemer, Shetterly and Smith. Anderson, Buhlinger, Field, Mayer, McKay, Meyers, Pendergrass, Piazza, Rhoten, Thalhofer, Thomas and Warden were absent.

Also present were Campbell Richardson and Robert W. Lundy, Legislative Counsel.

Approval of January Minutes

A motion was made, seconded and carried to approve the minutes of the January 1968 meeting.

Miscellaneous Matters

The committees discussed the reproduction and distribution of the complete proposed revised probate code. Allison stated that the drafting work was up to date with committee action thus far; that he had drafts prepared which contained everything but comments on the chapter on accounting and distribution; that he had not yet inserted headings, etc., but that he and the Legislative Counsel would get together soon and do that. Zollinger urged early reproduction and distribution of the entire draft, so that attorneys and other interested persons would have as much time as possible to examine it. Husband expressed the view that the committees should have an opportunity to look at the completed draft in its entirety before it was reproduced for widespread distribution. Lundy pointed out that the Law Improvement Committee would probably want to examine the completed draft before such reproduction. Zollinger

suggested that at least enough copies of the completed draft be reproduced for purposes of consideration by the advisory and Bar committees and the Law Improvement Committee. In response to questions, Lundy indicated that it would not be possible to accomplish this reproduction in time for presentation to the Law Improvement Committee at its meeting scheduled for March 8, 1968. Lundy was requested to begin preparation for the work of composing and reproducing the completed draft, including consideration of methods of composition, personnel available to do the composition, etc., in order that the work itself could be undertaken as soon as possible.

Hope was expressed that the work of the committees on the content of the proposed revised code could be concluded at their next meeting on March 15 and 16, 1968. Dickson commented that if this target date was met there would be no purpose in meeting again until a completed draft was available for consideration.

Dickson requested that Lundy and Allison have a completed draft ready for presentation to the Law Improvement Committee as soon as possible. It was suggested that the completed draft so presented be accompanied by a letter of transmittal from the advisory committee, which, among other things, should give credit to individuals who worked on the revision project, especially those who were not members of the advisory committee. It was noted that this presentation would constitute the report of the advisory committee to the Law Improvement Committee. Lundy commented that comments in the completed draft would explain changes in the present probate code, and also that there would be tables showing relationship between the present code and the proposed revised code. Allison suggested that it be stressed to the Law Improvement Committee that the proposed revised code was not revolutionary in nature, but by and large reflected what was presently being done in probate matters, except that the new code would set up a simpler, easier way of doing things.

It was agreed that it would be desirable to make at least a preliminary report to the Law Improvement Committee at its next meeting on March 8, especially since probate revision would probably be a principal matter for consideration at that meeting. Dickson, Zollinger and Allison were designated to represent the advisory committee at the March 8 meeting of the Law Improvement Committee, but it was indicated that other members of the advisory and Bar committees would be welcome to attend if they so desired. Dickson requested that he be notified as soon as arrangements were definite for the March 8 meeting, so that he could arrange to attend. Lundy was asked

to try to have the probate revision matter placed on the March 8 agenda for around 11 a.m.

Husband suggested that it would be helpful to the Law Improvement Committee at the March 8 meeting to have before it a list of significant proposals by the advisory committee for change in the present probate code. Dickson indicated that he, Zollinger, Allison and Lisbakken would get together before the March 8 meeting and prepare such a list.

Apportionment of Estate Taxes (Tab 27. The draft discussed is Appendix A to these minutes, without the changes made at the meeting.)

Lisbakken reported for the special subcommittee on apportionment of estate taxes, stating that it was the consensus of the subcommittee that people wanted estate taxes paid out of their residuary estate. The subcommittee had agreed that there should be no apportionment of federal or state estate taxes unless the testator's will otherwise provided. The subcommittee recommended that if the will provided for apportionment, or if the decedent died intestate, then the Uniform Estate Tax Apportionment Act approach should be used. The committees began consideration of the draft submitted by the subcommittee.

The term "curatelic trustee," appearing in (1) (c) of section 2 of the draft, was discussed briefly. The term was thought to mean a guardian of the person, and the comment was made that the term was defined in the Uniform Probate Code (3rd Working Draft, November, 1967).

Riddlesbarger stated that there were 25 states having apportionment statutes, and that the tendency was toward equitable apportionment and not to put the whole burden on the residuary estate. He expressed the view that an effective date provision should be included in the draft, having in mind that the provision would make the draft applicable only as to wills executed after the effective date. Allison asked if it would be advisable to use the date of death instead of the date of will execution. Zollinger pointed out that the purpose of the draft should be to resolve the matter of estate tax payment where a testator made no provision therefor, and that this would not depend upon the date of will execution. He expressed the belief that most testators who were silent on the subject did not intend apportionment. Dickson commented that the draft should apply to wills made after a certain date.

Lisbakken believed most people considered the fact that

the residuary estate might be subject to taxes. Richardson disagreed. Either way the draft would be conditioned on whether the will provided otherwise. Those who worked on the draft felt it was easier to say there should be no apportionment than to say there would be and codify the manner of apportionment. The subcommittee took the view that more people would prefer not to require apportionment than would want to. Richardson disagreed with this view.

It was pointed out that what was being taxed was the right to receive, and not the property itself or the estate. Mapp read a definition of estate tax, saying he thought it needed clarification and stressing the fact that the tax was on the right to receive. Husband remarked that he did not think there was one will in 30 that specified no apportionment; that most wills were silent on the subject. Zollinger suggested that the important thing was what a testator desired when he said nothing about it, an inquiry similar to that employed in considering the law of descent and distribution. He disagreed with the subcommittee's view, and indicated his concern about the residue under a will and all other types of transfer of property that were subject to taxes. He agreed that under a will the residuary estate should bear taxes unless otherwise provided, but did not think it was the intent that remaining assets of an estate should bear all taxes.

Mapp commented that without a statute, such as the Uniform Act or the draft the subcommittee recommended, there was no legal way to apportion the taxes. There was a discussion of Beatty v. Cake (236 Or. 498 and 242 Or. 128) in regard to apportionment. Mapp asked how, in the absence of a statute, could an executor compel a surviving joint tenant to contribute to payment of estate taxes.

Riddlesbarger moved, and it was seconded, that section 1 of the draft be approved. On a vote of all members present, the motion failed, 8 to 6. On a separate vote, members of the advisory committee favored the motion, 5 to 3, and members of the Bar committee rejected the motion, 5 to 1.

Richardson expressed the view that apportionment should be codified because there was a problem in Oregon as to what the law on the subject was, but objected to the effect, imposed by section 1 of the draft, of being silent in the will. He stated that the federal estate tax and Oregon estate tax should be apportioned unless the will provided otherwise, and that the manner of this apportionment should be specified in the statutes. Lisbakken suggested adoption of the Uniform Act (section 2 of the draft), without section 1 of the draft.

Allison recommended the approach of the Uniform Act, commenting that there should be some machinery for apportioning payment of estate taxes in an equitable manner, including contribution by people getting property outside the will.

Jaureguy expressed the view that surviving joint tenants should pay a portion of the estate taxes. It was pointed out that the present law in Oregon does not require this. Jaureguy remarked that he would make a distinction in regard to apportionment as between specific gifts under a will and joint estates, on the theory that in most instances joint estate property would otherwise have fallen within the residuary estate.

Richardson moved, seconded by Allison, that the committees adopt in principle section 2 of the draft, without section 1. Motion carried. The committees proceeded to consider the provisions of section 2 of the draft.

Riddlesbarger suggested that a sentence be added to (2) of section 2 of the draft, stating that "a mere direction to pay debts shall not be considered against apportionment."

A question was raised as to whether the court, referred to in (3) (a) of section 2 of the draft, was sufficiently identified. Allison noted that the proposed revised probate code would specify that where proceedings in regard to the same estate were commenced in two or more counties, the court in which proceedings were first commenced would have the right to determine venue most advantageous for the benefit of the estate.

Reference was made to "personal representative" appearing in (3) (c) of section 2 of the draft, and it was asked whether "fiduciary" should not be substituted therefor. Richardson suggested that the paragraph should read: ". . . negligence of the personal representative, the court may charge him with the amount . . ." Dickson suggested: ". . . negligence of the fiduciary, the court may charge him with the amount ..."

After brief discussion, it was determined that the court referred to in (3) (d) of section 2 of the draft was the probate court.

Richardson asked about the need for an effective date provision in the draft, and the application of the draft to wills executed or decedents who died before that effective date. Dickson expressed the view that Beatty v. Cake would apply to resolve this matter.

The question whether, under section 2 of the draft, a foreign fiduciary would or should be allowed to come into Oregon and enforce apportionment, whether or not the foreign state had an apportionment statute or whatever the terms of such a foreign statute, was discussed. It was thought that it could not be assumed that all states would ultimately adopt the Uniform Act. Dickson remarked that a foreign fiduciary might be able to enforce apportionment in Oregon whether or not section 2 of the draft was enacted.

The question was raised whether an Oregon personal representative could go into Idaho and enforce collection there against an Idaho insurance beneficiary of a portion of the estate taxes paid by the personal representative. Lovett indicated he thought federal statutes covered such a situation. Mapp commented that there would be no way presently to enforce collection in the joint tenancy situation. The question of which state law would apply was discussed. Zollinger expressed the view that the law of the state of the court in which the will was probated would apply. It was thought that Beatty v. Cake would apply in determining which state law would govern.

Zollinger moved, seconded by Riddlesbarger, that the committee adopt section 2 of the draft, with the following changes: In (2) insert "a mere direction to pay debts shall not be considered against apportionment"; and in (3) (c) delete "the personal representative" and insert "him." Motion carried. (Note: See page 19 of these minutes.)

Dickson thanked the subcommittee for its work on the draft.

#### Finality of Decree of Distribution

Allison distributed to members present copies of his memorandum on the finality of a decree of distribution. (Note: This memorandum is Appendix B to these minutes.)

The memorandum was read and discussed. In response to questions by Riddlesbarger, Allison commented that there was no need to require deeds transferring real property by the personal representative, since title to both real and personal property would vest in the recipients on the date of death of the decedent, and that the provision for recording the decree in counties where real property was located, as presently done, would be sufficient to show the transfer of title.

There appeared to be no disagreement with the memorandum or the conclusions expressed therein.

Ancillary Administration (Tab 24)

The committees began a consideration of the draft, dated March 16, 1967, on ancillary administration, which appeared following tab 24 in blue notebook.

Butler indicated that it was his impression that the committees had previously considered the matter of ancillary administration and had decided not to include provisions on this subject in the proposed revised probate code. Allison commented that the last committee action on the subject appeared to have been taken at the March 1967 meeting, at which time a motion to table the matter carried. (Note: See Minutes, 3/17,18/67, page 6.) Butler expressed his opposition to inclusion of a separate chapter on ancillary administration in the proposed revised code, and commented that the matter should be governed in the same manner as Oregon domiciliary administration.

Zollinger remarked that he was not enthusiastic about a separate chapter on ancillary administration, but indicated his view that one aspect thereof not covered adequately by present law and susceptible of improvement was the matter of distribution to a foreign personal representative. He commented that this matter could be handled by provision in the chapter on accounting and distribution. Allison pointed out that the draft of the chapter on accounting and distribution (2nd draft, 1/10/68), which appeared following tab 23 in the blue notebook, incorporated the present Oregon statute (i.e., ORS 116.186) on delivery of property and payment of debts to foreign personal representatives without initiation of an estate proceeding in this state, with the only change being an increase in the maximum value of the property or debt from \$500 to \$1,000. Mapp stated that the Oregon statute was similar to those of many other states on the subject, and expressed the view that the treatment of the subject in sections 4-201, 4-202 and 4-203 of the Uniform Probate Code constituted an improvement in language and clarity of the existing statutes.

Mapp commented that another aspect of the matter was the situation involving, for example, a will probated in Washington and the decedent having left assets in Oregon, raising the question as to whether the will should be reprobated in Oregon or the Oregon court should accept the

Washington probate. He also remarked that a basic concept of the Uniform Probate Code was that it was desirable to have one personal representative administering an estate where assets were located in more than one state. Riddlesbarger recollected that the committees had appeared not to favor this concept, at least in so far as it contemplated transferring assets out of Oregon without some Oregon estate proceeding.

Section 1. Mapp noted that section 1 of the draft on ancillary administration reflected an endeavor to eliminate the necessity of calling witnesses and re-probating a will in Oregon that had previously been probated elsewhere. He referred to section 3-227 of the Uniform Probate Code, giving a conclusive effect to final probate orders or decrees in other jurisdictions, and indicated he was inclined to favor the wording of the Uniform Code over that of the draft pertaining to recognition of foreign probate.

Richardson expressed the opinion that present Oregon law contained a provision on recognition of foreign probate. Allison noted that ORS 115.160 made provision for establishing foreign wills, but appeared not to provide for contest thereof. Jaureguy remarked that there should be a right to contest a foreign will in Oregon even though it had not been contested in the foreign jurisdiction.

Zollinger indicated that he preferred the wording of section 1 of the draft to that of the Uniform Probate Code, commenting that the latter was too broad, and Dickson and Richardson agreed.

Zollinger left the meeting at this point (4:20 p.m.)

Riddlesbarger moved, and it was seconded, that section 1 of the draft be approved and located in an appropriate place in the proposed revised code with other provisions relating to admission of wills to probate. Motion carried.

Section 2. Mapp referred to section 2 of the draft on ancillary administration, which would authorize granting original probate in Oregon of the will of a testator dying domiciled outside this state unless the will was rejected in the foreign state for a cause that would be ground for rejection in Oregon. He pointed out that if a will were denied probate in Washington but admitted in Oregon, part of the estate would pass by intestacy and part under the will. Opinion was expressed that if a will were rejected in a

foreign jurisdiction for grounds not recognized in Oregon, there should be no reason the will could not be probated in this state. Jaureguy commented that Oregon heirs under a will denied probate in a foreign jurisdiction should have the right to relitigate the matter in this state, especially if there were local circumstances justifying such relitigation. Shetterly remarked that Oregon heirs might not have received notice of a foreign probate proceeding. Allison expressed the view that the effect of section 2 was to remove from Oregon court jurisdiction to pass upon a will under the laws of Oregon, and indicated that he did not think the section was needed.

Riddlesbarger asked if there was statutory authority for probate of a foreign will in Oregon. Allison noted that section 5 of the draft of the chapter on wills (2nd draft, 7/26/67), which appeared following tab 10 in the blue notebook, specified the requirements for a lawfully executed will. Riddlesbarger responded that section 5 of the wills chapter did not appear to answer his question, but indicated that the provision in the draft of the chapter on powers and jurisdiction of probate court stating that probate jurisdiction included probate and contest of wills did appear to resolve the matter.

Mapp moved, seconded by Riddlesbarger, that section 2 of the draft be approved. Motion failed.

Section 3. Mapp referred to section 3 of the draft on ancillary administration and commented that, in view of the discussion and action on section 2, it would appear that the committees would not favor section 3. He moved, and it was seconded, that section 3 be rejected. Motion carried.

Section 4. Mapp referred to and explained section 4 of the draft on ancillary administration. Dickson expressed the view that previous discussion by the committees indicated that most members were opposed to section 4. Allison pointed out that, under section 7 of the draft of the chapter on initiation of probate or administration (3rd draft, 11/21/67) appearing following tab 12 in the blue notebook, a foreign executor could qualify as a personal representative in Oregon. Dickson ruled that the consensus of the committees was that section 4 of the draft be rejected.

The meeting was recessed at 4:40 p.m.

The meeting was reconvened at 9:05 a.m., Saturday, February 17, 1968, in Suite 2201, Lloyd Center, Portland, by Chairman Dickson.

The following members of the advisory committee were

present: Dickson, Zollinger, Allison, Carson, Husband, Jaureguy, Lisbakken, Mapp and Riddlesbarger.

The following members of the Bar committee were present: Heisler, Krause, Meyers, Kraemer, Smith and Thomas.

Also present was Lundy.

Ancillary Administration (continued) (Tab 24.)

Section 4. Mapp reviewed the discussion of section 4 of the draft on ancillary administration by the committees the previous day, noting that it had been pointed out that the proposed revised code would permit a foreign executor to qualify as an Oregon personal representative and that it had been concluded that section 4 should be rejected.

Section 5. Mapp explained that the purpose of subsection (1) of section 5 of the draft on ancillary administration was to hold up distribution of an ancillary estate in Oregon as long as the will was subject to contest in the jurisdiction where the testator died domiciled. He commented that since the subsection was keyed to provisions rejected by the committees the previous day, there appeared to be no need to retain subsection (1).

Mapp pointed out that subsection (2) of section 5 of the draft would permit transfer of property by an ancillary personal representative in Oregon to a domiciliary personal representative elsewhere if the court thought such transfer was necessary for certain purposes. He recommended that subsection (2) be located in the chapter on accounting and distribution. The committees discussed at length the use of the word "ancillary," and there was disagreement as to its exact meaning, whether the word should be defined, whether the word should be deleted and whether other words should be substituted therefor.

Dickson suggested that subsection (2) of section 5 of the draft be revised to read: "When administration in this state has been completed, the court may, upon application, authorize delivery of such property to such other foreign personal representative as the court finds appropriate for the payment of debts, taxes or other charges, or for distribution to the beneficiaries of the estate of the decedent." The comment was made that it should be made clear that the reference was to a personal representative in another state, and the view was expressed that use of the word "foreign" accomplished this purpose.

Zollinger moved, and it was seconded, that subsection (1) of section 5 of the draft be deleted, and that subsection (2),

revised as suggested by Dickson, be approved and placed in the chapter on accounting and distribution. Motion carried.

Allison suggested that all provisions involving foreign estate proceedings might be located together in the proposed revised code. Zollinger indicated he favored the locating of such provisions with others of similar subject matter, and Dickson expressed agreement. Zollinger remarked that he would be content to leave the matter of location to the Legislative Counsel.

Section 6. Mapp referred to section 6 of the draft on ancillary administration, and suggested that previous action by the committees eliminated the necessity for paragraphs (c) and (d) of subsection (1) thereof. It was suggested that "certified" be substituted for "verified" in subsection (3). The meaning of "this Act" in subsection (3) was questioned. After further discussion, Zollinger moved, seconded by Mapp, that section 6, revised by deleting paragraph (c) of subsection (1) and substituting "certified" for "verified" in subsection (3), be approved and located in an appropriate place in the proposed revised code determined by the Legislative Counsel in accordance with general views expressed by the committees. Krause expressed the opinion that the section was too narrow, and suggested that it be broadened to cover the proof of any foreign probate determination in a simplified manner. He moved that his suggestion be incorporated in Zollinger's motion. Allison called for the question on Zollinger's original motion. Motion carried.

Attention was called to the second sentence of subsection (3) of section 6 of the draft, and its meaning and the appropriateness of its wording were questioned and discussed. This led to a further discussion of proof of documents and the treatment thereof in all of section 6, after which Zollinger proposed the following wording on the subject: "A document filed or entered in a foreign jurisdiction may be proved by a copy thereof certified by the clerk of the court in which such document was filed or entered or by such other official as shall have custody of the original document."

Zollinger moved, and it was seconded, that his proposed wording be substituted for subsections (1) and (2) of section 6 of the draft. Motion carried.

Section 7. Mapp referred to section 7 of the draft on ancillary administration, and suggested that it might be deleted in view of action taken by the committees on previous sections of the draft. Mapp moved, seconded by Zollinger, that section 7 be deleted. Motion carried.

Section 1. Allison suggested that the last sentence of subsection (1) of section 1 of the draft on ancillary administration (i.e., "Rights to take against the will are not affected by this section.") was unnecessary and might be deleted.

Allison referred to section 5 of the draft of the chapter on initiation of probate or administration (3rd draft, 12/22/67), which appeared following tab 12 in the blue notebook, and requested clarification of the impact on that section, relating to testimony of attesting witnesses of will, of the committee action as to section 6 of the draft on ancillary administration. He indicated that he preferred the wording of original section 6 (1) (b) (i.e., proof "that a will has been probated or established, by a certified copy of the order admitting the will to probate, etc.") to that adopted by the committees (i.e., "a document filed or entered in a foreign jurisdiction may be proved, etc."), remarking that he did not consider an order admitting a will to probate a "document." Zollinger expressed the view that such an order was a "document" that was "entered," but commented that he would agree to a revision of the section 6 wording to read "an order or document entered or filed, etc." Allison stated that he was still concerned about whether the testimony of witnesses was or had to be "filed" and about the matter of proof thereof.

After discussion, Allison stated that if it were the consensus of the committees that the order admitting a will to probate was the only required document, he would like to rewrite subsection (1) of section 1 of the draft to read: "The written will of a testator . . . may be admitted to probate upon petition therefor and by filing a certified copy of the will and the order admitting the will to probate or evidencing its establishment from the jurisdiction where the testator died domiciled."

Dickson remarked that, as a result of the discussion, it appeared only subsection (3) of section 6 of the draft would remain. Allison agreed that only the provision on translated foreign documents would be retained. Dickson indicated that the translation provision should be applicable to the testimony of witnesses treated by section 5 of the initiation of probate or administration draft, and that the drafting involved would be left to Allison to accomplish in accordance with the discussion.

Delivery of personal property and payment of debts to foreign personal representatives. Mapp summarized previous discussion of the committees on ancillary administration and the authorization to be given a foreign personal representative to come into Oregon and perform such acts as recovery of property and collection of debts and giving discharge therefor. He

referred to section 17 of the draft of the chapter on accounting and distribution (2nd draft, 1/10/68), which appeared following tab 23 in the blue notebook. He pointed out that section 17 was an amendment of existing law (ORS 116.186), relating to delivery of personal property and payment of debts to foreign personal representatives, and that the change made by the amendment merely increased, from \$500 to \$1,000, the minimum value of the property or debt for purposes of the application of certain procedural requirements, such as the requirement that delivery or payment should not be made until 90 days after first publication of a notice. Mapp noted that the procedure contemplated by section 17 avoided the problems of ancillary administration in certain circumstances. He expressed the view that, under section 17, if a debt were less than \$1,000, it would not be necessary to publish notice.

Mapp called attention to sections 4-201, 4-202 and 4-203 of the Uniform Probate Code, and noted that these sections covered the same subject matter as section 17 of the accounting and distribution draft. He suggested that the more simplified procedure of the Uniform Code sections was preferable to that of section 17, and posed the question of how much protection should be afforded Oregon creditors in the situations contemplated by the sections under discussion.

Allison commented that consideration should be given to the requirement of the Oregon statute as to inheritance tax clearance before delivery of property or payment of a debt to a foreign personal representative. Zollinger remarked that there should be protection for Oregon debtors who pay a debt they believe they owe, and that the Uniform Code treatment of the matter appeared to afford such protection. He indicated that it appeared the Uniform Code approach might afford less protection to creditors, but more complete protection to debtors, than under the Oregon statute, and expressed the opinion that the Uniform Code approach was more realistic and preferable.

The requirement of the Oregon statute (section 17 (4) (d)) that there be a release of the property or debt given by the State Treasurer in respect to inheritance taxes was discussed at length. It was suggested that the release procedure gives the State Treasurer an opportunity to learn about assets that might be subject to tax, but questions were raised as to how often taxes actually were collected in such situations and what the State Treasurer did with the releases. Husband suggested that in the absence of such releases and other procedural requirements it might be possible to hide assets by having bank accounts in several states. Lisbakken referred to the requirements of notice by depositories to the State Treasurer set

forth in ORS 118.440. Husband expressed the view that the State Treasurer would have difficulty in checking on such situations; that while Oregon banks would give the notice, there was a question whether out-of-state banks would do so. He remarked that unless the State Treasurer did something with the notices, such as disseminating the information among other states, they were not particularly useful.

After discussion, it was apparently agreed that there was nothing in the sections of the Uniform Code under consideration that was in conflict with the Oregon inheritance tax laws, since the liability to pay the tax was imposed on beneficiaries and not on debtors.

Riddlesbarger moved, seconded by Lisbakken, that section 17 of the accounting and distribution draft be deleted and the substance of sections 4-201, 4-202 and 4-203 of the Uniform Probate Code substituted therefor. Motion carried.

Mapp referred to and explained the provisions of sections 4-204 to 4-207 of the Uniform Probate Code, whereby a foreign personal representative might be authorized to exercise powers of a local personal representative pending initiation of local administration. There was brief discussion of the matter, but no action taken thereon.

Escheat (Tab 26.)

Carson referred to the draft, dated April 12, 1967, on escheat, which appeared following tab 26 in the blue notebook, and proceeded to point out the disposition of the existing statutes pertaining to escheat in ORS chapter 120 by the draft, as follows:

ORS 120.010 (property that escheats; disposition of proceeds), repealed by draft.

ORS 120.020 (state as a party defendant to foreclosure of lien on escheated property), repealed by draft.

ORS 120.030 (determination of escheat; service on State Land Board; payment to state; records), repealed by draft.

ORS 120.040 (sale of real property of escheated estate; deed to state if not sold), repealed by draft.

ORS 120.050 (action to recover or enforce rights to escheated property), repealed by draft.

ORS 120.060 (filing information of escheat; order to show

cause), repealed by draft.

ORS 120.070 (ouster of jurisdiction of county court upon filing information in circuit court; necessity of final accounting before judgment of escheat), repealed by draft.

ORS 120.080 (receiver may be appointed), not affected by draft.

ORS 120.090 (appearances and answers; trial of issues made), repealed by draft.

ORS 120.100 (payment of claims against estate; deed to state; sale of realty), repealed by draft.

ORS 120.110 (provisions of decree of escheat of personal property), repealed by draft.

ORS 120.120 (escheated deposits; direction by Governor to file information or bill of discovery; disposal), repealed by draft.

ORS 120.130 (recovery of escheated property), amended by draft.

ORS 120.140 (procedure where real property or amount sought to be recovered does not exceed \$250), repealed by draft.

ORS 120.150 (right of aliens to recover escheated property), not affected by draft, but should be repealed.

The meeting was recessed at 11:40 a.m.

The meeting was reconvened at 1 p.m., by Chairman Dickson. The following members of the advisory committee were present: Dickson, Zollinger, Allison, Carson, Husband, Jaureguy, Lisbakken, Mapp and Riddlesbarger. The following members of the Bar committee were present: Krause, Meyers, Kraemer, Smith and Thomas. Also present was Lundy.

Escheat (continued) (Tab 26)

Carson continued his review of the disposition of existing statutes on escheat by the draft dated April 12, 1967, as follows:

ORS 120.210 (escheat of money or property deposited with institution on death, escape or parole of inmate; notice and publication), amended by draft.

ORS 120.220 (collection and disposition by State Land Board), amended by draft.

ORS 120.230 (owners' and representatives' rights to reclaim property; limitation), amended by draft.

Carson noted that it would be necessary to substitute "Director of the Division of State Lands" for "Clerk of the State Land Board" throughout the draft by reason of legislation enacted at the 1967 regular legislative session.

Jaureguay suggested that "known" be inserted before "heirs" in section 1 of the draft.

Allison referred to provisions of the draft requiring notices to the state, and called attention to the provisions of section 7 of the draft of the chapter on title and possession of property and duties and powers of personal representatives (amended 4th draft, 1/26/68), which appeared following tab 15 in the blue notebook, relating to information to devisees and heirs and notice to the State Land Board.

Mapp indicated that section 2-105 of the Uniform Probate Code provided that: "If there is no heir under the provisions of this Article [i.e., intestate succession and wills], the net intestate estate escheats to the state." Zollinger suggested that such a provision, together with section 5 of the draft, should adequately cover the matter of escheat. Allison pointed out that section 5 (6) of the draft of the chapter on intestate succession (3rd draft, 12/1/67), which appeared following tab 3 in the blue notebook, was substantially the same as the Uniform Code provision.

Allison noted that the existing statutes on escheat set forth procedures to be followed where probate proceedings disclosed no heirs and for a proceeding to be brought in the circuit court in the absence of probate proceedings. He commented that some of the existing statutes, such as ORS 120.060, dealt with matters not necessarily probate in nature, and questioned whether the committees should include such provisions in the proposed revised code. Riddlesbarger expressed the view that the committees should propose such changes as they considered desirable, but that ORS 120.060 should not be repealed and if the committees desired to propose changes in the procedure, the State Land Board should be contacted to obtain its views on revision of the procedure.

Lisbakken noted that under the Uniform Code provision the state is treated as any other heir, and expressed the view, with which Mapp agreed, that this approach was desirable.

Allison commented that if there were no other heirs to institute probate proceedings, there would be no notice to the State Land Board, and that ORS 120.060 should not be repealed without some new provision for a proceeding similar to that contemplated by the existing statute. Zollinger pointed out that if the state were treated as an heir, the State Land Board could institute a probate proceeding. It was noted that section 4 of the draft of the chapter on initiation of probate or administration (3rd draft, 12/22/67), which appeared after tab 12 in the blue notebook, would allow "any interested person" to petition for the appointment of a personal representative, and it was commented that the state would be entitled to petition as an "interested person."

There was further discussion of whether the committees should propose the repeal of ORS 120.060 or any change therein. Riddlesbarger restated his view that ORS 120.060 and companion existing statutes on the separate non-probate proceeding for escheat at the instance of the State Land Board should not be repealed or otherwise affected, at least not without consultation with and approval of the Board. Krause remarked that the State Land Board should be asked for its comments on the matter. Zollinger disagreed, expressing the opinion that the committees should proceed to make those recommendations for change they considered desirable. Dickson commented that the committees had approved a provision making the state an heir, but that the separate non-probate proceeding should be retained also. Allison indicated that he favored retention of the separate non-probate proceeding and the existing 10-year recovery provision (ORS 120.130) as well.

After further discussion, Mapp moved, and it was seconded, that the committees approve appropriate provisions requiring the state to proceed as an heir in probate proceedings, that the existing separate non-probate proceeding be deleted and that appropriate provisions be included in the proposed revised code for reclaiming escheated property. Motion carried.

Carson commented that sections 1 to 4 of the draft on escheat set forth certain desirable mechanics not found in the draft of the chapter on intestate succession. Allison responded that other provisions to be contained in the proposed revised code would require sufficient notice to the state as an heir.

Zollinger proposed, and the committees apparently agreed, that sections 1 to 4 of the draft on escheat should be deleted.

Mapp pointed out that the committees had adopted some significant changes in the law of intestate succession, reducing the categories of potential heirs by eliminating very distant

heirs. He questioned whether, in view of this committee action, it served a useful purpose to retain the reclaiming provisions set forth in ORS 120.130, as amended by section 5 of the draft on escheat. Zollinger noted that under the abandoned property statutes (ORS 98.302 to 98.436) a person entitled to abandoned property could reclaim it at any time, and expressed the opinion that there was merit to allowing recovery of escheated property as well, and Dickson agreed.

Allison referred to section 14 of the draft of the chapter on accounting and distribution (amended 2nd draft, 2/2/68), which appeared following tab 23 in the blue notebook, remarking that the court order thereunder releasing the personal representative would bar suit against the personal representative unless commenced within one year after the date of the discharge. Dickson referred to the existing statute (ORS 18.160), under which a judgement may be set aside within one year on the basis of mistake, inadvertence, surprise or excusable neglect, indicating that this statute had been held applicable to a distribution order in a probate proceeding. He noted that other provision was made under existing law for setting aside distribution orders where fraud was involved and in the case of an application therefor within "term time." He stated that he favored the one-year limitation contained in section 14 of the accounting and distribution draft.

Mapp moved, seconded by Kraemer, that section 5 of the escheat draft and all other provisions dealing with reclaiming escheated property be deleted. Motion failed.

A motion was made and seconded that section 5 of the escheat draft be approved in substance, and redrafted in an appropriate manner by Allison. Motion carried. Allison suggested that the last subsection of section 5, relating to escheated property of state institution inmates, be placed in a separate section, and it was agreed that this matter would be left to Allison's judgment.

Riddlesbarger referred to section 6 of the escheat draft, which amended ORS 120.210, and commented that the reference therein to "personal representative" caused him to believe there should also be a reference to a guardian of a state institution patient or inmate or his heir. Lundy remarked that under the existing guardianship law it appeared that a guardian could act for a patient or inmate of his heir without specific authorization set forth in ORS 120.210, and Dickson and Zollinger agreed. Zollinger suggested that when section 5 of the escheat draft was redrafted, the reference to "guardian or conservator" in paragraph (d) of subsection (3) might be deleted.

It was pointed out that ORS 120.080 and 120.150 should be added to the list of repealed existing statutes in section 9 of the escheat draft.

A motion was made and seconded that sections 6 to 9 of the escheat draft be approved, subject to editorial changes made pursuant to the discussion of the sections by the committees. Motion carried.

In response to a question by Allison, it was explained that the deletion of the references to escheat in ORS 178.080, as amended by section 7 of the escheat draft, was based on ground that the State Treasurer had nothing to do with escheats, and that the amendment was merely a housekeeping matter.

Lundy asked the reason for substitution of "Clerk of the State Land Board" for "State Treasurer" in subsection (6) of ORS 178.080, as amended by section 7 of the escheat draft. Zollinger responded that he thought the purpose of the reporting required by the subsection was to determine the existence of escheatable property, and commented that the subsection should not be in ORS 178.080, but with other provisions on escheat.

#### Effect of "Pay My Just Debts"

Riddlesbarger referred to the discussion of the committees the previous day on the effect of a will direction to "pay my just debts" on apportionment of estate taxes, and the action by the committees to insert in the draft on estate tax apportionment a specific provision that "a mere direction to pay debts shall not be considered against apportionment." He reviewed some background on his concern about the effect of a direction to "pay my just debts, referring to an annotation on the subject in 37 A.L.R. 2d, beginning on page 7. He recommended that a provision should be added to others in the proposed revised code relating to will construction, such provision to state that "a mere testamentary direction to pay debts, charges, expenses of administration or taxes or any of them shall not be deemed to affect rights of exoneration of encumbrances or apportionment of taxes." He expressed the view that the effect of the direction to "pay my just debts" should be clarified in Oregon, and indicated he did not believe the action of the committees the previous day went far enough.

The reference in the wording recommended by Riddlesbarger to a "mere" direction was questioned. Carson suggested that "general" might be preferable to "mere." After further discussion, the following wording was proposed: "A mere testamentary direction to pay debts, charges, expenses of administration,

Page 20  
Probate Advisory Committee  
Minutes, 2/16,17/68

taxes, or any of them, shall not be deemed a direction for exoneration of encumbrances or against apportionment of taxes." Riddlesbarger moved, seconded by Zollinger, that the proposed wording be incorporated in an appropriate section of the proposed revised code dealing with construction of wills. Motion carried.

The meeting was adjourned at 2:40 p.m.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting,  
February 16 and 17, 1968)

§1. No Apportionment of Estate Taxes.

Unless the will otherwise provides, the federal estate tax and the Oregon estate tax shall not be apportioned, but shall be paid as an expense of administration. If the will provides for apportionment, then apportionment shall be made in accordance with the provisions of ORS \_\_\_\_\_.

§2. Apportionment of Estate Taxes.

(1) Definitions. For purposes of this section:

(a) "estate" means the gross estate of a decedent as determined for the purpose of federal estate tax and the estate tax payable to this state;

(b) "person" means any individual, partnership, association, joint stock company, corporation, government, political subdivision, governmental agency, or local governmental agency;

(c) "person interested in the estate" means any person entitled to receive, or who has received, from a decedent or by reason of the death of a decedent any property or interest therein included in the decedent's estate. It includes a personal representative, curatelic trustee, guardian of property and trustee;

(d) "state" means any state, territory, or possession of the United States, the District of Columbia,

and the Commonwealth of Puerto Rico;

(e) "tax" means the federal estate tax and the Oregon estate tax provided by \_\_\_\_\_ and interest and penalties imposed in addition to the tax;

(f) "fiduciary" means executor, administrator of any description, or trustee.

(2) Apportionment among interested persons; valuations; testamentary apportionment. Unless the will otherwise provides, the tax shall be apportioned among all persons interested in the estate. The apportionment shall be made in the proportion that the value of the interest of each person interested in the estate bears to the total value of the interests of all persons interested in the estate. The values used in determining the tax shall be used for that purpose. In the event the decedent's will directs a method of apportionment of tax different from the method described in this Act, the method described in the will shall control.

(3) Apportionment proceedings; jurisdiction; equitable apportionment; penalties and interest; charging fiduciary; court determination of amount of tax.

(a) The court where venue over the administration of the estate of a decedent lies, may on petition for the purpose determine the apportionment of the tax;

(b) If the court finds that it is inequitable to apportion interest and penalties in the manner

provided in subsection (2), because of special circumstances, it may direct apportionment thereof in the manner it finds equitable;

(c) If the court finds that the assessment of penalties and interest assessed in relation to the tax is due to delay caused by the negligence of the fiduciary, the court may charge the personal representative with the amount of the assessed penalties and interest;

(d) In any suit or judicial proceeding to recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this Act, the determination of the court in respect thereto shall be prima facie correct.

(4) Withholding of Tax; Recovery from Estate; Bond of Distributee.

(a) The personal representative or other person in possession of the property of the decedent required to pay the tax may withhold from any property distributable to any person interested in the estate, upon its distribution to him, the amount of tax attributable to his interest. If the property in possession of the personal representative or other person required to pay the tax and distributable to any person interested in the estate is insufficient to satisfy the proportionate

amount of the tax determined to be due from the person, the personal representative or other person required to pay the tax may recover the deficiency from the person interested in the estate. If the property is not in the possession of the personal representative or the other person required to pay the tax, the personal representative or the other person required to pay the tax may recover from any person interested in the estate the amount of the tax apportioned to the person in accordance with this Act;

(b) If property held by the personal representative is distributed prior to final apportionment of the tax, the distributee shall provide a bond or other security for the apportionment liability in the form and amount prescribed by the personal representative.

(5) Exemptions; Allowance; Relationship of Donee; Foreign Taxes; Tax Credits; Property Includable in Computation.

(a) In making an apportionment, allowances shall be made for any exemptions granted, any classification made of persons interested in the estate and for any deductions and credits allowed by the law imposing the tax;

(b) Any exemption or deduction allowed by reason of the relationship of any person to the decedent or

by reason of the purposes of the gift shall inure to the benefit of the person bearing such relationship or receiving the gift; except that when an interest is subject to a prior present interest which is not allowable as a deduction, the tax apportionable against the present interest shall be paid from principal;

(c) Any deduction for property previously taxed and any credit for gift taxes or death taxes of a foreign country paid by the decedent or his estate shall inure to the proportionate benefit of all persons liable to apportionment;

(d) Any credit for inheritance, succession or estate taxes or taxes in the nature thereof in respect to property or interests includable in the estate shall inure to the benefit of the persons or interests chargeable with the payment thereof to the extent that, or in proportion as the credit reduces the tax;

(e) To the extent that property passing to or in trust for a surviving spouse or any charitable, public or similar gift or bequest does not constitute an allowable deduction for purposes of the tax solely by reason of an inheritance tax or other death tax imposed upon and deductible from the property, the property shall not be included in the computation provided for in section (2) hereof, and to that extent

no apportionment shall be made against the property.  
The sentence immediately preceding shall not apply to any case where the result will be to deprive the estate of a deduction otherwise allowable under section 2053(d) of the Internal Revenue Code of 1954 of the United States, relating to deduction for state death taxes on transfers for public, charitable or religious uses.

(6) Income Interests; Life or Temporary Interests; Charging Corpus.

No interest in income and no estate for years or for life or other temporary interest in any property or fund shall be subject to apportionment as between the temporary interest and the remainder. The tax on the temporary interest and the tax, if any, on the remainder shall be chargeable against the corpus of the property or funds subject to the temporary interest and remainder.

(7) Proceedings for Recovery of Tax; Commencement; Liability of Fiduciary; Apportionment of Amount Recovered.

Neither the personal representative nor other person required to pay the tax shall be under any duty to institute any suit or proceeding to recover from any person interested in the estate the amount of the tax apportioned to the person until the expiration of the three months next following final determination of the tax. A personal

representative or other person required to pay the tax who institutes the suit or proceeding within a reasonable time after the three months' period shall not be subject to any liability or surcharge because any portion of the tax apportioned to any person interested in the state was collectible at a time following the death of the decedent but thereafter became uncollectible. If the personal representative or other person required to pay the tax cannot collect from any person interested in the estate the amount of the tax apportioned to the person, the amount not recoverable shall be equitably apportioned among the other persons interested in the estate, who are subject to apportionment.

(8) Foreign Fiduciaries and Estate; Tax Credits.

(a) A personal representative acting in another state or a person required to pay the tax domiciled in another state may institute an action in the courts of this state and may recover a proportionate amount of the federal estate tax, of an estate tax payable to another state or of a death duty due by a decedent's estate to another state, from a person interested in the estate who is either domiciled in this state or who owns property in this state subject to attachment or execution. For the purposes of the action the determination of apportionment by the court having jurisdiction of the administration of the decedent's estate

in the other state shall be prima facie correct.

(9) Construction.

This section embodies the Uniform Estate Tax Apportionment Act and shall be so construed as to effectuate its general purpose to make uniform the law of those states which enact it.

APPENDIX B

(Minutes, Probate Advisory Committee Meeting,  
February 16 and 17, 1968)

February 13, 1968

MEMORANDUM

FINALITY OF DECREE OF DISTRIBUTION

Section 827, Jaureguy and Love, Oregon Probate Law and Practice, calls attention to the language of ORS 117.630 which makes the decree allowing the final account "primary evidence of the correctness of the account as thereby allowed and settled." The section further provides that the order setting forth the names and ages of the heirs and legatees "shall be prima facie evidence of the facts set forth therein." The authors state that it is difficult to reconcile this statute with the general rule that probate courts are courts of general jurisdiction whose orders with respect to descent of personal property are conclusive and therefore not subject to collateral attack. In section 829, the authors further call attention to the fact that there is no express statutory provision requiring an order of distribution.

It is believed that the proposed code will meet these uncertainties in the present probate code.

All references to the Accounting and Distribution chapter, Tab 23, are made with reference to the amended second draft. Section 3 requires that the final account include a petition for an order authorizing the personal representative to distribute the estate to the persons and in the portions specified therein. The proposed code requires notice to be mailed to the heirs in an intestate situation, to the devisees if the decedent died testate, to creditors not receiving payment in full whose claims have not otherwise been barred, and to any other interested person. Section 6 provides that in the decree of final distribution the court shall designate the persons in whom title to the estate available for distribution is vested and the property to which each is entitled under the will, by agreement approved by the court or pursuant to intestate succession.

Subsection (3) of section 6 provides "The decree of distribution shall be a conclusive determination of the persons

who are the successors in interest to the estate of the decedent and of the extent and character of their interest therein, subject only to the right of appeal and the right to vacate the decree."

Section 7 relieves the personal representative from liability to the extent that the final account is approved, subject only to the right of appeal and to the power of the court to vacate its final orders.

Section 14, providing for the discharge of the personal representative, states that the discharge shall operate as a release of the personal representative from further duties and shall operate as a bar to any suit against the personal representative and his surety, unless such suit be commenced within one year from the date of the discharge.

The background of these provisions is documented in the November 14, 1966, memorandum by Campbell Richardson, William Keller and William Tassock. The specific sources of the provisions referred to will be recited in the comments on the chapter on Accounting and Distribution.

STANTON W. ALLISON