

ADVISORY COMMITTEE
Probate Law Revision

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

Dates) 1:30 p.m., Friday, February 17, 1967
and: and
Times) 9:00 a.m., Saturday, February 18, 1967
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland

Suggested Agenda

1. Approval of minutes of the January meeting.
2. Reports on miscellaneous matters.
3. Allocation of income (Mr. McMurchie).
4. Accounting (continuation of the discussion at the January meeting by Mr. Richardson).
5. Ancillary Administration (Mr. Mapp and Mr. Riddlesbarger).
6. Creditors rights and insolvent estates (Mr. Gooding).
7. Estates of persons presumed dead (Mr. Allison).
8. The effect of a provision in a will "to pay all my just debts" (Mr. Riddlesbarger).
9. Inheritance tax (Mr. Carson, Mrs. Braun and Miss Lisbakken).
10. Drafts of the following subjects:
 - (a) Wills
 - (b) Family rights
 - (c) Advancements
 - (d) Effect of adoption
 - (e) Effect of illegitimacy
11. Next meeting.

ADVISORY COMMITTEE
Probate Law Revision

Thirty-third Meeting, February 17 and 18, 1967
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The thirty-third meeting of the advisory committee (a joint meeting with the Committee on Probate Law and Procedure, Oregon State Bar) was convened at 1:45 p.m., Friday, February 17, 1967, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison (arrived at 3:45 p.m.), Butler, Gooding, Mapp and Riddlesbarger. Carson, Frohnmayer, Husband, Jaureguy and Lisbakken were absent.

The following members of the Bar Committee were present: Biggs, Braun, Krause, Lovett, Meyers, Kraemer, McKenna (arrived at 3 p.m. and left at 4:45 p.m.), Richardson and Bettis. Gilley, Mosser, Silven, Piazza, Thalholfer, Pendergrass, Thomas, Copenhaver and Warden were absent.

Also present were Mr. Jack McMurchie who presented a draft relating to allocation income earned during administration of a decedent's estate, and James Sorte from the staff of Legislative Counsel.

Minutes of January meeting

There being no objections, the minutes of the last meeting (January 20 and 21, 1967) were approved as submitted.

Miscellaneous Matters

There were no reports of miscellaneous matters.

Allocation of Income

Mr. Jack McMurchie distributed to all members of the committees a proposed draft for the allocation of income of an estate. [Note: This draft is Appendix A of these minutes.] McMurchie explained, for the benefit of new members, that he had previously appeared before the committees at the time the committees discussed Accounting (See minutes 10/14, 15/66 p. 6). Following the October meeting, McMurchie had prepared a draft that was considered at the November meeting (See minutes 11/18, 19/66 pp. 9 to 12). At the November meeting, the committees had suggested certain changes in the draft so that it would be applicable to testate and intestate situations. The committees had also favored a proposal that would not require periodic adjustments during administration where the

amount of the estate was small. It was felt that small estates would not justify all of the time and work involved. McMurchie advised committees that he felt the present draft (Appendix A) would provide the suggested changes recommended by the committees.

McMurchie advised the committees that prior to preparing the draft he discussed the matter with several bank and trust officers, and they in turn discussed the matter with other people who deal with problems of allocation of income in an estate.

McMurchie said that all of the people he had talked to favored changing the Uniform Principal and Income Act rather than drafting new sections to be placed in the chapters on estates. He said one of the reasons for this is that there might be some confusion over whether a trustee is to follow the estate law.

Dickson said that he felt some cross reference should be placed in the Uniform Principal and Income Act, but that he believed there should be sections in the probate chapters dealing with this problem. The committees seemed to agree.

McMurchie said that the committees had wanted the draft to be applicable to both testate and intestate situations. He said that after considering this he had decided that there is no particular problem in intestate situations. In those cases, the residue is divided and the income allocated in the same manner of division. He suggested there is some problem where the widow elects to take against the will, but it would not justify adding to the statute proposed.

He indicated that he had changed the draft so that there should not be a problem of periodic adjustments in small estates, and this, too, was as requested by the committees.

One change in the first draft is the way the paragraph begins, and the present draft (Appendix A) begins "Unless the decedent's will otherwise provides,".

Another change that was made was in the place of "liability", as used in the Uniform Principal and Income Act, he used "liabilities, claims, debts, expenses of administration and inheritance and estate taxes."

Subsection (1)

McMurchie said that there were no changes made in subsection (1) of the first draft.

Subsection (2)

McMurchie advised the committees that subsection (2) was amended so that an outright pecuniary bequest that qualified for a marital deduction under the federal laws would share in income.

McMurchie told the committees that he had changed the first draft so that there do not have to be periodic adjustments as claims are paid except in the situation where the claims are large and it is necessary to make an equitable apportionment.

McMurchie said that the present plan is to use inventory values and not calculate increases in the estate.

Butler moved the adoption of the draft, Zollinger seconded the motion and the motion carried.

Compensation of Personal Representative (Continuation of the discussion by Campbell Richardson on Accounting. See minutes 11/18, 19/66 and 1/20, 21/67).

Richardson explained that the only matter in the draft remaining to be discussed was compensation of the personal representative. (See Memorandum dated November 14, 1966, prepared by Campbell Richardson, William Tassock and William Keller relating to Accounting). He explained that he had made a comparison of the various states, and there is a wide variance in not only the approach, but also the amount of the compensation of a personal representative.

Richardson distributed a draft of a section proposed to be adopted and incorporated into the proposed probate code. [Note: This draft is Appendix B to these minutes.]

Butler commented that he had discussed the amount of the compensation of the personal representative with a number of bank and trust officers. They had concluded that most of the work involved in an estate is in those estates with a value of less than \$50,000, and that the proposed draft would further reduce the fee in those estates. He said that the people he talked to felt it would be realistic to adopt a fee schedule that would allow the personal representative four percent of the first \$50,000, three percent of all over \$50,000 up to \$100,000 and two percent on all property of a value exceeding \$100,000. He said he would also favor compensation, on property listed for tax purposes, at the rate of one percent. McKay agreed that what Butler proposed would be a reasonable rate of compensation.

Richardson pointed out that he felt the draft represented what he believed the committees had indicated they wanted from previous discussion. He said that the draft in no way reflected his own views, and he had merely tried to draft the provision to reflect the wishes of the committees.

Braun asked whether the proposed schedule would be a fixed schedule without regard to whether the estate was difficult to administer.

Dickson said that the present compensation was not out of line, and neither would the compensation outlined in the draft be out of line. He said that often when a personal representative earns his compensation from administering a relatively easy estate it makes up for the time that he works very hard in administering an estate that is difficult.

McKay was of the opinion that the percentage should be higher on the first \$1,000.

Bettis said that if there is a provision in the code that eliminates the need to probate small estates, this would justify a higher rate of compensation.

Zollinger asked for an indication of the feelings of the members with reference to small estates.

Butler said that the absolute minimum fee, on any estate, should not be less than \$250.

Zollinger said that the minimum fee could always be changed by agreement of the parties.

There followed a discussion of the difference between the compensation of the personal representative and attorney.

Dickson indicated he would favor a proposal that allowed the compensation at the rate of four percent of the first \$60,000 and two percent of the overplus. He said that the court could always authorize an extraordinary fee. He also favored compensation of one percent of the value of property listed for tax purposes but not part of the probate estate.

Bettis said that he would favor compensation at the rate of one percent of property not part of the probate estate but part of the estate for tax purposes if the compensation was for the attorney. He said that type of property does add work for the attorney, but not the personal representative.

Riddlesbarger said he would not favor the one percent applying to the proceeds of insurance.

Mapp said he did not think any state in the union allowed compensation to be based on property that was not part of the estate the personal representative was charged with the responsibility to administer.

Butler noted that Oregon and the federal government require insurance to be reported.

Zollinger said he would be inclined to favor a proposal that the court could allow a reasonable fee for the work required for property not a part of the probate estate. He said that there would be such a variance in the amount of work required for this kind of property that a fixed percentage would be unrealistic.

Kraemer and Richardson were of the opinion that insurance proceeds should not be considered in fixing the amount of compensation.

After further discussion, Butler moved adoption of the proposal. Kraemer seconded the motion. Motion carried.

Ancillary Administration (Continuation of the discussion at the February 1967 meeting by Riddlesbarger and Mapp. A draft of the proposal is Appendix C to these minutes).

Riddlesbarger said that section 9 of the draft presupposes administration of an estate at the domicile of the decedent. Where there is no administration at the domicile, administration in Oregon would not be considered ancillary.

There followed a general discussion of whether or not a will admitted in the domiciliary state would have to be proven in ancillary administration. Riddlesbarger and Mapp said they did not see any need for going through the proof a second time once it was admitted in the domiciliary state. In reply to a question, they both favored reliance on the domiciliary court's decision, not only on the admission of the will, but also an order of the domiciliary court refusing admission of the will to probate.

Dickson asked whether or not it would be feasible to simply provide that Oregon will follow the decree of distribution of the domiciliary state.

Allison asked the reason for giving preference to the domiciliary state. He posed a problem where there was property in the domiciliary state, but the bulk of the property was in another state. The question raised was whether previous action by the non-domiciliary state would be nullified by subsequent action by the domiciliary. Mapp answered that this was the intent of the proposal. One of the reasons is to discourage someone from shopping for a forum in which to probate an estate.

McKay questioned whether there was any need to change the law. Under Oregon law, as to property in Oregon, you simply probate it as any other estate.

Riddlesbarger suggested that the domicile of the testator was the proper forum. The testator chose to live in the domicile, probably executed his will there and the domiciliary state would be the proper state to administer the estate if the intention of the testator was to be followed.

Zollinger said that he opposed following the acts of the domicile state. He indicated the basis for his objection is that this deals with the question of the sovereignty of the State of Oregon.

Allison said that he could visualize a problem with following the ruling of the forum of the domicile of the decedent. In a situation where a man lived all of his life in Oregon, had most of his property here, executed his will here, moved to New Mexico and died, the facts of undue influence, if any, would more easily be proved in Oregon. However, under the proposal, Oregon courts would be bound by a determination of the New Mexico courts.

The meeting was adjourned at 5:05 p.m.

The meeting was reconvened at 9:00 a.m., Saturday, February 18, 1967, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Carson, Gooding, Jaureguy, Lisbakken, Mapp and Riddlesbarger. The following members of the Bar committee were present: Biggs, Braun, Krause, Lovett, Meyers, McKay, Silven and Bettis. Also present was Sorte.

Ancillary Administration (continued)

Mapp read the sections of the proposal and explained the sources the draftsmen had used in preparing the proposal.

Allison raised the question of what instruments are filed when you commence ancillary administration. He indicated the proposal did not spell out whether you file the will, the will and a record of testimony, or whether there was a requirement that there be a petition.

Riddlesbarger said that just what is filed might vary considerably and it would probably be better to leave this part somewhat vague.

Allison was of the opinion that Oregon should not defer to the domiciliary state in all instances. He indicated that Oregon should have the right to decide how much evidence it takes to establish a will.

Riddlesbarger called attention to the fact that Oregon presently allows most of the things the proposal has with reference to personal property and that he did not see any objection to making the same laws applicable to real property.

Riddlesbarger summarized the alternatives to the ancillary administration proposal as follows: (1) Foreign powers act; (2) Require original probate but with less proof required; or (3) A combination of ancillary and original probate.

Zollinger said that whatever the committees adopted should be consistent with the guardianship law.

Allison favored filing the will so it would be known if there were restrictions on the sale of real property.

Dickson called attention to the fact that the court could order recording the will in the absence of statute.

McKay indicated that the timing of the recording was important as a sale could be made prior to compliance with recording the will.

The committees then raised the question of whether the committees favored a proposal that a domiciliary administrator can act in Oregon in that capacity, without any other circumstances, and in testate and intestate situations. The committees voted yes.

Zollinger noted the problem that might arise by allowing a corporate-foreign personal representative to act without complying with general Oregon corporation law.

The committees voted in favor of allowing a foreign corporation to serve as personal representative in Oregon.

The committees favored requiring a foreign corporation to qualify to do business in Oregon prior to serving as personal representative.

The committees voted against a proposal that would bind Oregon to any acts taken by the personal representative in the domiciliary state.

The committees favored a proposal that would allow a will contest in Oregon even though the will had been admitted in the domiciliary.

The committees recessed at 12:15 p.m.

The meeting was reconvened at 1:30 p.m., Saturday, February 18, 1967, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison (left at 3:45 p.m.), Gooding (left at 3:30 p.m.), Butler, Carson, Jaureguy, Lisbakken and Mapp. The following members of the Bar committee were present: Biggs, Braun, Lovett, Meyers, McKay, Silven and Bettis (left at 3:30 p.m.). Also present was Sorte.

Provision in will "to pay my just debts."

Riddlesbarger distributed a report dated February 17, 1967.
[Note: This report is Appendix C to these minutes.]

Riddlesbarger pointed out to the committees that a provision in a will "to pay my just debts" is a common expression in a will, but it is not clear whether this should be interpreted as an expression of intent on the part of the testator. Riddlesbarger said that although he did not feel the committees should concern themselves with this problem at this time, he called it to their attention so this could be looked at when the committees considered drafts of the proposed probate code.

Jaureguy asked whether or not such an expression in a will authorized payment of debts for which there had been no claim filed.

Zollinger expressed the opinion that this should all be considered at the time the drafts are considered. Zollinger moved that there be a group of sections in the proposed code dealing with interpretation of wills, and that there be a definition of the meaning of "to pay all my just debts." Motion carried.

Creditors Rights and Insolvent Estates

Gooding distributed to the members of the committees a memorandum he had prepared. [Note: This is Appendix D to these minutes.]

Gooding advised the committees that he had been working with Judge Dickson and Judge Snedecor in the area of creditor's rights and insolvent estates. He said that a question arose as to whether or not all insolvent estates should be handled through the bankruptcy courts or the probate courts. Another question arose as to preferences, and again whether the bankruptcy courts are a better place to deal with these problems.

Zollinger asked whether the assets of a trust, that was created for the benefit of the trustor and others, are available to the personal representative.

Gooding indicated that these assets would be available if the trust were revocable by the trustor, or if there were other incidents of ownership.

After discussion of the policy considerations of the proposal, Biggs moved that the committees do not adopt the proposal. Motion carried.

Estates of Persons Presumed Dead

Allison distributed a draft he had prepared. [Note: This draft is Appendix E to these minutes.]

Allison explained that since the adoption of the present Oregon code in this area there has been very little litigation. He indicated that before drafting the proposal he had studied the Iowa and Washington codes. Allison indicated that he believes the present Oregon law on this subject is too cumbersome. It was pointed out that some of the problems when persons are missing are the management of property, needs of the family of the missing person, protection of buyers of property and protection of the rights of the missing person. Allison explained the changes he had made and compared the proposal with the Iowa and Washington code.

Butler questioned whether there could be a guardian ad litem appointed for a deceased person.

Lovett asked whether the present law uses the date of disappearance or the date of the court order as the date of death. Zollinger said that the present law is somewhat obscure on this point.

Allison explained that one of the things he intended was to shorten the time within which a missing person could come back and demand his property. In the proposal, the requirement is that the missing person be protected for one year after the probate.

The committees then discussed the provision for bonds by the distributees of the missing person. After further discussion, the committees decided to postpone consideration of the matter until the March meeting. Chairman Dickson appointed Allison and Braun to review the matter prior to the March 1967 meeting and to lead the discussion at that time.

Inheritance Tax

Carson reviewed previous action by the committees, and said that the committees had taken action in addition to the recommendations of the subcommittee of himself, Braun and Lisbakken. He said that the primary objective is to allow the determination and payment of the inheritance tax outside of the probate proceeding. The present plan is that the determination of inheritance tax will be extra-judicial, except in cases where there is a dispute, and in the latter case there will be a judicial determination. Carson said that the objective of the subcommittee at this time is to prepare a draft, and in doing so, the subcommittee will keep in touch with the inheritance and gift tax people of the state. He said that this was true because presumably the inheritance and gift tax people would have the same objectives as the probate committees.

Dickson asked the subcommittees to contact Senator Husband and Mr. Ferder prior to the next meeting, and he would place inheritance tax on the agenda for the March 1967 meeting of the committees.

Next Meeting

The following matters were tentatively scheduled for discussion at the March 1967 meeting of the committees:

1. Minutes of the February meeting.
2. Ancillary Administration.
3. Persons presumed dead.
4. Inheritance Tax.
5. Drafts of the following:
 - a. Intestate succession.
 - b. Wills.
 - c. Advancements.
 - d. Illegitimacy.
 - e. Adoption.

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

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, February 17,18, 1967)
129.XXX. Income earned during administration
of a decedent's estate.

Unless the decedent's will otherwise provides, income from the assets of a decedent's estate received after the death of the decedent and before final distribution, including income from property used to discharge liabilities, claims, debts, expenses of administration and inheritance and estate taxes, shall be determined in accordance with the rules applicable to a trustee under this Act and distributed as follows:

(1) To specific legatees and devisees the income received from the property bequeathed or devised to them respectively, less taxes, ordinary repairs and other expenses incurred in the management and operation of the property, any interest paid during the period of administration on account of such property, and an appropriate portion of taxes imposed on income (excluding taxes on capital gains) which are paid during the period of administration.

(2) To all other legatees and devisees, except legatees of pecuniary bequests not in trust which do not qualify for the marital deduction provided for in Section 2056 of the federal Internal Revenue Code, as of January 1, the remaining income, in proportion to the respective interests of such legatees and devisees in the assets of the estate which have not been distributed to them or expended for the payment of inheritance or estate taxes, charged against their particular share of the estate, computed at the time of each such distribution or payment, on the basis of inventory values. As used in this subparagraph, remaining income means the total income from all property which is not specifically bequeathed or devised less the taxes, ordinary repairs, and other expenses incurred in the management and operation of all such property from which the estate is entitled to income, any interest paid during the period of administration on account of such property and the taxes imposed on income (excluding taxes on capital gains) which are paid during the period of administration, and which are not charged against the property specifically bequeathed or devised.

(3) Income received by a trustee under this section shall be treated as income of the trust.

court may order. The compensation shall be a commission upon the whole estate accounted for, which shall include property inventoried and subject to the court's jurisdiction, additions thereto such as income and realized gains, and property not included in the appraised value of the estate but reportable for Oregon inheritance or federal tax purposes. Commissions shall be as follows:

- (a) 4% of the first \$60,000, but not less than \$250
- (b) 2% of all above \$60,000
- (c) 1% of property exclusive of proceeds of life insurance not included in the appraised value of the estate but reportable for Oregon inheritance or federal estate tax purposes, whichever is greater.

(2) The court may also allow just and reasonable compensation for any unusual services not ordinarily required of personal representatives in such estates.

(3) When a decedent by his will has made special provision for the compensation of his personal representative, such personal representative is not entitled to any other compensation for his services, unless prior to his appointment he subscribes and files with the clerk a written declaration renouncing the compensation provided by the will.

APPENDIX C

(Minutes, Probate Advisory Committee Meeting, February 17,18, 1967)

REPORT

February 17, 1967

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

From: W. P. Riddlesbarger

Subject: Effect of direction in a will for payment of
"my just debts."

A direction in a will to pay "all my just debts" directs the payment of expenses of administration and all state and federal estate and inheritance taxes. Thompson v. Thompson, 230 SW2d 376; In re Keller's Estate, 286 P2d 889; In re Clarkson's Estate, 12 N.Y.S.2d 304. Contra: In re Doerfler's Estate, 109 N.E.2d 230; Furley v. Hazelwood, 174 So. 616; In re Owens Estate, 145 P2d 376. These cases hold that the word "debts" does not include obligations arising after the death of the testator.

In the Nawrocki case, 200 Or 660 the court said that in determining whether the devise of mortgaged property was entitled to exoneration, the provision of the will directing that all just debts be paid from the first money available from the estate would be given weight, but was not conclusive. The court decided the case by applying the common law rule of exoneration out of any residuum not specifically devised. No other Oregon case has been found interpreting such a direction in a will.

It is recommended that the foregoing information be kept in mind as re-examination of revisions of the statutes takes place.

APPENDIX D

(Minutes, Probate Advisory Committee Meeting, February 17,18, 1967)

If the amount realized from the assets reported in the Inventory and Appraisalment are not sufficient to pay the costs and expenses of administration of and the claims against the estate, and if the decedent was, at the time of his death, the owner with right of survivorship of personal or real property (excepting property for which there is an exception from execution on judgment) with one or more others, then the surviving owner or owners shall be deemed to hold the interest in the property attributable to the decedent in resulting trust for the benefit of the personal representative of the decedent to the extent necessary to pay any unpaid claims or costs or expenses of administration. The interest attributable to the decedent is defined as the ownership interest expressed in the document establishing the ownership; or if no ownership interest is there expressed, shall be in equal proportion with the other owner or owners.

APPENDIX E

(Minutes, Probate Advisory Committee Meeting, February 17,18, 1967)

ESTATES OF ABSENTEES

I was directed to submit suggestions for ORS 120.310 to 120.400 inclusive entitled "Estates of Persons Presumed to be Dead."

Before discussing the attached tentative redraft of the above sections, it seems obvious that any section including these provisions should also incorporate ORS 127.010 to 127.350 inclusive which cover trustees to administer property of missing persons and persons missing during war. I have not made an analysis of these sections but my present recommendation is that these sections be incorporated verbatim in the proposed code.

The sections on estates of persons presumed to be dead are discussed in Section 862 of Jaureguy and Love who recite the general rule expressed, among other authorities, in Cunnius v. Reading School District, 198 U.S. 458, 25 S.Ct. 721, 49 L. Ed. 1125, that two criteria are necessary for assurance of due process:

- (1) Adequate notice to the absentee of the pending proceeding;
- (2) Adequate protection to the absentee in the event he is found alive within a reasonable time provided by the statute.

I have examined the applicable sections in the Iowa 1963 Probate Code, Sections 510 to 517, and the Washington 1965 Code, Sections 11.80.010 to 11.80.100 inclusive.

It seemed advisable, since apparently this is a seldom-used proceeding which has not been amended since it was enacted in 1917, to reduce somewhat the amount of time required. The present Oregon statute would require twenty weeks before probate proceedings would be commenced, plus a minimum of six months for the probate proceeding, plus an additional five years for the rights to be asserted against distributees.

My suggested draft incorporates the first six sections of the Iowa Code with some additional time provided, and the balance is a minor redrafting of the present Oregon sections, since the Iowa Code does not provide for an assertion of rights if the absentee turns up alive.

STANTON W. ALLISON

ESTATES OF ABSENTEES

Incorporate ORS 127.010 to 127.350 inclusive.

I.

Administration may be had upon the estate of an absentee. A petition therefor must be filed in the office of the clerk and must allege:

1. Whether the absentee was a resident or a non-resident of this state, and his address at his last known domicile; that he has, without known cause, absented himself from his usual place of residence, and concealed his whereabouts from his family, for a period of seven years; that for such period his whereabouts have been and still are unknown.
(Al added)

2. That the said absentee has property in this state (describing it with reasonable certainty), all or part of which is situated in the county in which the petition is filed.

3. The names of the persons, so far as known to the petitioner, who would be entitled to share in the estate of the absentee if he were dead.

4. In the case of a nonresident, whether administration upon the estate has been granted in the state of last known domicile.

5. Facts showing that the petitioner is a party who would be entitled to administer the estate of the said absentee in case the absentee were known to be dead. (Al-ORS in too lengthy section concerning resident and nonresident absentee.)

II.

Upon filing of such petition, the court shall, by a proper order, prescribe the notice and the return day therein, which shall be addressed to and served upon such absentee and the alleged distributees of his estate.

III.

Said notice shall in all cases be served:

1. By publication in the county in which the petition is filed, once each week for four consecutive weeks, in a newspaper designated by the court; and

2. Upon all the alleged distributees of the estate of said absentee by ordinary mail addressed to them at their last known address.

IV.

Proof of the publication and service of such notice shall be filed with the clerk aforesaid on or before the day set for hearing.

V.

If, on the day set for hearing, the absentee fails to appear, the court shall appoint some disinterested person as guardian ad litem to appear for the absentee and all distributees not appearing, and said cause shall thereupon stand continued for thirty days. The court shall have authority to make further continuance upon proper showing. The guardian ad litem shall investigate the matter and things alleged in the petition. Upon the further hearing, the court shall hear the proofs, and, if satisfied of the truth of the allegations of the petition, shall enter an order establishing the death of the absentee as a matter of law.

VI.

Upon the entry of order establishing the death of the absentee, administration of the estate of such absentee, whether testate or intestate, shall proceed as provided for the estates of other decedents, except as provided in this chapter.

VII.

Before distribution of the estate of an absentee, the persons entitled to receive the same shall furnish bonds, with securities approved by the court, in twice the amount of the personal property distributed, and in ten times the amount of estimated annual rents, issues, and profits of any real property so distributed, conditioned that if the absentee is in fact alive and shall within one year after the date of the order of distribution make demand therefor, refund will be made of the property distributed with interest on the amounts received.

VIII.

Any court having probate jurisdiction shall revoke letters of administration at any time upon due and satisfactory

proof that the absentee is in fact alive, after which revocation all the powers of the administrator shall cease, but all receipts or disbursements of assets and other acts by him before revocation shall remain as valid as though such letters had not been revoked. The administrator shall settle an account of his administration down to the time of such revocation, and shall transfer all assets remaining in his hands to the person as the administrator of whose estate he had acted, or to his attorney or other duly authorized agent. In the event a sale of real or personal property has been conducted and closed by the administrator the absentee has no right, title or interest in or to such real or personal property but only to the proceeds realized therefrom or so much thereof, if any, as remains in the hands of the administrator upon the closing of the estate of the absentee, and such absentee shall have the right of recovery of all such funds in all cases in which such recovery could have been had in the absence of ORS _____ to _____.

IX.

(1) After revocation of letters of administration, the person erroneously presumed to be dead may, on application filed of record, and in conformance with the statutory provisions, be substituted as plaintiff in all actions and suits brought by such administrator, whether prosecuted to judgment or otherwise. He may, in all actions or suits previously brought against such administrator, be substituted as defendant, on proper application filed by him or by the plaintiff therein, but shall not be compelled to go to trial within less than three months from the time of such application.

(2) Judgments or decrees recovered against such administrator before revocation of letters may be opened upon application by the absentee, made within three months after such revocation, and supported by affidavit, specifically denying, on the knowledge of the affiant, the cause of action or specifically alleging the existence of facts which would constitute a valid defense; but if within the three months such application is not made, or, being made, the facts shown are adjudged an insufficient defense, the judgment or decree shall be conclusive as to all intents, saving the defendant's right of appeal, as in other cases.

(3) After the substitution of the absentee as defendant in any judgment or decree, it becomes a lien upon his real estate in the county, and so continues as other judgments unless or until it is set aside by the lower court or reversed by the Supreme Court.

X.

The costs attending the issuance of such letters of administration or their revocation shall be paid out of the estate of the absentee, and costs arising upon an application for letters which are not granted, shall be paid by the applicant.

MEMORANDUM
February 9, 1967

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

FROM: Campbell Richardson

At the January meeting I was asked to redraft the section relating to compensation of representatives which appears at the bottom of page 9 of the November 14, 1966 memorandum re accounting.

The American College of Probate Counsel has published a study, revised as of July 1, 1966, of fees of executors, administrators and testamentary trustees. The study sets out the fees in effect in each of the various states. It notes that in most of the states fees of executors and administrators are specified by statute and that in the remaining states, the statutes merely provide for reasonable compensation or contain no provision at all. Even where statutory rates are prescribed, such rates may either by the terms of the statute or in the application thereof be considered as maximum rates. A majority of the statutes provide that additional compensation may be allowed for unusual or extraordinary services. The study also notes that the property upon which the fee rates are based varies considerably from state to state.

Present Oregon law provides as compensation a commission "upon the whole estate accounted for by him," and such further compensation as is just and reasonable for any extraordinary or unusual services not ordinarily required of an executor or administrator in the discharge of his trust.

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The following Section 22 is proposed for further discussion:

Section 22. COMPENSATION OF REPRESENTATIVE. (1) Upon application to the court the personal representative shall be entitled to receive compensation for his services as hereinafter provided. If there shall be more than one personal representative, the compensation shall not be increased, but may be divided among them as they shall determine or as the court may order. The compensation shall be a commission upon the whole estate accounted for, which shall include property inventoried and subject to the court's jurisdiction (less mortgages and liens thereon?), additions thereto such as income and realized gains, and property not included in the appraised value of the estate but subject to Oregon inheritance tax. Commissions shall be as follows:

(a) 3% of the first \$100,000, but not less than \$250

(b) 2% of all above \$100,000

(c) 1% of property not included in the appraised value of the estate but subject to Oregon inheritance tax (exclusive of homestead?).

(2) The court may also allow such further compensation as is just and reasonable (for any extraordinary and unusual services not ordinarily required of a personal representative?).

(3) When a decedent by his will has made special provision for the compensation of his personal representative, such personal representative is not entitled to any other compensation for his services, unless prior to his appointment he subscribes

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and files with the clerk a written declaration renouncing the compensation provided by the will.

under the will during such period of time except upon order of the court and upon proof that a contest of the will is not pending at the testator's domicile.

(2) Payment, transmission or distribution of assets by an ancillary personal representative in good faith and pursuant to an order under subdivision (1) of this section operates as a complete discharge to the ancillary personal representative even if the probate or establishment of the will at the domicile is thereafter set aside or revoked for any cause whatever.

Comment: Adapted from § 1603 New York Probate Code.

Section 3. Original probate.

(1) A will of a non-domiciliary which upon probate may operate upon any property in this state and is lawfully executed for probate in this state, may be admitted to probate in the same manner as any other will may be admitted to probate under this act, except as herein otherwise prescribed.

(2) A will which has been admitted to probate or established at the testator's domicile shall not thereafter be admitted to original probate in this state except in a case where the court is satisfied that ancillary probate would be unduly expensive, inconvenient or impossible under the circumstances.

(3) A will which by judgment or decree of a competent court at the testator's domicile has been denied probate or establishment shall not be admitted to probate of this state except where the denial of probate or establishment is solely

for a cause which is not ground for rejection of a will of a domiciliary testator.

Comment: Based upon § 1605 New York Probate Code.

Section 4. Proof of will by probate in non-domiciliary jurisdiction.

In the case of original probate of the will of a non-domiciliary testator an authenticated copy of the will and of its probate or establishment in a jurisdiction other than the one in which he died domiciled shall be sufficient proof of its contents and lawful execution, if no objection is made thereto. If objection to the probate of such a will is filed this section shall not relieve proponent from offering competent proof of the contents and legal sufficiency of the will except that the original will need not be produced unless directed by a court.

Comment: Adapted from § 1606 New York Probate Code.

Section 5. Granting of ancillary letters.

(1) Any domiciliary personal representative, including a nonresident of this state or a foreign corporation, upon the filing of an authenticated copy of the domiciliary letters with the probate court, may be granted ancillary letters in this state.

(2) If the domiciliary personal representative is a foreign corporation, it need not qualify under any law of this state except those provisions of this act generally applicable to the qualification of personal representatives to authorize

it to act as ancillary personal representative in the particular estate.

(3) If application is made for the issuance of ancillary letters, any interested person may intervene and petition for the appointment of any person who is eligible under this act or the law of this state. The court may give preference in appointment to the domiciliary personal representative if it finds such preference to be in the best interests of the estate.

Comment: Adapted from § 2 Uniform Ancillary Administration of Estates Act.

Section 6. General powers and duties of ancillary personal representative.

(1) The court may direct the ancillary personal representative to pay from the assets received by him in this state the debts of the decedent due to creditors on claims allowed in this state, and to distribute the remaining assets after the payment of creditors and expenses to those entitled thereto or to otherwise dispose of the assets as justice requires.

(2) The court shall direct the ancillary personal representative to distribute the assets remaining after any distributions directed under the preceding subdivision of this section to the domiciliary representative.

Comment: Adapted from § 1610 New York Probate Code.

Section 7. Effect of adjudication for or against representatives.

A prior adjudication rendered by a court of competent

jurisdiction for or against any representative of the estate shall be conclusive against the ancillary personal representative in this state as if he were a party to the adjudication unless it resulted from fraud or collusion of the representative to the prejudice of the estate. This section shall not apply to an adjudication in another jurisdiction admitting or refusing to admit a will to probate.

Comment: Based on § 1612 New York Probate Code.

Section 8. Authentication and translation.

(1) Proof required by this act of letters, or of a will and the records of judicial proceedings with reference to the probate or establishment thereof, may be made by copies authenticated by the attestation of the clerk of the court, or other official having custody of the documents, (and by the seal of office of the clerk or other official if there is a seal, together with a certificate of a judge of the court that the attestation is in due form and by the proper officer.)

Comment: Adapted from ORS 115.160, 28 USC 1739, and § 7 Uniform Probate of Foreign Wills Act.

(2) If the respective documents or any part thereof are not in the English language, verified translations may be attached thereto and shall be regarded as sufficient proof of the contents of the documents unless objection is made thereto. If any person in good faith relies upon probate under this act he shall not thereafter be prejudiced because of inaccuracy of such translations, or because of proceedings to set aside or modify the probate on that ground.

Comment: Based on § 7 Uniform Probate of Foreign Wills Act.

Section 9. Application of general law.

Except where special provision is made otherwise, the law of this state relating to wills and to the probate, contest and effect thereof shall apply in the case of a non-domiciliary testator and the law and procedure of this state relating generally to administration and to representatives shall apply to ancillary administration and representatives.

Comment: Based on § 1613 New York Probate Code.

ancillary letters of administration. In a case where the court has theretofore issued original or ancillary letters or there is pending before the court an application therefor, the court shall take such proceedings as justice requires.

2. The court shall issue ancillary letters of administration to the following persons in the following order:

(a) The person appointed administrator in the domiciliary jurisdiction or the person acting in that jurisdiction to administer the decedent's estate in accordance with the law thereof.

(b) A person entitled to original letters of administration under this act.

3. If no person named in any subparagraph of subdivision 2 is willing to qualify or to designate a person eligible to receive ancillary letters they shall issue to a person in the succeeding subparagraph of such subdivision who will qualify or will designate a person eligible to receive letters.

§1608. Ancillary letters generally

1. A person acting in the decedent's domicile as executor or administrator or to administer the decedent's estate in accordance with the law thereof may by an acknowledged instrument designate and authorize the appointment of a person eligible to receive letters to act as ancillary administrator or ancillary administrator c.t.a. If conflicting designations or joint plural designations are made or if two or more persons are entitled jointly to letters under this article the court may appoint one or more of the persons so designated or one or more of the persons so entitled.

2. A person to whom ancillary letters are issued must qualify in the same manner as prescribed in this act for the qualification of a fiduciary except that the penalty of the bond may be in such sum, not exceeding twice the amount which appears to be due from the decedent to domiciliaries of this state, as to the court seems just.

3. In any case where the court is satisfied that there is no creditor of the decedent who is a domiciliary of this state and that no estate tax is assessable in this state, ancillary letters may issue without bond.

Before issuing such letters without bond, however, the court may require that supplemental process issue, directed generally to all creditors or persons claiming to be creditors who are domiciled in this state and that it be served by publication unless such process had theretofore been served in the proceeding.

4. All of the provisions of this act relating to eligibility to receive letters shall be applicable to appointments made under this article.

5. Any corporate banking institution of any state of the United States, the Commonwealth of Puerto Rico, territory or possession of the United States not entitled of right under the banking law to receive such letters may nevertheless be authorized by the court to receive such letters upon filing such bond as the court may require.

§1609. Petition; process

1. A petition for ancillary probate or for ancillary letters of any kind may be made by any creditor, public administrator, county treasurer or person interested. The petition shall show a statement of all of the decedent's property in this state and the value thereof, the amount of the security given on the original appointment, the name and post-office address of each domiciliary creditor or person claiming to be a creditor and the amount of each claim so far as it is ascertainable.

2. Process shall issue to the state tax commission, to all domiciliary creditors or persons claiming to be creditors and to such other persons entitled to letters or to designate an appointee as the court by order directs. The court may issue process generally to all creditors or persons claiming to be creditors who reside within the state, who shall be served in such manner as directed by the court.

§1610. General powers and duties of ancillary fiduciary

1. The provisions of law governing the rights, powers, duties and liabilities of a fiduciary apply to a person to whom ancillary letters are granted under this article except where a special provision is otherwise made or where a contrary intent is expressed in or plainly to be inferred from the context.

2. The court or any court of this state having jurisdiction may direct a person to whom ancillary letters have been issued to pay from the assets received by him in this state the debts of the decedent due to creditors who reside in this state. If the amount of all the decedent's debts here and elsewhere exceeds the amount of all the decedent's property applicable thereto the court may direct the ancillary fiduciary to pay such sum to each resident, creditor as equals that creditor's share of all distributable assets.

3. The court or any court of the state having jurisdiction may direct the ancillary fiduciary to distribute the remaining assets after the payment of creditors and expenses to those entitled thereto or or to otherwise dispose of the assets as justice requires.

4. Unless a court shall direct the ancillary fiduciary to distribute the assets as provided in the preceding subdivisions of this section he is required to transmit the remaining assets to the state or country where domiciliary letters were granted to be disposed of pursuant to the law thereof.

§1612. Effect of adjudication for or against fiduciary

A prior adjudication rendered by a court of competent jurisdiction for or against an estate fiduciary shall be conclusive against the ancillary fiduciary in this state as if he were a party to the adjudication unless it resulted from fraud or collusion of the fiduciary to the prejudice of the estate. This section shall not apply to an adjudication in another jurisdiction admitting or refusing to admit a will to probate.

§1613. Application of general law

Except where special provision is made otherwise, the law of this state relating to wills and to the probate, contest and effect thereof shall apply in the case of a non-domiciliary testator and the law and procedure of this state relating generally to administration and to fiduciaries shall apply to ancillary administration and ancillary fiduciaries.

(b) A contest of the will is not pending in the testator's domicile and

(c) The time provided in the domicile for the institution of a contest has expired.

3. Payment, transmission or distribution of assets by an ancillary fiduciary in good faith and pursuant to an order or decree under subdivision 2 of this section operates as a complete discharge to the ancillary fiduciary even if the probate or establishment of the will at the domicile is thereafter set aside or revoked for any cause whatever.

§ 1605. Original probate

1. A will of a non-domiciliary which upon probate may operate upon any property in this state and is deemed validly executed for probate in this state, may be admitted to probate in the same manner as any other will may be admitted to probate under this act, except as herein otherwise prescribed.

2. A will which has been admitted to probate or established in the testator's domicile shall not thereafter be admitted to original probate in this state except in a case where the court is satisfied that ancillary probate would be unduly expensive, inconvenient or impossible under the circumstances.

3. A will which by judgment or decree of a competent court in the testator's domicile has been denied probate or establishment shall not be admitted to probate in this state except where the denial of probate or establishment is solely for a cause which is not ground for rejection of a will of a domiciliary testator.

§ 1606. Proof of will by probate in non-domiciliary jurisdiction

In the case of original probate of the will of a non-domiciliary testator an authenticated copy of the will and of its probate or establishment in the jurisdiction in which the will was executed shall be sufficient proof of its contents and of compliance with the law of the place of execution, if no objection is made thereto. If objection to the probate of such a will is filed this section shall not relieve proponent from offering competent proof of the contents and legal sufficiency of the will except that the original will need not be produced unless directed by a court.