

ADVISORY COMMITTEE
Probate Law Revision

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

Dates) 1:30 p.m., Friday, March 18, 1966
and : and
Times) 9:00 a.m., Saturday, March 19, 1966
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland

Suggested Agenda

1. Approval of minutes of February meeting.
2. Reports on miscellaneous matters.
3. Inheritance by nonresident aliens.
Revised draft by subcommittee (Allison, Lisbakken, Lovett, Barrie and Schwabe).
4. Testamentary additions to trusts.
Report by Riddlesbarger on phrase "the validity of which is determinable by the law of this state."
5. Probate courts and jurisdiction thereof.
Progress report by subcommittee (Thalhofer, Copenhaver, Field, Gooding and Warden).
6. Heirship determination (generally and pretermitted heirs).
Report by subcommittee (Riddlesbarger, Braun, Gilley, Mapp and Zollinger).
7. Delivery of wills by custodians or possessors.
Consideration of ORS 115.110, 115.130 and 115.990.
8. Foreign wills.
Drafts by Mapp and Riddlesbarger of revisions of ORS 114.060 and 115.160.
9. Letters testamentary and of administration.
Revised draft by Richardson and Lundy.
10. Notice of estate administration.
Revised draft by Bettis, Krause and Lundy. Criticism and alternative draft by subcommittee of dissenters (Allison, Carson and Zollinger).

11. Bond of personal representative.
Revised draft by Frohnmayer and Hornecker.
12. Removal, death or resignation of personal representative.
Revised draft by Frohnmayer and Hornecker.
13. Next meeting.

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

ADVISORY COMMITTEE
Probate Law Revision

Twenty-third Meeting, March 18 and 19, 1966
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The twenty-third 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, March 18, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson (arrived 2:35 p.m.), Zollinger, Allison, Butler, Husband, Jaureguy (arrived 2:40 p.m.), Lisbakken, Mapp and Riddlesbarger. Carson, Frohnmayer and Gooding were absent.

The following members of the Bar committee were present: Bettis (arrived 3 p.m.), Gilley, Braun (arrived 2 p.m.), Copenhaver, Field (arrived 3:15 p.m.) and Warden. Boivin, Hornecker, Krause, Lovett, Luoma, Rhoten, Richardson, Tassock and Thalhoffer were absent.

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

Vice Chairman Zollinger noted that Dickson would be delayed in attending the meeting by reason of a hearing. Zollinger presided pending Dickson's arrival.

Testimony of Attesting Witnesses

Zollinger referred to section 6 of the draft of proposed legislation relating to initiation of probate or administration, which had been prepared by Gilley, with assistance by Krause and Hornecker, and distributed in the form of a report to all members of both committees before the January meeting. Zollinger pointed out that section 6, relating to testimony of attesting witnesses, had been considered and approved at the February meeting. [Note: See Minutes, Probate Advisory Committee, 2/18,19/66, page 9.] Zollinger asked whether a witness attesting a will might make his affidavit, to be used subsequently in lieu of his testimony or personal presence, at the time of attestation. He suggested, and Warden agreed, that an affidavit made by a witness at the time of attestation would be more significant than an affidavit made at a later time. Gilley commented that some attorneys routinely followed the practice of having witnesses make their affidavits at the time of attestation.

Zollinger pointed out that under section 6 of the draft it was not clear whether the practice of witnesses making their affidavits at the time of attestation was authorized and suggested that section 6 be revised to make such authorization clear. Gilley commented that if the affidavit was attached to the original copy of the will, rather than to a photographic or photostatic copy thereof, the affidavit might be detached in the course of preparing and maintaining the file of estate records. Zollinger proposed that the affidavit might be set forth in the will document itself, following the attestation clause, instead of attached thereto, and, in response to a question by Riddlesbarger, commented that authorization for this practice should be permissive in nature and not mandatory or exclusive.

Allison commented that the statute section relating to execution of wills might be revised to include the authorization on attesting witness affidavits proposed by Zollinger, rather than the section relating to testimony of attesting witnesses. Zollinger expressed the view that section 6 of the draft was the appropriate place to recognize expressly the validity of an affidavit set forth following the attestation clause in a will.

Warden and Gilley remarked that, in their experience, the testimony of witnesses personally present to prove a will was seldom if ever employed, and that proof by affidavit was the common practice.

There was general agreement that section 6 of the draft should be revised to provide expressly that the affidavits of attesting witnesses may be made at the time of attestation and may be set forth following the attestation clause in the will. Gilley suggested, and it apparently was agreed, that the provision need not specify that the affidavits may be set forth in the will itself, but merely that the affidavits may be made at the time of attestation or any time thereafter, thus permitting inclusion of the affidavits in the will or attachment to the original will or a copy thereof.

Miscellaneous Matters

Lundy reported that he had obtained and brought to the meeting copies of two bills revising most of the New York probate statutes prepared by the New York Temporary State Commission on Estates and introduced at the 1966 session of the New York legislature. He indicated he had requested sufficient copies of the bills to distribute to all members of both committees, but had received only five of each bill. He invited members present to help themselves to the copies available.

Lundy noted that the 1965 ORS chapters on probate were not yet available for distribution to members and insertion in their copies of the Oregon probate code. He indicated he had not yet completed the list of revised probate codes recently enacted in other states that he had been requested at the February meeting to prepare and distribute to members. He reported that he had begun work on a proposed outline or arrangement of provisions to be included in the proposed revised Oregon probate code, noted that he was encountering some difficulty in the prosecution of this task and that the probate codes of other states were not particularly helpful as guides, and invited suggestions from members on this matter.

Gilley indicated that Miss Lydia Strnad, chairman of the Protective Services Subcommittee, Committee on Aging, Community Council, had suggested to him that the probate committees consider recommending the establishment of public administrators and guardians in Oregon, to function in situations where regular administrators and guardians willing and able to act could not be found. Lisbakken remarked that Gladys M. Everett, a Portland attorney, had been working on the guardianship aspect of this problem, and suggested that she might be consulted on this matter. Zollinger expressed the view, with which there appeared to be general agreement, that the matter of public administrators and guardians was deserving of consideration by the committees, but that such consideration should be postponed until after work on the principal proposed probate revision legislation was completed.

Inheritance by Nonresident Aliens

Allison noted that at the February meeting the subcommittee on inheritance by nonresident aliens, consisting of himself, Lisbakken, Lovett, Barrie and Schwabe, had submitted a draft on the subject, which had been considered and approved in principle by the committees. He pointed out that a number of suggestions for revision of the draft had been made at the February meeting, and that the draft had been rereferred to the subcommittee for appropriate revision. He commented that a revised draft had been prepared, and proceeded to distribute copies thereof to members present. The revised draft read as follows:

"1. Where, at the time of distribution of an estate, the probate court finds that an heir, legatee, devisee, or distributee is an alien not residing within the United States or its territories, who would not receive the benefit, use, or control of the money or other property due him, the probate court shall order that the

administrator or executor of said estate sell and convert said property into cash and that the money due said alien be deposited to his credit at interest in a savings account in a bank or banks in the State of Oregon. The passbook or other evidence of such deposit shall be delivered to the clerk of the court. Such sales of property shall be made pursuant to the procedure prescribed by the statutes for the sale of real and personal property by decedents' estates.

"The money to be deposited shall be subject to the expenses of such sales and such sums as the court may fix and allow for the services of the administrator or executor, and his attorney, and of the attorney in fact, if any, representing the alien in said proceeding. It shall not be subject to the provisions of the Uniform Disposition of Unclaimed Property Act (ORS 98.306).

"2. Any money so deposited shall be withdrawn and distributed only upon the order of the court which ordered the deposit. A petition for an order authorizing withdrawal shall be filed by the alien heir, legatee, devisee, or distributee, or, if deceased, by a personal representative appointed by said court. The petition shall allege that at the time of filing the alien heir, legatee, devisee, or distributee, or, if deceased, his heirs or beneficiaries, would receive the benefit, use, or control of the money. The court shall fix a time and date certain for the hearing of said petition and shall order that written notice thereof be given not less than thirty days prior thereto to the State Land Board of Oregon, to the bank in which said funds are deposited, and to the consular representative of the country of which the alien is, or if deceased was, a citizen.

"If at such hearing the court determines that the petitioner or, if deceased, his heirs or beneficiaries, would receive the benefit, use, or control of said money, the court shall make an order that the money, including the interest accrued thereon, be paid to the petitioner or to his attorney in fact, subject to the costs and expenses of the recovery proceeding as allowed and approved by the court.

"A subsequent petition filed after denial of a petition for an order authorizing withdrawal shall allege the particulars of new and changed conditions since the filing of the last previous petition.

"The recovery proceeding shall be filed under the

register number of the estate in which the order for deposit of the money due the alien was entered, and no order shall be required to reopen the estate for the recovery proceeding.

"3. If no petition for withdrawal of any money so on deposit is filed and pending within ten years from the date of the order directing the deposit, such money, including the interest accrued thereon, shall be distributed to an heir, devisee, or legatee, other than such alien, who has filed his petition within one year from the expiration of the ten year period and has been found eligible to take such property. If no such petition is filed and allowed by the court, the money shall be disposed of as escheated property.

"4. Section 111.070 is hereby repealed."

Allison explained the new features of the revised draft, which were: (1) Reduction from 20 years to 10 years of the period within which a nonresident alien heir would be permitted to establish eligibility to withdraw a deposit; (2) exemption of deposits from the seven-year presumption of abandonment under the Uniform Disposition of Unclaimed Property Act, particularly ORS 98.306; (3) requirement of new evidence for a second and each subsequent claim by a nonresident alien during the 10-year period; (4) provision that a claim by a nonresident alien be handled as a part of the original estate proceeding, but with no necessity to reopen the estate for this purpose; (5) provision for disposition of a deposit after 10 years by distribution to eligible heirs who had filed claims therefor within one year after expiration of the 10-year period, and if no such claims were filed, by escheat; and (6) provision, not previously discussed by the committees, that a petition for withdrawal of a deposit must have been filed and pending within the 10-year period, instead of the requirement of the previous draft that the court order for withdrawal be made within that period.

Barrie commented that the requirement of the revised draft that a petition for withdrawal of a deposit be filed and pending within the 10-year period prompted a question as to the time to which evidence of eligibility of a nonresident alien heir to withdraw should be directed. He noted that under the present reciprocity statute (i.e., ORS 111.070) evidence of eligibility was directed to the situation at the time of the death of the decedent. He posed a situation in which a petition for withdrawal was filed shortly before expiration of the 10-year period alleging new evidence that was determined to be insufficient to establish eligibility of the nonresident

alien heir by the court after that expiration, and in which different and sufficient new evidence came to light after that expiration but before the court hearing on the petition. He asked whether evidence of a situation arising after expiration of the 10-year period should be allowed in a withdrawal proceeding pending on the date of that expiration.

Suggestions that evidence of eligibility of a non-resident alien heir in a withdrawal proceeding be limited to the situation existing at the time of filing the petition and, instead, that such evidence extend to the situation existing at the time of the court hearing on the petition were made and discussed. Allison proposed, and it was agreed, that action on this matter should be postponed until the next meeting in order to obtain the views of Schwabe thereon. It also was agreed that consideration of this matter should be scheduled for the Friday afternoon session of the April meeting of the committees.

Husband expressed the view that the second paragraph of section 1 of the revised draft did not make it clear that expenses of sale and compensation of personal representative and attorneys were to be paid out of sale proceeds, and suggested that the paragraph be revised to read: "The money to be deposited shall be the proceeds of sale remaining after payment therefrom of the expenses of such sale and such sums * * *."

At this point (2:40 p.m.) Barrie left the meeting.

Testamentary Additions to Trusts

Riddlesbarger pointed out that the committees previously had approved substitution of the Uniform Testamentary Additions to Trusts Act for ORS 114.070 [Note: See Minutes, Probate Advisory Committee, 12/17,18/66, page 6], but had postponed action on the phrase "the validity of which is determinable by the law of this state" in section 1 of the Act, pending a report by him on the meaning of this phrase. He indicated that he had encountered considerable difficulty in determining the meaning of the phrase, and was still unsure on this matter. He noted that one commentator had stated that the phrase was included in the Uniform Act to avoid any question in the conflicts of law area as to whether or not a particular state was attempting to reach out into the laws of other states. Riddlesbarger remarked that he was inclined to favor retention of the phrase because it was contained in the Uniform Act and because its deletion might raise questions as to the reason therefor.

Mapp commented that of the states in which the Uniform Act

had been adopted, in only one (i.e., New Jersey) was the Act adopted without the phrase in question. In response to a question by Zollinger, Mapp expressed the view that the phrase meant that the Act was applicable only to testamentary provisions which were valid under Oregon law. Mapp also remarked that the wording of the phrase did not turn on whether the testamentary provision was valid or invalid, but only on whether the validity thereof was determinable by the law of Oregon. Zollinger indicated his uncertainty as to the meaning of the phrase, and suggested that whatever its meaning, the wording used did not clearly express that meaning.

Allison moved, seconded by Braun, that the phrase in question be deleted from the Uniform Act as approved by the committees. Motion carried.

Probate Courts and Jurisdiction

Members of the subcommittee on probate courts and jurisdiction, appointed at the January meeting, reported on activities and progress of the subcommittee. Copenhaver noted that of the 36 counties in Oregon, county courts had probate jurisdiction in 14, district courts in 11 and circuit courts in 11; and that of the 14 county courts with probate jurisdiction, 12 were in eastern Oregon. He indicated that he did not believe the matter of transfer of probate jurisdiction from all county courts to circuit courts had been considered formally by the county judges' association, but that he was aware that many county judges were not opposed to such a transfer and some would favor it. He commented that much of the opposition to such a transfer was found among attorneys in multi-county judicial districts without a resident circuit court judge in each county, and that periodic unavailability of a circuit court judge to handle probate matters in each county of such judicial districts was a problem, particularly, for example, in the 9th Judicial District (i.e., Harney and Malheur Counties).

Warden reported that he had sent a questionnaire to all district court judges asking whether they favored transfer of all probate jurisdiction to the circuit court; that of 24 replies, 18 (including seven from judges with probate jurisdiction) were in favor of such transfer; and that of the six replies expressing opposition, four were from judges with probate jurisdiction. He noted that the Bar Committee on Judicial Administration also was studying the matter of centralizing probate jurisdiction in the circuit courts, and that District Judge Henry Kaye of Umatilla County, a member of that Bar committee, had sent a questionnaire to all district court judges with probate jurisdiction asking if they would be willing to handle probate matters on a pro tem circuit

court judge basis if the jurisdiction was transferred to the circuit court. Warden indicated that Judge Kaye's survey disclosed that eight of the 11 district court judges were willing to handle probate matters on such a pro tem basis.

Dickson commented that the probate caseload in some of the eastern Oregon counties in multi-county judicial districts did not appear to be heavy. He called attention to statistics as of the end of 1965 indicating that, for example, there were 150 estates pending in Malheur County, of which 69 were over three years old; 55 pending in Harney County, with 15 over three years old; 25 pending in Sherman County, with 8 over three years old; 57 pending in Grant County, with 27 over three years old; 16 pending in Wheeler County, with 7 over three years old; and 40 pending in Gilliam County, with 26 over three years old.

Dickson remarked that a large majority of the county and district court judges with probate jurisdiction appeared to be in favor of transfer thereof to the circuit court. He suggested that district court judges could handle some probate matters on a pro tem circuit court judge basis in order to relieve some of the extra burden on regular circuit court judges. In response to a question by Allison, Warden agreed that assignment to other judicial districts was a significant factor in the periodic unavailability of circuit court judges in multi-county judicial districts in eastern Oregon. Allison expressed the view that such assignment might be less frequent if probate jurisdiction was transferred to those circuit courts.

Warden suggested that utilization of attorneys as pro tem probate judges in county seats with no resident circuit court judge and no district court judge might afford a solution to the problem in multi-county judicial districts without resident circuit court judges in each county. Zollinger commented that such utilization of attorneys presupposed the availability and willingness of attorneys to undertake such service when most such attorneys had a probate practice, and suggested authorization for appointment of attorneys as probate commissioners to sign orders and handle other ex parte matters.

Zollinger asked whether the committees favored a proposal to transfer all probate jurisdiction to the circuit courts, and if so, whether this proposal should be included in the principal proposed probate revision bill or in a separate bill. Dickson expressed the view that the proposal need not be in a separate bill, since the jurisdiction transfer matter appeared to be noncontroversial in a large majority of the counties that would be affected by the proposal. Riddlesbarger moved, and it was seconded, that the committees approve in principle the inclusion in the principal proposed probate

revision bill of provision for transfer of all probate jurisdiction to the circuit courts, for district court judges to handle ex parte probate matters when circuit court judges were unavailable and for probate commissioners, who should be attorneys, to handle ex parte probate matters in counties having no district court. Motion carried unanimously.

Husband asked whether appointment of probate commissioners should be made by the Supreme Court or the appropriate circuit court. There was general agreement that probate commissioners should be appointed by the circuit court judges.

Dickson requested that the subcommittee on probate courts and jurisdiction establish and maintain contact with the Bar Committee on Judicial Administration for the purpose of exchanging information on proposals relating to probate courts and jurisdiction thereof. He also asked the subcommittee to keep in touch with Lundy in regard to the drafting of the proposal approved by the probate committees. In response to a question by Lundy, Warden indicated that the Judicial Council was not considering the matter of probate jurisdiction at the present time.

Delivery of Wills by Custodians or Possessors

Lundy referred to his report, dated March 16, 1966, on the subject of delivery of wills by custodians thereof, and to the rough draft of a suggested statute contained in the report. [Note: Copies of this report were distributed before the meeting to some members and at the meeting to other members.] He pointed out that section 1 of the rough draft was derived from ORS 115.110 and 115.130, but differed therefrom in certain respects, and that section 2 repealed ORS 115.110, 115.130 and 115.990.

In response to a question by Husband, Zollinger and Lundy indicated that section 1 of the rough draft did not require a custodian of a will to deliver it to the court unless the court so ordered; that, in the absence of such a court order, the custodian might deliver the will to an executor named therein. Riddlesbarger expressed the view that wills should be delivered to the court in all cases, in order that such wills might be more readily available to interested persons than if they were delivered to executors. In response to questions by Husband, Riddlesbarger agreed that the general practice in Lane County was not to deliver nonprobated wills to the court, and Dickson commented that the general practice in Multnomah County was the same, but that the Multnomah County Clerk maintained a good record of all wills delivered to him. Bruan noted that her office followed the practice of

delivering wills to the court. Husband remarked that delivering wills to the court might result in some instances in discovery of property, the existence of which otherwise would be undisclosed. Zollinger and Dickson expressed the view that alternative delivery of wills to the court or an executor should be retained.

Zollinger moved, seconded by Gilley, that the rough draft be approved without change. Motion carried.

Execution of Wills

Riddlesbarger pointed out that, at the January meeting, he and Mapp had been assigned the task of preparing and submitting for consideration by the committees (1) a revision of ORS 114.060, relating to execution of nonresidents' wills affecting property in Oregon, along the lines of section 50 of the Model Probate Code; and (2) a revision of section 5, relating to establishing foreign wills, of Gilley's draft on initiation of probate or administration along the lines apparently agreed upon by the committees. [Note: See Minutes, Probate Advisory Committee, 1/14,15/66, page 30.]

Mapp stated that in fulfillment of the first part of his and Riddlesbarger's assignment (i.e., revision of ORS 114.060) he had prepared a report embodying a rough draft of proposed legislation consisting of four sections -- section 1 on who may make wills, section 2 on execution of will, section 3 on person signing testator's name to sign his own name as witness and section 4 on validity of will. He distributed copies of his report, dated March 16, 1966, to the members present.

Mapp explained that sections 1 and 3 of his rough draft were the same as sections 1 and 3 of Riddlesbarger's wills draft as approved by the committees at the November 1965 meeting [Note: See Rewritten Draft, 11/19-20/65, attached as an appendix to Minutes, Probate Advisory Committee, 11/19,20/65], that section 2 of his draft was a revised version of section 2 of Riddlesbarger's wills draft as approved and that section 4 of his draft was a proposed revision of ORS 114.060.

Execution of will (section 2). Mapp referred to section 2 of the rough draft, relating to execution of will, noting that the section preserved the substantive requirements of the present Oregon statute (i.e., ORS 114.030) and section 2 of Riddlesbarger's wills draft as approved, but incorporated certain judicial interpretations so that all actual requirements were clearly stated. He pointed out that section 2 of the rough draft generally followed the form used in section 47

of the Model Probate Code.

Allison noted that section 2 would permit a testator to acknowledge, in the presence of the attesting witnesses, his signature previously made by someone else, and questioned the desirability of this practice. Mapp pointed out that section 47 of the Model Probate Code required that the signing of the testator's name by someone else be done in the presence of the attesting witnesses. He commented that two clauses (i.e., "himself sign" and "at his direction and in his presence have someone else sign his name for him") in section 47 of the Model Probate Code had been combined in section 2 of the rough draft, and that it was contemplated that the "acknowledge" clause apply only to the testator's signature made by himself.

In response to a question by Zollinger, Mapp affirmed that section 2 did not require that attesting witnesses sign at the request of the testator, and commented that such was not required by the present Oregon statute. Zollinger suggested that it be required that the testator acknowledge that the document is his will and that the attesting witnesses sign at the request of the testator. He pointed out that the former requirement was set forth in section 279, 1963 Iowa Probate Code, and the latter requirement in section 279, 1963 Iowa Probate Code and section 11.12.020, 1965 Washington Probate Code. Jaureguy expressed approval of a requirement that attesting witnesses sign at the request of the testator, but Mapp and Dickson expressed the view that this was a formality not contributing to the validity of the will and should not be required.

The appropriateness of the word "acknowledge" in the requirement that a testator "acknowledge his signature already made" in the presence of the attesting witnesses was discussed. Allison suggested that the word might seem to imply an acknowledgment made before a notary public, although in fact this was not contemplated. Dickson expressed the opinion that the word was capable of different meanings in different contexts, but that its use in the context of section 2 was appropriate and preferable to such words as "verify" and "declare."

Mapp pointed out that the requirement of section 2 that a testator sign or acknowledge his signature in the presence of the attesting witnesses was based upon interpretation of "attested" in the present Oregon statute by the Oregon Supreme Court. Allison noted that the pertinent sections of the Iowa and Washington probate codes previously referred to did not specifically contain such a requirement, and questioned inclusion of the requirement in section 2.

Dickson suggested that section 2 be revised to read as follows:

"Sec. 2. Execution of will. A will shall be in writing and shall be executed by the signature of the testator and of at least two attesting witnesses on the instrument as follows:

"a. The testator, in the presence of each of the attesting witnesses, shall himself sign or at his direction and in his presence have someone else sign his name for him or acknowledge his signature previously made.

"b. The attesting witnesses shall each sign in the presence of the testator."

In response to a question by Braun, Dickson expressed the view that, under the revision of section 2 suggested by him, a testator's acknowledgement of his signature included his name signed for him by someone else.

Zollinger suggested that the requirement that attesting witnesses sign in the presence of the testator need not be perpetuated, pointing out that "presence of the testator" was being interpreted quite broadly. Warden commented that there was some danger in permitting attesting witnesses to sign out of the testator's presence, such as the possibility of substitution of pages of the will.

Warden moved, seconded by Gilley, that the revision of section 2 suggested by Dickson be approved. Zollinger moved, seconded by Braun, that the main motion be amended so as to delete the requirement that attesting witnesses sign in the presence of the testator. Motion to amend the main motion failed. Main motion carried.

Person signing testator's name to sign his own name as witness (section 3). It was suggested that the substance of section 3 of the rough draft, relating to person signing testator's name to sign his own name as witness, should be incorporated in section 2.

Allison moved, and it was seconded, that section 3 be revised to include the requirement that a person signing the testator's name do so in the testator's presence, and that the substance of section 3 so revised be approved and incorporated in section 2. Motion carried.

Validity of will (section 4). Mapp noted that there were two versions of section 4 of the rough draft, relating to validity of will -- one on page 2 of his report and the other

on page 4. He pointed out that the version on page 4 differed from the one on page 2 in requiring that the will be written and attested.

Mapp commented that the version of section 4 on page 2 of the report would permit probate in Oregon of a holographic will made in California by either a resident of California or a resident of Oregon, and of a holographic will made in Oregon by a California resident. Riddlesbarger indicated that the authorization under section 4 on page 2 of probate in Oregon of a will executed in this state by a nonresident according to the law of the testator's domicile was a feature not contained in section 50 of the Model Probate Code. Braun and Husband expressed the view that probate of holographic wills should be allowed in Oregon; Jaureguy and Allison expressed the contrary view. Zollinger noted that probate of holographic wills was permitted under the present Oregon statute (i.e., ORS 114.060) as to bequests of personal property, although not as to devises of real property, located in this state. Husband expressed the opinion that extending the recognition of the validity of holographic wills in Oregon would create more problems than would be solved thereby. Dickson remarked that it was interpretation of wills, rather than the manner of their execution, that gave rise to most of the problems.

Allison suggested that there should be a minimum requirement under section 4 that a will be in writing and signed by the testator. He moved, seconded by Warden, that the version of section 4 on page 4 of the report, with the word "attested" therein deleted, be approved. Motion carried.

The meeting was recessed at 4:45 p.m.

The meeting was reconvened at 9:05 a.m., Saturday, March 19, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

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

The following members of the Bar committee were present: Bettis, Gilley, Braun, Copenhaver, Hornecker, Lovett, Rhoten, Thalsofer and Warden.

Probate Courts and Jurisdiction

Dickson asked Copenhaver and Warden to repeat their reports on probate courts and jurisdiction thereof, previously made at the Friday afternoon session of the meeting, for the

benefit of members not present at that time, and they proceeded to do so. In response to a question by Husband, Warden indicated that the three district court judges with probate jurisdiction who had expressed reluctance to handle probate matters on a pro tem circuit court judge basis if the jurisdiction was transferred to the circuit court were Judge Hall of Curry County, Judge Hall of Lincoln County and Judge Jenkins of Washington County.

Referring to the previous discussion on appointment of probate commissioners, Dickson suggested that there should be a commissioner in each county of the large eastern Oregon multi-county judicial districts.

In response to a question by Lundy, Dickson and Thalhofer expressed the view that the transfer of all probate jurisdiction to circuit courts should include jurisdiction as to guardianship, adoption, change of name and commitment of the mentally ill and deficient.

Establishing Foreign Wills

Riddlesbarger noted that the first part (i.e., revision of ORS 114.060) of his and Mapp's assignment on wills had been disposed of at the meeting the previous day, and that the second part of that assignment (i.e., revision of section 5, relating to establishing foreign wills, of Gilley's draft on initiation of probate or administration) remained for report and consideration. Mapp commented that the first part of the assignment was concerned with original probate in Oregon of foreign executed wills, while the second part involved ancillary probate in Oregon of wills probated in another jurisdiction.

Mapp referred to the Uniform Probate of Foreign Wills Act, and suggested that this Act should be considered by the committees. He explained that the Act, in general, provided that if a will already had been probated in another jurisdiction, normally the jurisdiction of the testator's domicile, then the jurisdiction having adopted the Act would accept that ancillary probate and admit the will to probate. He proposed that Lundy be asked to send copies of the Act to all members of the committees, and that action on the matter of establishing foreign wills be postponed pending this distribution and consideration of the Act by members.

Allison and Jaureguy recollected that at one time the Bar committee had recommended adoption of the Uniform Act. [Note: See Oregon State Bar, 1954 Committee Reports 25 (1954).] Lundy noted that the Act had been submitted to the Oregon legislature in 1951, as Senate Bill 135, at the request of the

Commission on Uniform Laws.

Zollinger commented that in connection with the establishing of foreign wills the committees might also wish to consider the matter of ancillary administration and distribution. Mapp remarked that the matter mentioned by Zollinger was covered in another Uniform Act (i.e., the Uniform Ancillary Administration of Estates Act), and suggested that copies of this Act also should be distributed to members.

Dickson suggested, and it was agreed, that Lundy should send copies of both Uniform Acts to members, and that consideration of these Acts should be scheduled for the Friday afternoon session of the April meeting of the committees. Dickson asked Mapp and Riddlesbarger to be prepared to lead the discussion of these matters at the April meeting.

Heirship Determination

Riddlesbarger noted that at the January meeting a subcommittee, consisting of himself, Braun, Gilley, Mapp and Zollinger, had been appointed to study and report on the matter of proceedings for the determination of heirship, both generally and as to pretermitted heirs. [Note: See Minutes, Probate Advisory Committee, 1/14,15/66, page 17.] He stated that he had asked Lundy to draft a proposed pretermitted heir statute for consideration by the subcommittee, and that Lundy had prepared and submitted such a draft. He commented that Lundy's draft included those matters on which the committees apparently were in agreement at the January meeting, and was embodied in a report which also contained comment on the draft and related matters and which was accompanied by a copy of statute sections on pretermitted children included in a bill revising New York's substantive law of estates prepared by the New York Temporary State Commission on Estates and introduced at the 1966 session of the New York legislature. Riddlesbarger indicated that the subcommittee had met the previous day after the meeting of the full committees had been recessed, and had discussed its recommendations to be made to the full committees.

Pretermitted heirs. Riddlesbarger stated that the subcommittee was of the opinion that all aspects of the matter of pretermitted heirs should be reexamined, rather than consideration being limited to the procedure for determination of pretermitted heir claims and distribution of shares, and that to aid in this reexamination the committees should have copies of the draft Lundy submitted to the subcommittee and of the proposed New York statutes on pretermitted heirs. Copies of Lundy's draft and the proposed New York statutes were distributed to the members present.

Riddlesbarger noted that all members of the subcommittee

but himself were inclined to favor no provision at all on pre-termitted heirs, although the subcommittee did not strongly recommend adoption of this course of action.

Riddlesbarger reported that the subcommittee had decided not to proceed further on the basis of Lundy's draft, although it appeared to reflect accurately the ideas generally approved at the January meeting, because, as Zollinger had pointed out in a letter to the subcommittee members, the restatement of those ideas in the draft disclosed an inconsistency and certain questionable matters of policy. Riddlesbarger indicated that the subcommittee recommended that the proposed New York statute on pretermitted heirs be considered as the basis for a substitute for Lundy's draft and the provisions thereof previously agreed upon by the committees. He pointed out that under the proposed New York statute only children born after execution of a testator's will were considered pretermitted heirs, and that descendants of deceased children were not so considered.

Riddlesbarger noted that the subcommittee also recommended that there be no special provision on the remedy of pretermitted heirs, but that determination of pretermismission should be made and distribution of pretermitted heir shares accomplished in the probate proceeding as a part of the general procedure on settlement and distribution, and that the subject of all remedies involved in probate should be treated broadly. He commented that centralization of probate jurisdiction in the circuit courts, in accordance with the proposal approved by the committees at the meeting the previous day, would facilitate implementation of this recommendation. He referred with approval to the broad statement of the jurisdiction of the probate court in section 10, 1963 Iowa Probate Code. He stated that the subcommittee's recommendation included repeal of the present specific Oregon statutes on determining heirship (i.e., ORS 117.510 to 117.560).

Zollinger remarked that the subcommittee did not recommend the particular wording of the proposed New York statute, contemplating that such wording could be clarified and improved in some respects, but did recommend the substance of that proposed statute with one change, which was to extend application thereof to children adopted after execution of a testator's will. He explained the provisions of the proposed New York statute on determination of the share a pretermitted child was entitled to receive, in general gearing such share to the shares given children living when the testator executed his will. He posed a situation in which a testator willed \$500 to each of two living children and another child was born after execution of the will, and pointed out that under the proposed New York statute in this situation each child would receive one-third share of \$1,000. He also pointed out that if the bequests to

the two living children were unequal, such as \$600 and \$400, the after-born child would receive one-third of \$1,000 and the other children would share the balance of the \$1,000 on a 60/40 basis.

In response to a question by Jaureguy, Zollinger indicated that, under the proposed New York statute, if there were no children living at the time of execution of a will, an after-born child would receive an intestate share of the testator's estate.

Allison referred to the situation posed by Zollinger involving bequests of \$500 to each of two living children, and asked why the after-born child in that situation should not receive \$500 from some other portion of the estate, instead of one-third of the total willed to the two living children. Zollinger commented that the disposition suggested by Allison's question had merit if the bequests to living children were equal, but would create difficulties if such bequests were unequal. Gilley remarked that such disposition also would invade other testamentary provisions and in some instances would unduly disrupt the testamentary plan.

Zollinger expressed the opinion that the subcommittee was in agreement that the reason for a statutory provision for pretermitted children was that a testator would have provided for them if he had known they existed. He commented that the subcommittee also felt that if a testator did not provide for living children, more often than not it was because the testator intended such omission, and that to require an intestate share to such omitted children more often than not defeated the purpose of the testator. He indicated the subcommittee's view that in the case of after-born children, however, there was substantial reason to require some pretermitted share, but that if a testator left nothing to living children, then it was likely he would not have desired to leave anything to after-born children either. He expressed the opinion that the proposed New York statute embodied a fairly carefully and well thought out plan on pretermission and pretermitted shares, and indicated that the subcommittee recommended this plan as probably the best that could be made. Riddlesbarger pointed out that instances in which any given provision for pretermitted heirs would apply inequitably could be raised, and agreed that the proposed New York statute, tending to give considerable effect to the wishes of a testator, offered about the best possible plan.

Riddlesbarger moved, seconded by Zollinger, that the committees reconsider their previous action on a proposed pretermitted heir statute and consider the plan embodied in the proposed New York statute. Motion carried. After further

discussion, Zollinger moved, seconded by Warden, that the substance of the proposed New York statute, extending its application to after-adopted children and excluding the provision on remedy of pretermitted children, be approved. Motion carried unanimously.

Heirship determination generally. Riddlesbarger moved, seconded by Mapp, that the present specific Oregon statutes on determining heirship (i.e., ORS 117.510 to 117.560) be repealed, and that general provisions on remedies involved in probate, following the approach of the 1963 Iowa Probate Code (particularly sections 10 and 11 thereof), be approved. Motion carried. Dickson referred the matter of drafting implementation of the approved motion to the subcommittee on probate courts and jurisdiction. Riddlesbarger commented that in drafting such implementation consideration should be given to the role of the probate commissioners, authorization for whom the committees had approved at the meeting the previous day, in the matter of general remedies.

Other provision for children of decedents. Riddlesbarger stated that the subcommittee also recommended that consideration be given to authorizing the probate court to make some provision out of a decedent's estate for dependent minor children of the decedent. Allison noted that discussion in the subcommittee reflected a strong feeling that it was unjust to have laws making it the duty of a parent, while living, to support his minor children, but to permit the parent to make no provision on his death for subsequent support of such children. He commented that the subcommittee proposed a statute that would empower the probate court, upon application by the surviving parent, guardian or a friend of a minor child of the decedent, to allocate income of the estate to the support of the child if not otherwise adequately provided for. Allison indicated that one objection to the proposal was that it contained no clear guidelines for the court to follow in exercising its power, and suggested that the proposal be contingent upon transfer of all probate jurisdiction to the circuit court. He also suggested that the matter be considered by the committees in connection with its review of the present Oregon statutes on support of surviving spouse and minor children (e.g., ORS 116.005 to 116.015). Dickson commented that the proposal involved many problems, one being that many estates were inadequate to supply funds for support of dependent minor children. He expressed the view that the proposal would be too controversial for inclusion in the proposed principal probate revision bill.

Letters Testamentary and of Administration

Lundy noted that at the February meeting Richardson was assigned the task of preparing and submitting for consideration

by the committees a revision of sections 9 and 12 of Gilley's draft on initiation of probate or administration. [Note: See Minutes, Probate Advisory Committee, 2/18,19/66, pages 11 and 12.] Lundy indicated that Richardson had prepared such a revision and sent it to him. Lundy stated he had made some changes in Richardson's revision and set it forth as a rough draft in a report, dated March 14, 1966, mailed to all members before the meeting.

Lundy explained that the substance of section 9, relating to issuance of letters of representation were admission of will revoked, and section 9a, relating to form of letters of representation, of the rough draft had been combined in section 9 of Gilley's draft. He noted that sections 9 and 12 of the rough draft were related in that they both dealt with revocation of one kind of letters and issuance of another kind in substitution, and suggested, and Allison agreed, that the two sections might be located together in the proposed revised probate code.

Zollinger referred to the form for testate letters in subsection (1) of section 9a of the rough draft, and suggested that "of the estate of the decedent" be added after the blank for insertion of the proper designation of the personal representative. He also suggested that the forms for both testate and intestate letters include a more direct statement of the authority of the named personal representative to act as such as of the date of the letters, such as "and is (are) as of the date hereof the appointed, qualified and acting personal representative(s) of the estate."

Allison commented that there were situations involving the use of letters to evidence the authority of the personal representative in which the date of death of the decedent was significant, and suggested that the forms for letters include a blank for insertion of that date. He noted that the form for letters of administration in section 11.28.140, 1965 Washington Probate Code, called for entry of the date of the decedent's death. In response to a question by Zollinger, Jaureguy indicated that the clerk who prepared and delivered the letters could discover the date of a decedent's death from the petition for probate or administration. Zollinger questioned the need for including date of death in the letters.

Lundy pointed out that the forms in section 9a, like those in the present Oregon statutes (i.e., ORS 115.210 and 115.350), were not mandatory. He also noted that the 1963 Iowa Probate Code, the proposed revised New York probate code and the Model Probate Code did not contain statutory forms for letters. In answer to a question by Butler, Allison and Dickson commented that the statutory forms, even though merely permissive, were useful in promoting uniformity throughout the state and helpful

to the county clerks, who had the forms printed.

Lundy noted that the forms set forth in section 9a were drafted in contemplation that in some instances there might be more than one executor, administrator with the will annexed or administrator, and asked if this was appropriate. Carson commented that he had never hear of joint administrators with the will annexed. Zollinger remarked that he saw no reason not to recognize the possibility of more than one administrator, although this was not as common as co-executors.

Lundy referred to subsection (3) of section 9a, relating to the form for letters issued to special administrators, and asked whether the subsection was really helpful in indicating such form and whether an actual permissive form for special administrators should be set forth as for other personal representatives. Dickson noted that the authority of special administrators was so limited they might not require letters, and suggested that subsection (3) might be deleted.

Zollinger indicated he was inclined not to favor reference to all letters as "letters of representation," with the distinction as to testate and intestate letters appearing only in the section containing the permissive forms. He suggested that the present terminology "letters testamentary" and "letters of administration" be continued. Allison suggested that there be more complete headings on the forms, such as designation of whether they were letters testamentary or of administration and perhaps a blank for insertion of the estate file number.

Dickson assigned Zollinger to work with Richardson and Lundy in preparing a revision of section 9a of the rough draft, incorporating any desirable suggestions made in the preceding discussion, for consideration by the committees at the next meeting.

Notice of Estate Administration

Lundy noted that at the February meeting Bettis and Krause had been assigned the task of preparing revisions of section 10, relating to copy of will and of order to heirs, legatees and devisees, and section 13, relating to publication of notice by executor or administrator, of Gilley's draft on initiation of probate or administration, with the revisions to take into consideration motions adopted and views expressed on the subject of notice of estate administration at that meeting. [Note: See Minutes, Probate Advisory Committee, 2/18,19/66, pages 14 to 16 and 18.] Bettis commented that he had prepared a revision of section 13, Krause a revision of section 10, and that both drafts had been sent to Lundy.

Lundy stated that, upon receiving the drafts from Bettis and Krause, he had combined them, with certain changes and additions, in a rough draft on notice of estate administration, which, together with the original drafts by Bettis and Krause, was embodied in a report directed to the committees. Lundy noted that copies of this report, dated March 14, 1966, had been mailed to all members before the meeting.

Lundy proceeded to explain, briefly, the contents of the rough draft. He indicated that section 10(1) was based upon a motion adopted at the February meeting and provided for mailing of copies of published notices and of wills admitted to probate to all known heirs and to all legatees and devisees. He pointed out that subsections (2) and (3) of section 10 prescribed mailed notice to the State Land Board where a decedent died intestate and there were no known heirs and where any known heir or any legatee or devisee was a non-resident alien. Allison pointed out that some such provision as section 10(3) previously had been suggested by Barrie and also by the subcommittee on inheritance by nonresident aliens at the February meeting. [Note: See Minutes, Probate Advisory Committee, 2/18,19/66, pages 4 and 5.] Lundy commented that section 10(4) dealt with filing proof of the mailings required by the preceding three subsections of the section.

Lundy indicated that section 13 of the rough draft constituted a revised provision on publication of notice by personal representatives, and embodied the concept that the notice was addressed to heirs, legatees and devisees as well as to creditors. He referred to paragraph (c) of subsection (1), and expressed the view that the notice should indicate whether a will had been admitted to probate, but suggested that the committees might not wish to go so far as to have the notice indicate specifically the right of interested persons to contest. He pointed out that section 13 would require only two publishings of the notice, unlike the present requirement of at least four by ORS 116.505, and noted that Bettis and Gilley probably would wish to comment on this change since it was a feature of their drafts.

Lundy explained that section 13a of the rough draft, relating to notice by successor personal representatives, was based upon section 11.40.150, 1965 Washington Probate Code, and had been suggested at the February meeting. [Note: See Minutes, Probate Advisory Committee, 2/18,19/66, pages 17 and 18.]

Mailed notice to heirs, legatees and devisees. Allison pointed out that at the February meeting there had been some disagreement among members as to whether notice to heirs, legatees and devisees should be required and, if so, the nature

thereof, and that after the assignment to Bettis and Krause had been made a subcommittee, consisting of himself, Carson and Zollinger, had been appointed to offer criticism of the Bettis and Krause proposal and to prepare and submit an alternative proposal. He distributed copies of the subcommittee's report to the members present, commenting that there had not been an opportunity to involve Carson in its preparation. The subcommittee report read as follows:

"ALTERNATIVE REVISED DRAFT OF SECTION 10 (1)
OF ROUGH DRAFT ON NOTICE OF ESTATE ADMINISTRATION

"Your subcommittee's dissent is directed solely to the provision in the Lundy draft that where a will is probated the personal representative must mail a copy of the will, not only to the legatees and devisees named therein as now provided (ORS 115.220), but also to each known heir of the testator.

"Unless the heir is a pretermitted child (in which case his interest would be apparent from the petition for probate as is now the case) the heir at law has no interest in the property and assets of the estate which should entitle him to notice. The only reason we can conceive for the proposed change is to give notice to every collateral heir who is not provided for by the will so that he may contest the will. We do not believe such a result is socially desirable. The practical result would be, in our opinion, that the attorney for the estate would have not only the burden of sending notices and copies of the will to all the heirs, but would in the course of probate have to explain to these heirs why they were mailed the notice and a copy of the will.

"What should the personal representative's attorney tell these people when they ask for information; that they should consult their own attorneys for advice whether to contest the will? Any attorney in probate practice would agree that this would be only the beginning of the problem in each case, yet the attorney for the estate ethically could not advise these adverse parties.

"We have also excused the mailing where the address of the party cannot with diligence be ascertained in the 30-day period.

"The suggested draft of (1) is as follows:

"(1) Immediately after his appointment a personal representative shall cause a copy of the published notice provided for in section 13 to be mailed to each known heir of the decedent at his last known address, if the decedent died intestate. If the decedent died testate, upon the entry of the order admitting the will to probate the

personal representative shall cause a copy of the published notice provided for in section 13 and a copy of the decedent's will to be mailed to each legatee or devisee named therein at the last known address of the legatee or devisee. If the personal representative is an heir, legatee, or devisee, no mailing to him is required. If the personal representative is not able, with diligence, to ascertain the address of any heir, devisee, or legatee within 30 days after his appointment, mailing of notice of his appointment, or of the will, to such heir, devisee, or legatee is excused."

Carson noted that both section 10 of Lundy's draft and the alternative revised draft required mailing of copies of published notices "immediately," and that the alternative revised draft required such mailing, in the testate situation, "upon the entry of the order admitting the will to probate." He suggested that delays in first publication of notice might make literal compliance with these requirements difficult in some instances. Allison commented that the mailing might be required "immediately (or promptly) following the first publication of the notice." Zollinger remarked that "immediately" and "upon the entry of the order" might be deleted, since proof of the mailing was required to be filed within 30 days after appointment of the personal representative.

Warden referred to the alternative revised draft, and suggested that there might be sufficient reason to require mailing of notice to some heirs, such as the surviving spouse and lineal descendants of the decedent, in the testate situation. Allison, Zollinger and Dickson expressed agreement with Warden's suggestion. Carson noted that beneficiaries under testamentary trusts might be considered as entitled to receive notice as legatees and devisees, although in the trust situation the actual legatee or devisee was the trustee and not a beneficiary. He suggested, however, that mailed notice to trust beneficiaries should not be required, and Zollinger agreed, commenting that notice to surviving spouse and lineal descendants who were not legatees or devisees might reach some trust beneficiaries.

Riddlesbarger asked whether any member was aware of problems arising from failure of heirs to receive notice of estate administration. Dickson responded that his court occasionally received letters from persons claiming to be heirs and that they were unaware of admission of a will to probate, and that these letters often requested copies of the will. Husband asked whether those who contested wills were not collateral heirs in most cases. Allison commented that a requirement of notice to collateral heirs in the testate situation amounted to an invitation to contest the will, and that he did not think this was desirable. He also expressed the view that this

requirement would involve the mailing of an unduly large number of copies of the notice and will.

Riddlesbarger suggested, and Dickson, Braun and Carson agreed, that copies of the wills need not be sent to anyone. Carson commented that the mailing of will copies imposed a considerable burden on estate attorneys and created other problems for them.

Zollinger moved, seconded by Thalhofer, that subsection (1) of section 10 of Lundy's draft be revised to read as follows:

"(1) A personal representative shall cause a copy of the published notice provided for in section 13 to be mailed to each known heir of the decedent at his last known address, if the decedent died intestate. If the decedent died testate, the personal representative shall cause a copy of the published notice provided for in section 13 and a copy of the decedent's will to be mailed to the spouse and lineal heirs of the testator who are not provided for by the will and to each legatee or devisee named therein at the last known address of the party. If the personal representative is an heir, legatee or devisee, no mailing to him is required. If the personal representative is not able to ascertain the address of any of the parties to whom notice is to be given, the mailing of the notice to such parties is excused."

Riddlesbarger moved, seconded by Carson, that Zollinger's motion be amended by deletion of "and a copy of the decedent's will" in the proposed revision of subsection (1) of section 10 of Lundy's draft. Riddlesbarger's motion to amend carried. Zollinger's motion, as amended, carried.

Mailed notice to State Land Board. Lundy noted that subsection (2) of section 10 of his draft, relating to mailed notice to the State Land Board where a decedent died intestate and there were no known heirs, represented a departure from the present requirement (i.e., subsection (2) of ORS 113.310) that such notice be given before appointment of an administrator. He commented that it was agreed at the February meeting that he should discuss this matter with the Clerk of the Land Board, but that he had not had an opportunity to do so after preparation of the draft. He indicated that his previous discussions with the Clerk had disclosed that the Land Board's interest was in protecting property that might escheat and that notice in advance of appointment of an administrator was thought to further this interest.

Zollinger moved, seconded by Warden, that subsection (2) of section 10 of Lundy's draft, with deletion of "immediately after his appointment," be approved. Motion carried.

Zollinger referred to subsection (3) of section 10 of Lundy's draft, relating to mailed notice to the State Land Board where any known heir or any legatee or devisee was a nonresident alien, and pointed out that the subsection would require mailed notice in many instances in which there was no reason to suppose a nonresident alien would not be eligible to receive his inheritance and in which, therefore, the Land Board would have no interest. He indicated that he favored deletion of the subsection unless its application could be limited to situations in which escheat would more likely result, such as requiring the notice only as to nonresident aliens who were citizens of countries listed by the Land Board as those whose citizens would not have the benefit, use or control of inheritances from United States decedents. Rhoten suggested that personal representatives and estate attorneys would not likely be aware of such a list in many cases.

In response to a question by Lundy, Lovett pointed out that the State Land Board would receive notice of a proceeding to withdraw a nonresident alien heir's deposit under the draft on the subject of inheritance by nonresident alien heirs previously considered and apparently tentatively approved by the committees, but would not receive notice of the proceeding culminating in the order that the deposit be made.

On a suggestion by Riddlesbarger, Dickson ruled that the matter of the disposition of subsection (3) of section 10 be tabled, that Lundy should discuss the matter with Barrie and report thereon at the next meeting of the committees and that the matter be scheduled for consideration at the next meeting.

Published notice. Dickson referred to the word "immediately" in subsection (1) of section 13 of Lundy's draft, relating to publication of notice by personal representatives, and suggested, and it was agreed, that "promptly" should be substituted therefor.

Husband questioned the desirability of reducing the number of publishings of the notice to two. Gilley pointed out that this reduction was a feature of section 13 of his draft on initiation of probate or administration, and commented that it was his impression that the first publication was the significant one in most instances and that interested

persons would be as likely to learn of the initiation of estate proceedings through one publication as they would through five publications. Mapp agreed that one publication would be sufficient for interested persons who systematically checked such notices.

Dickson commented that the expense of publishing notices was one of the smallest expenses charged to the estate, and expressed the view that in deciding upon the number of publishings it would be preferable to err on the side of too many rather than too few. Bettis pointed out that the initial cost of published notice, such as the cost of setting the type, represented the largest share of publication expenses, and that the expense of publication after the first one was relatively small. Gilley recognized that newspapers might oppose reduction of the number of publishings on the ground of possible loss of revenue, but suggested that newspapers might be justified in charging the same amount for two publishings as presently charged for at least four. Warden commented that if the charge were to remain the same, there would be less reason to reduce the number of publications presently required.

At Bettis' suggestion the members were polled on the question of reducing the number of publishings of notice to two, and a majority were in favor of such reduction.

The wording of the publication requirement in subsection (1) of section 13 was discussed. Lundy pointed out that the terminology was similar to that used in the present statute on sales by guardians (i.e., ORS 126.441), and suggested that the committees decide upon the terminology to be used uniformly throughout the proposed revised probate code wherever publication of notice was called for. Carson suggested that the wording should be "once in each of two successive weeks, or two publishings in all." Jaureguy proposed that "or" in Carson's suggested wording be deleted. Rhoten moved, seconded by Gilley, that the wording "once in each of two successive weeks, two publishings in all" be approved. Motion carried.

Husband referred to paragraph (a) of subsection (1) of section 13, and questioned the necessity of the requirement therein that the published notice contain a positive statement of the death of the decedent. Riddlesbarger moved, seconded by Husband, that "and the fact of his death" in paragraph (a) be deleted. Motion carried. Allison suggested that "and the date of his death" be added to paragraph (a). Zollinger remarked that he did not understand why the notice should specify the date of the decedent's death.

Gilley moved, and it was seconded, that paragraph (b) of subsection (1) of section 13 be revised to read: "The names and addresses of the personal representative and of his attorney, if any." Motion carried. Zollinger suggested that paragraph (b) also require the name and address of a nonresident personal representative's resident agent to accept service. Butler indicated his intention to move, at the appropriate time, to reconsider the previous action by the committees in approving authorization for nonresident personal representatives.

Carson commented that there should not be too many statutory requirements as to the content of published notice; that additional requirements increased the chances of faulty notices. Braun suggested that if the purpose of additional requirements was to make the published notice more suitable to mail to heirs, legatees and devisees, it might be better to prescribe separately a notice to be so mailed and keep the published notice simple. Dickson expressed the view, with which Zollinger agreed, that the published notice had the purpose of attempting to inform all interested persons of the estate proceeding and of satisfying some aspects of due process by publicizing the opportunity for such persons to come forward and submit claims, make objections or whatever. Bettis commented that, while he believed the mailing of copies of the published notice to heirs, legatees and devisees would best accomplish the purpose of informing them of the estate proceeding, the publication itself would contribute to this accomplishment. Braun asked whether unknown heirs would be considered precluded from asserting any rights they might have as a result of the published notice. Lundy noted that the right of unknown heirs to contest a will, for example, would, in the absence of fraud, be precluded six months after admission of the will to probate.

Gilley moved, seconded by Thalhoffer, that paragraph (c) of subsection (1) of section 13 be revised by deletion of the wording as to contesting the probate or validity of the will (i.e., all wording after "a statement of that fact"). Motion carried.

Lovett asked whether the published notice should include the dates of the will and of its admission to probate, noting that section 303, 1963 Iowa Probate Code, specified that the notice should contain these dates. Zollinger called attention to the fact that the Iowa section set forth the form of the published notice. Braun suggested that the notice should indicate specifically whether the decedent died testate or intestate. Dickson remarked that he favored inclusion of a statement that a will had been admitted to probate if

such was the case, but not a statement of intestacy in the event a will had not been so admitted. Jaureguy moved, seconded by Thalhofer, that paragraph (c) of subsection (1) of section 13 be revised by substituting "the date of the will and the date of its admission to probate" for "a statement of that fact." Motion failed.

Allison referred to paragraph (d) of subsection (1) of section 13, and moved, seconded by Bettis, that the period within which creditors should be required to present their claims be reduced from six to four months after the date of first publication of the notice. Motion carried. Riddlesbarger moved, seconded by Zollinger, that "the address stated in the notice" be substituted for "a specified place in this state" in paragraph (d). Motion carried.

Allison suggested that the published notice contain the date of first publication in order that creditors know when the four-month period within which they must present their claims begins. He moved, seconded by Riddlesbarger, that a new paragraph be added to subsection (1) of section 13 as follows: "(e) The date of the first publication of the notice." Motion carried.

Allison and Carson questioned the appropriateness of "in the probate proceeding" in subsection (2) of section 13. Husband expressed the view that the wording was appropriate. Carson asked whether an intestate proceeding was a "probate" proceeding, and suggested that the wording be "with the clerk of the court." Dickson commented that perhaps the personal representative should file his proof of publication of notice "with," instead of "before he files," his final account. Allison suggested that filing of such proof might be required at the same time as filing proof of mailed notice. In response to a question by Gilley, Dickson remarked that so long as the proof of publication was filed the time of filing was immaterial. Riddlesbarger moved, and it was seconded, that subsection (2) be revised by deletion of "before he files his final account" and approved as so revised. Motion carried.

At this point (12 noon) Warden left the meeting.

Notice by successor personal representatives. Allison suggested several changes in the wording of section 13a of Lundy's draft, relating to notice by successor personal representatives. He pointed out that "and will" appearing twice in the first sentence of the section should be deleted in view of the previous action by the committees eliminating the requirement of mailing copies of will from section 10 of the draft. He proposed that the second sentence and subsections

(1) and (2) of section 13a be revised to read:

"However, if the death, removal or resignation occurred within four months after the date of the first publication of notice:

"(1) The successor personal representative shall cause a notice of his appointment and of the death, removal or resignation of his predecessor personal representative to be published in a newspaper published in the county in which the probate proceeding is pending, or if no newspaper is published in that county, then in a newspaper designated by the court, once in each of two successive weeks, two publishings in all.

"(2) The period of time between the death, removal or resignation and the date of first publication of the notice by the successor personal representative shall be added to the original four months within which claims are required to be presented, and a statement of the additional time for presentation of claims shall be included in the published notice by the successor personal representative."

Lundy posed a situation with coexecutors, one of whom died and was replaced by another before expiration of the four-month period for presentation of creditors' claims, and asked whether the new coexecutor in this situation would be a "successor personal representative" subject to the notice provisions of section 13a. Allison, Carson and Zollinger responded that if one of two coexecutors died, the survivor would continue to serve as sole executor, and rarely, if ever, would the deceased coexecutor be replaced.

Zollinger noted that section 13a would not require publication of notice by a successor personal representative if he was appointed after the four-month period for presentation of claims, and expressed the view that the successor should publish notice regardless of when he was appointed. He pointed out that, if the present concept of the Oregon statutes was retained, claims would not be barred by expiration of the four-month period, and that creditors desiring to present claims after such expiration should be informed by published notice as to whom and where such presentment was to be made. Gilley suggested that creditors, by a reasonable amount of inquiry, could obtain the necessary information in the successor personal representative situation. Bettis remarked that the estate records on file with the court would disclose whatever information creditors might need in such a situation.

Riddlesbarger suggested, and Dickson agreed, that creditors would adequately be notified in the successor personal representative situation if the original publication of notice under section 13 specified, pursuant to a requirement in paragraph (d) of subsection (1) of that section, that creditors present their claims to the "personal representative or his successor." In response to a question by Rhoten, Dickson commented that he was not inclined to favor extending the four-month claim presentment period in the successor personal representative situation. Gilley noted that Riddlesbarger's suggestion would impose upon creditors the responsibility of ascertaining the identity and whereabouts of a successor personal representative, but indicated he did not object to such imposition. Husband commented that he would prefer a notice provision for creditors to present their claims at a place, rather than to a particular named personal representative. Zollinger remarked that the notice should specify presentment of claims to a named person, and that such presentment at a place would not be sufficient.

Allison expressed approval of Zollinger's proposal that successor personal representatives publish notice whenever they might be appointed. Zollinger commented that if such appointment occurred before expiration of the four-month claim presentment period, the period should be extended to some extent, but otherwise no provision for additional time for such presentment should be made. Allison moved, seconded by Rhoten, that there be a provision that a successor personal representative publish notice of his appointment in every case in the manner set forth in subsection (1) of section 13a. Motion carried. Rhoten suggested, and it was agreed, that if appointment of the successor personal representative occurred before expiration of the four-month claim presentment period, the court should be authorized to extend the period for not more than four months after appointment of the successor and that the notice published by the successor should state the period of extension.

The meeting was recessed at 1:15 p. m.

The meeting was reconvened at 2:30 p.m. All members of the advisory committee, except Frohnmayer and Gooding were present. The following members of the Bar committee were present: Bettis, Gilley, Braun, Hornecker, Lovett and Thalsofer (arrived 3 p.m.).

Executors and Administrators Generally

Hornecker noted that at the February meeting he and Frohnmayer were assigned the task of preparing a revision of those parts of the draft on executors and administrators generally, which was considered at that meeting, relating to

bond of personal representative and removal, death or resignation of personal representative. [Note: See Minutes, Probate Advisory Committee, 2/18,19/66, pages 33 and 34.] Hornecker distributed to members present copies of a revised draft prepared by himself and Frohnmayer. [Note: A copy of this revised draft constitutes the Appendix to these minutes.]

Qualification of personal representative (section 1).

Carson referred to subsection (5) of section 1 of the revised draft, relating to disqualification to act as personal representative of a member of the Oregon State Bar who had resigned when charges of professional misconduct against him were under investigation or disciplinary proceedings against him were pending, and commented that it was his impression it had been decided at the February meeting not to refer specifically to Rule N. Lundy and Gilley remarked that the specific reference probably would be construed to mean the rule as it existed on the effective date of the revised probate code, and that subsequent changes in the rule could be anticipated. In response to a question by Hornecker, Zollinger pointed out that an attorney submitting a special resignation under Rule N must know about and specifically recognize the pending investigation of charges or disciplinary proceedings.

Braun moved, and it was seconded, that subsection (5) be revised to read: "(5) A person who has resigned from the Oregon State Bar when charges of professional misconduct are under investigation or when disciplinary proceedings are pending against him." Motion carried. Riddlesbarger asked whether subsection (5) should be worded in terms of "a person who has tendered his resignation." Zollinger responded that the person should not be disqualified to act as personal representative until his resignation became effective. In response to a question by Jaureguy, Zollinger expressed the view that the person would not be considered to have resigned until his resignation was accepted by the Supreme Court. Jaureguy moved, and it was seconded, that "or tendered his resignation" be inserted after "Oregon State Bar" in subsection (5) as previously approved by the committees. Motion failed.

Husband moved, seconded by Lovett, that "until he is reinstated" be inserted at the end of subsection (5) as previously approved by the committees. Motion carried.

Allison suggested that subsections (4) and (5) be combined in a single subsection. Lundy pointed out that subsection (5) was limited to Oregon resignations, while subsection (4) extended to suspension or disbarment from the practice of law

anywhere. It was agreed that subsections (4) and (5) should be separate subsections.

Butler expressed his strong objection to that part of subsection (6) permitting a nonresident to act as personal representative under certain conditions. He commented that his experience as personal representative of the estate of a Washington resident revealed the difficulties involved in authorizing nonresident personal representatives. He suggested that the interests of estates and beneficiaries would be better served if nonresident personal representatives were prohibited. Jaureguy remarked that a nonresident would be less familiar with the local procedures than a resident personal representative. In response to a question by Riddlesbarger, Butler expressed the view that a testator who was considering naming a nonresident executor in most cases did not realize the problems involved. Husband commented that if there was a nonresident personal representative additional burdens would be placed upon the estate attorney.

Riddlesbarger expressed the view that a testator should be able to name a nonresident as executor if he so desired. Gilley indicated he was in favor of permitting nonresident personal representatives, that he had served as executor of estates of Washington and Idaho decedents and had encountered no insurmountable problems and that he had heard no complaints arising out of the authorization for nonresident personal representatives in California and Washington. He remarked that he did not believe there would be additional burden on the estate attorney by reason of a nonresident personal representative, but that any such burden should not be the crucial factor in determining whether or not to allow nonresident personal representatives.

Butler moved, and it was seconded, that subsection (6) be revised to read: "(6) A nonresident of this state." On a vote by the advisory committee only, motion carried. On a separate vote by the Bar committee, motion failed.

Zollinger suggested that it would be desirable for the committees to know whether or not probate codes recently enacted in other states authorized nonresident personal representatives, and asked Lundy to obtain such information. Butler noted that Richardson recently had received a questionnaire from a group conducting a survey of probate practice in the several states and that a question as to nonresident personal representatives had been included therein. He suggested that Richardson might know of the results of the survey as to that particular question.

Lundy noted that subsection (7) disqualified judges of

all county courts, and pointed out that some such judges had no judicial functions. In response to a question by Zollinger, Lundy indicated that at the February meeting the committees had decided against using "a judicial officer" because this wording would include municipal judges. The wording "judicial officers other than municipal judges" and "a judicial officer of any county or state court" were suggested. Gilley asked whether federal judges should be disqualified. Braun asked whether the probate commissioners, appointment of whom the committees previously had approved, should be disqualified. Dickson commented that disqualification of probate commissioners probably would make it extremely difficult to find attorneys to serve as such commissioners. Lundy remarked that probate commissioners probably would be prohibited from acting as such in respect to estates for which they were personal representatives or attorneys.

Hornecker moved, seconded by Butler, that subsection (7) be approved without change. Motion carried.

Necessity and amount of bond; bond notwithstanding will (section 2). Husband referred to that part of subsection (1) of section 2 of the revised draft requiring that the bond of a personal representative be one executed by a surety company, and expressed the view that this requirement would increase the difficulties involved in probate practice, particularly in the case of small estates. Zollinger moved, seconded by Braun, that subsection (1) be approved. Motion carried.

Jaureguy referred to subsection (2), and expressed some concern that the general guidelines for the court to follow in fixing the amount of bond of a personal representative set forth in that subsection would not result in an adequate bond in all cases. Butler commented that the present arbitrary guidelines based on the value of the estate resulted in inequities in some cases. Zollinger moved, seconded by Carson, that subsection (2) be approved. Motion carried.

Husband referred to subsection (3), relating to the bond of a personal representative when the will declared that no bond was required, and moved, seconded by Zollinger, that the oath requirement be deleted. Motion carried unanimously.

Allison referred to that part of subsection (3) authorizing the court to require a bond notwithstanding a contrary declaration in a will, and asked whether the bond required by the court was to be a surety company bond. Jaureguy suggested that the court should be authorized to require a personal surety bond as well as a surety company bond. Zollinger suggested that the court might be authorized to

require "such bond as in the discretion of the court should be required." Husband commented that if the court determined a bond was necessary, there was sufficient reason for it to be a surety company bond. Zollinger proposed, and it was agreed, that the bond required by the court be the same as that described in subsection (1).

Hornecker noted that the reference to a nonresident personal representative in subsection (3) should be deleted pursuant to the previous action by the advisory committee in eliminating authority for nonresident personal representatives.

Dickson suggested, and Allison agreed, that subsection (4) might be expanded to authorize the court to require a bond if one was not previously required, a new bond, an additional bond or a bond in respect to sales of property by a personal representative, as well as to increase or decrease the amount of an existing bond, and thus eliminate the necessity for at least the second sentence of subsection (3). Thalhofer and Husband indicated they did not favor this suggested expansion of subsection (4).

Braun suggested that it might be wise to authorize the court to increase or decrease the amount of a bond before the filing of the inventory. She moved, seconded by Gilley, that subsection (4) be revised to read: "(4) If at any time it appears to the court that the bond of the personal representative is inadequate or excessive, the court may, by order, increase or reduce the amount of the bond." Motion carried.

Butler moved, and it was seconded, that subsection (5) be approved. Motion carried.

When new bond may be required (section 3). Zollinger referred to subsection (2) of section 3 of the revised draft, relating to discharge of the surety on a former bond when a new bond was filed, expressed the view that it was an appropriate provision and withdrew his suggestion, made at the February meeting, that it be deleted. Dickson suggested that the discharge of the surety on the former bond be by court order. In response to questions by Allison and Jaureguy, Zollinger commented that the surety on a new bond would assume responsibility only for subsequent acts or omissions of the personal representative and not for prior acts or omissions, and that section 3 applied only to new bonds and not to additional bonds.

Riddlesbarger questioned the meaning of "financially involved" in subsection (1).

Riddlesbarger suggested, and Butler and Lovett agreed, that the substance of subsection (1) of section 3 might be incorporated in subsection (4) of section 2 by inserting "or require a new bond" at the end of subsection (4) of section 2, thus eliminating the necessity for subsection (1) of section 3. Zollinger commented that subsection (4) of section 2 also should authorize the court to require an additional bond. He expressed the view that the discharge of sureties on any bond should be by court order, rather than, in the case of a new bond, automatically upon the filing of the new bond, and that the court order should be conditioned upon a finding that another or other bonds were sufficient. Hornecker questioned the need for a court order discharging a surety from liability for subsequent acts or omissions of a personal representative. Riddlesbarger commented that a surety company probably would wish to have some official evidence of its discharge and that a court order would satisfy that wish. In response to questions by Allison, Zollinger expressed the opinion that the exoneration of the surety on a personal representative's bond when an estate was closed did not discharge the surety from liability for previous acts or omissions of the personal representative, and indicated that he was not proposing to deal with the matter of exoneration of such surety on closure of the estate at this point.

Riddlesbarger moved, seconded by Gilley, that "or require a new or additional bond" be inserted at the end of subsection (4) of section 2. Motion carried.

Allison moved, seconded by Gilley, that a second sentence be added to subsection (4) of section 2, to read substantially as follows: "When a new bond has been approved and filed, the court may order that the surety on the former bond be discharged from any liability on account of its principal arising from subsequent acts or omissions of the personal representative." Motion carried.

Removal of personal representative; grounds and procedure (section 4). The procedure for removal of a personal representative set forth in subsections (1) to (3) of section 4 of the revised draft was discussed. Riddlesbarger and Zollinger commented that the citation described in subsection (1) appeared to be directed to the personal representative's attorney if the personal representative could not be found in the state and to the surety on the personal representative's bond, and indicated that they did not favor citation requiring the appearance of such attorney and surety. Allison noted that the present Oregon statute on removal of personal representatives (i.e., ORS 115.470) provided for notice to the personal representative "served in the manner provided for

the service of summons."

Hornecker indicated that citation to the personal representative's attorney was a suggestion by Frohnmayer and was designed to give the court jurisdiction to act on the removal of the personal representative when the latter could not be found in the state and service of the citation therefore could not be made on him. Riddlesbarger commented that obtaining jurisdiction over the personal representative's attorney by citation would not effectively obtain jurisdiction over the personal representative. Carson remarked that obtaining jurisdiction over the attorney would be fruitless in most cases, since the attorney would not be in a position to do anything to resolve the problems giving rise to the proposed removal of the personal representative.

Zollinger stated he would not object to the citation being directed to the personal representative and served on him if he could be found in the state, but if he could not be so found, then on his attorney and the surety on his bond as a substituted service on the personal representative rather than as a citation directed to the attorney and surety. He commented that the court had sufficient jurisdiction to remove a personal representative without the necessity of citation, and that the primary purpose of citation was to notify the personal representative of his opportunity to appear and be heard on the issue of his removal. Carson expressed approval of Zollinger's proposal, remarking that the attorney and surety should not be punished by contempt, for example, in a proceeding to remove the personal representative for some act or failure to act of the personal representative. He suggested that it should be emphasized that service of citation on the attorney or surety constituted nothing more than substituted service on the personal representative. Lovett expressed the view that a copy of the citation directed to the personal representative should be served on the surety whether or not service thereof on the personal representative was made.

It was agreed that service of the citation in a proceeding to remove a personal representative should be directed to the personal representative only and served on him if found within the state, but if not so found, service should be made on his attorney and surety on his bond for the purpose of constituting service on the personal representative.

Allison suggested, and Jaureguy agreed, that "on the ground that he has become disqualified" should be substituted for "who has become disqualified" in the first sentence of subsection (1). Allison also suggested that the words "in any way" in the first sentence of subsection (1) be deleted as unnecessary.

Allison expressed objection to the wording of the last sentence of subsection (1), commenting that the court need not

find "the charge to be true." He proposed that the sentence be revised to read: "Upon the hearing the court may, by order, remove such personal representative and revoke his letters."

Allison referred to subsection (3), and expressed the view that the personal representative should be informed of his opportunity in every case to appear and show cause why he should not be removed. He suggested that "may or on its own motion" in subsection (3) should be deleted.

Riddlesbarger questioned the appropriateness of including subsections (4) and (5) in a section otherwise pertaining to removal of personal representatives, and suggested that these subsections be separate sections located elsewhere in the proposed revised probate code. Lundy and Carson pointed out that subsection (5) was substantially the same as the last sentence of ORS 115.490. It apparently was agreed that subsections (4) and (5) should be separate sections located elsewhere.

Jaureguy commented, and Riddlesbarger agreed, that the separate section containing the substance of subsection (5) should include the following: "If the court is of the opinion that the personal representative has not faithfully and diligently performed such duties, it may (or shall) on its own motion order the personal representative to appear and show cause why he should not be removed." Braun remarked that the substance of the sentence suggested by Jaureguy appeared to be contemplated by "or on its own motion shall" in subsection (3).

Powers of successor and surviving personal representatives (sections 5 and 6). The limitation of the powers exercisable by a successor personal representative under subsection (2) of section 5 of the revised draft and by a surviving personal representative under section 6 to those not personal to another personal representative designated in a will was discussed. Hornecker noted that subsection (2) of section 5 was derived from section 100, Model Probate Code, and section 6 from section 101, Model Probate Code. Gilley suggested that "will" be substituted for "instrument creating the powers" in subsection (2) of section 5.

Allison expressed concern, in which Dickson joined, that subsection (2) of section 5 might be construed to override, in some instances, the authority of an administrator with the will annexed to sell property pursuant to a power of sale given by the will to the executor, as presently recognized in ORS 116.825, and stated that he opposed any such effect of subsection (2) of section 5. Zollinger

commented that a testator should be able to give a power that was personal to a designated executor, if he chose to do so, with some assurance the power would be exercised only by that executor. He noted that subsection (2) applied only to "successor" personal representatives, and suggested that the subsection should apply also when an executor named in a will failed to qualify and another personal representative was appointed. Gilley remarked that Zollinger's suggestion might be accomplished by substituting "the other personal representative" for "a successor personal representative" in subsection (2).

Riddlesbarger expressed the view that some provision should be made for determining whether a power given to a personal representative in a will was personal to that particular personal representative or not, and that perhaps the court should have discretion to make such determination by order. Allison indicated he would favor a provision that a personal representative appointed by the court in place of another have all the powers of the replaced personal representative unless the court, by order, found that powers given by a will were personal to the replaced personal representative designated in the will. In response to a question by Zollinger, Allison suggested that the court make its finding at the time it appointed the new personal representative and that this finding be included in the order of appointment.

Husband suggested that subsection (2) of section 5 be revised to read: "The other personal representative shall have all the powers of his predecessor except those specifically provided in the will to be personal to the personal representative therein designated." Zollinger commented that Husband's suggestion made the wording of the will the test of whether a particular power was personal to a designated personal representative, and indicated that he favored the suggestion. After further discussion, the following revision of subsection (2) was approved tentatively: "When the other personal representative is appointed, he shall have all the rights, powers and duties given in the instrument creating the powers, except those which the court finds are personal to the personal representative therein designated."

Allison expressed the opinion that often it would be extremely difficult to determine from a will whether a power given therein was personal to a designated personal representative, and that in view of this difficulty, all powers so given in a will should be considered not personal and should be exercisable by any personal representative.

Zollinger commented that he still adhered to the proposition that a testator should be able to give a power personal to a designated personal representative if he wished to do so, but indicated that he would not object to such power being evident by express terms of the will, thus requiring the testator to make the giving of a personal power perfectly clear. Husband indicated he agreed with Zollinger.

Butler suggested, and it apparently was agreed, that the powers, referred to in subsection (2) of section 5 and in section 6, given by a will should be considered not personal to a particular personal representative unless the will expressly provided that such powers were personal, and that drafting of appropriate wording to reflect this should be left to Lundy. Butler noted that a distinction between powers of appointment and powers of administration should be recognized in drafting the appropriate provision. Allison commented, and Zollinger agreed, that the provision on personal powers should not prevent a personal representative from performing those administrative functions necessary to the proper administration of the estate.

Zollinger remarked that section 6 prompted the question of what powers less than all of two or more personal representatives were authorized to exercise, and suggested that this was a matter the committees should consider. Lundy noted that this matter was dealt with in section 102, Model Probate Code, which listed certain powers that were to be exercised only by all of two or more personal representatives and allowed the exercise of other powers by any one of them.

Effect of substitution of personal representative (section 7). Hornecker noted that section 7 of the revised draft, relating to effect of substitution of personal representative, was derived from section 69, 1963 Iowa Probate Code. Zollinger suggested that section 7 was unnecessary. Butler moved, seconded by Gilley, that section 7 be deleted. Motion carried.

Property; failure to deliver; penalty (section 8). Hornecker noted that section 8 of the revised draft, requiring a resigned or removed personal representative to promptly deliver all estate property to his successor, was derived from section 70, 1963 Iowa Probate Code. Gilley moved, seconded by Butler, that section 8 be deleted. Motion carried.

Bank or trust company; change in status (section 9). Hornecker pointed out that section 9 of the revised draft, relating to the effect of change of status of a bank or trust company acting as personal representative, was the

same as subsection (2) of ORS 115.500. Zollinger expressed the opinion that the substance of section 9 was covered in the banking statutes. Hornecker and Lundy indicated they had been unable to find a comparable provision in the banking statutes, but that their search had not been a completely thorough one.

Riddlesbarger moved, and it was seconded, that section 9 be approved, with the proviso that it might be deleted if subsequently found to be duplicated in the banking statutes. Motion carried.

Next Meeting of Committees

The next joint meeting of the committees was scheduled for Friday, April 15, 1966, at 1:30 p.m., and the following Saturday, April 16, in Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

Dickson suggested, and it was agreed, that Lundy should determine the items to be included in the agenda for the April meeting. Lundy indicated that such agenda would include approval of the minutes of the February meeting. In response to a question by Lundy, Dickson commented that review of ORS chapter 116 was a matter available for inclusion in the April meeting agenda.

The meeting was adjourned at 5:15 p.m.

APPENDIX

(Minutes, Probate Advisory Committee Meeting, March 18 & 19, 1966)

(At the February meeting of the advisory and Bar committees, Mr. Frohnmayer and Mr. Hornecker were assigned to prepare and submit at the March meeting a revision of those parts of the draft on executors and administrators generally, which was prepared by Mr. Hornecker and Mr. Krause and considered at the February meeting, relating to bond of personal representative and removal, death or resignation of personal representative. The following draft, prepared by Mr. Frohnmayer and Mr. Hornecker and constituting a revision of most of the previous draft on executors and administrators generally, in accordance with motions adopted and views expressed at the February meeting, was submitted at the March meeting.)

PERSONAL REPRESENTATIVE

At the February meeting of the Advisory Committee and State Bar Committee, Gregory T. Hornecker and Otto J. Frohnmayer were commissioned to revise and submit to the members of both committees their revision. The revision with notes and comments is as follows:

Section 1

Qualification of Personal Representative. Any qualified person whom the court finds suitable may serve as a personal representative. A person is not qualified to serve as a personal representative who is:

- (1) Incompetent to act in that capacity.
- (2) A minor.
- (3) A person who has been convicted of a felony.
- (4) A person suspended for misconduct or disbarred from the practice of law, during the period of suspension or disbarment.
- (5) A member of the Oregon State Bar who has resigned pursuant to rule N of the rules of admission of the Supreme

Court of the State of Oregon, when charges of professional misconduct are under investigation, or when disciplinary proceedings are pending against the member.

(6) A nonresident of this state who has failed to file a bond or who has not appointed a resident agent to accept service of summons and process in all actions, suits and proceedings with respect to the estate and has caused such appointment to be filed in the probate proceedings.

(7) A judge of a county court, district court, circuit court or Supreme Court of the State of Oregon.

Comparable provisions:

Model Code § 96

Iowa Code § 295

Washington Code § 11.36.010

ORS 115.410

Section 2

Necessity and amount of bond; bond notwithstanding will.

(1) No personal representative shall, except as stated in this section, act as such until he files with the clerk of the court a bond executed by a surety company qualified to transact surety business in the State of Oregon in favor of all interested parties conditioned upon the personal representative performing the duties of his trust, in an amount, within the discretion of the court, but not less than \$1,000.

Comparable provisions:

Model Code § 106

Iowa Code § 169 et seq.

Washington Code § 11.28.180 et seq.

ORS 115.430

(2) In fixing the amount of the bond the court shall take into account the size of the estate, the character and liquidity of its assets, the anticipated income during probate, the probable amount of indebtedness and taxes and other pertinent facts with the view of affording adequate protection to the interested parties.

(3) When a will declares that no bond shall be required of the personal representative, he may act upon taking an oath faithfully to perform his trust, without filing a bond. (Query: Should personal representative be required to file an oath?) Notwithstanding such provision in a will, the court may, at any time in its discretion, on its own motion or upon the petition of any interested party or in any event upon the appointment of a nonresident personal representative, require such personal representative to give a bond.

Comparable provisions:

Model Code § 107

Iowa Code § 172 and § 173

Washington Code § 11.28.200

ORS 115.430

(4) If, upon filing the inventory, or at any time thereafter, it appears to the court that the bond of the personal representative is inadequate or excessive, the court may, by order, increase or reduce the amount of the bond.

Comparable provisions:

Model Code § 115

Iowa Code § 180

Washington Code § 11.28.210

ORS 115.450

(5) Nothing in this section shall alter the provisions of ORS 709.230 and 709.240 relating to a trust company acting as a personal representative.

Section 3

When new bond may be required. (1) If a surety on a bond becomes financially involved or is no longer qualified to transact business in the State of Oregon or if it desires to be released as the surety on a bond, the court may require the personal representative to file a new or additional bond in such amount as the court deems adequate.

(2) The new bond required under this section when approved and filed shall discharge the surety on the former bond from any liability on account of its principal arising from subsequent acts or omissions of the personal representative.

Comparable provisions:

Model Code § 116

Iowa Code § 185

ORS 126.176 (guardianship code)

Comment: Judge Dickson and Mr. Zollinger suggested that this provision be deleted along with the remainder of the section as shown on page 5 of the report of 1/14/66. Hornecker and Frohmayer are inclined to agree.

Section 4

Removal of personal representative; grounds and

procedure. (1) Any person interested in the estate may apply for the removal of a personal representative who has become disqualified for appointment or who, in any way, has been unfaithful to or neglectful of his trust. Such application shall be by petition and upon citation to the personal representative, or upon citation to his attorney if the personal representative cannot be served by the use of due diligence in the State of Oregon. In case the personal representative has filed a bond with the court, citation shall also be served upon the surety. If the court finds the charge to be true, it shall by order remove such personal representative and revoke his letters.

(2) The petition shall specify the grounds for the removal of the personal representative.

(3) The court on such petition may or on its own motion shall order the personal representative to appear and show cause why he should not be removed.

(4) The designation of the attorney or attorneys employed by the personal representative, if any, to assist him in the administration of the estate shall be filed in the probate proceedings. § 82, Iowa. Such designation shall state the attorney's name and address.

(5) It is the duty of the court to exercise supervisory control over a personal representative, to the end that he shall faithfully and diligently perform the duties of his trust.

Comparable provisions:

Model Code § 98

Iowa Code § 65 and § 82

Washington Code § 11.28.250 et seq.

ORS 115.470

Section 5

Appointment of successor personal representative. (1)

When a personal representative fails to qualify, dies, is removed by the court, or resigns, and such resignation is accepted by the court, the court shall appoint another personal representative.

(2) When a successor personal representative is appointed he shall have all the rights, powers and duties of his predecessor except that he shall not exercise powers given in the instrument creating the powers that by its express terms are personal to the personal representative

therein designated.

Comparable provisions:

Model Code § 100

Iowa Code § 66 and § 68

Washington Code § 11.28.290

ORS 115.500, 115.510

Section 6

Powers of surviving personal representative. Every power exercisable by joint personal representatives may be exercised by the survivor of them when one is dead or by the other when one appointment is terminated by order of the court or by the remaining personal representative or representatives when one or more of them has resigned unless the power given in the will appears by its terms to be personal to the personal representative therein designated who has died, resigned, or has been removed by the court.

Comparable provisions:

Model Code § 101

Iowa Code § 67

Washington Code § 11.28.270

ORS 115.500

Section 7

Effect of substitution of personal representative. The substitution of a personal representative shall occasion no delay in the administration of an estate. The periods herein

specified within which acts are to be performed after the appointment of a personal representative shall, unless otherwise ordered by the court, be computed from the issuing of the letters to the first personal representative.

Comparable provisions:

Iowa Code § 69

Section 8

Property; failure to deliver; penalty. A personal representative who has resigned or has been removed shall promptly deliver to the successor personal representative all the property in his hands or under his control belonging to the estate. If he fails or refuses to do so upon proper order of the court he shall be guilty of contempt.

Comparable provisions:

Iowa Code § 70

Section 9

Bank or trust company; change in status. Whenever a bank or trust company is appointed and qualified as a personal representative, and thereafter such company is converted as provided by law, or is consolidated with another bank or trust company or sells its trust and fiduciary business or its trust department to another bank or trust company, pursuant to any law permitting such conversion, consolidation or sale, the converted, consolidated or purchasing company shall continue and complete the adminis-

tration of the estate as though it had been originally appointed as the personal representative with all the rights, obligations and responsibility incident thereto.

Comparable provisions:

ORS 115.500, subsection (2)

Comment: Frohnmayer and Hornecker have made a rather hurried search of the provisions of the Oregon Code relating to banks and trust companies and have found no comparable provision or provisions. We do not find any comparable code section in the Model, Iowa or Washington Code. Query: Should an interested party have the right to be heard upon the appointment of a successor bank or trust company? Mr. Frohnmayer questions the absolute right of a successor bank or trust company to take over the powers of the original personal representative.

the estate of a decedent that a person has custody of a will made by the decedent, the court may issue an order requiring that person to deliver the will to the court.

(3) A person having custody of a will who fails to deliver the will as provided in this section is liable to any person injured by that failure for damages sustained thereby.

Section 2. ORS 115.110, 115.130 and 115.990 are repealed.

PRESENT OREGON STATUTES

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

"115.130 Order for production of will. If it is alleged in any petition that any will is in possession of a third person and the court is satisfied that the allegation is correct, an order must be issued and served upon the person having possession of the will, requiring him to produce it at a time and place named in the order."

"115.990 Penalties. Any person who wilfully sequesters or secretes any last will of a person then

deceased, or who, having the custody of any such will, wilfully fails or neglects to produce and deliver the same to the judge of the court having jurisdiction of its probate, or to any executor named therein, within a reasonable time after the death of the testator thereof, with intention to injure or defraud any person interested therein, is punishable, upon conviction, by imprisonment in the county jail not more than one year or by a fine not exceeding \$500."

WASHINGTON STATUTE
(1965 Probate Code)

"Sec. 11.20.010 DUTY OF CUSTODIAN OF WILL--LIABILITY. Any person having the custody or control of any will shall, within thirty days after he shall have received knowledge of the death of the testator, deliver said will to the court having jurisdiction or to the person named in the will as executor, and any executor having in his custody or control any will shall within forty days after he receives knowledge of the death of the testator deliver the same to the court having jurisdiction. Any person who shall wilfully violate any of the provisions of this section shall be liable to any party aggrieved for the damages which may be sustained by such violation."

IOWA STATUTE
(1963 Probate Code)

"§ 285. Custodian--filing--penalty

"After being informed of the death of the testator,

the person having custody of his will shall deliver it to the court having jurisdiction of his estate. Every person who willfully refuses or fails to deliver a will after being ordered by the court to do so shall be guilty of contempt of court. He shall also be liable to any person aggrieved for the damages which may be sustained by such refusal or failure."

MODEL PROBATE CODE

"§ 63. Duty of custodian of will; liability. After the death of a testator the person having custody of his will shall deliver it to the court which has jurisdiction of the estate. Every person who wilfully refuses or fails to deliver a will after being duly ordered by the court to do so shall be guilty of contempt of court. He shall also be liable to any party aggrieved for the damages which may be sustained by such refusal or failure.

"Comment. Statutes in practically every state provide that the custodian of a will may be compelled to produce it. Some stop with a general statement, while others go into more or less detail. In some jurisdictions criminal penalties are provided for the refusal to produce a will. The statute here presented is almost identical with Kan. Gen. Stat. (Supp. 1943) § 59-621."

The following is from a statutory note on section 63, Model Probate Code:

"Most legislative provisions today treat the refusal to produce the will as a contempt, giving the court power to imprison the custodian until he produces the will. Six jurisdictions, however, provide only a criminal sentence, in the form of a fine or imprisonment for a definite period, or both. These six are Connecticut, District of Columbia, Maryland, South Carolina, Tennessee and Washington. A few states provide for enforcement both by criminal sentence and imprisonment for contempt. No criminal penalties have

been set up in the Model Probate Code, since it is felt that such provisions rightfully belong in the penal code rather than in the probate code."

"It is common to provide for restitution to persons damaged by withholding of the will, either by making the custodian liable in damages to all persons injured, or by a penalty of a stated sum per day or per month, to be recovered for the benefit of the estate. * * * This type of statute, embodying a blanket penalty, has the merit that the damages may be recovered in a single suit, but this advantage is outweighed by two other considerations. The sum recoverable bears no relation to the actual damages sustained; it may be larger or smaller than the actual damages. Moreover, the benefits presumably enure to the various distributees in proportion to their shares in the estate, although possibly they have not been damaged in this proportion. * * * For these reasons the Model Probate Code does not contain this type of provision, but provides instead for liability to all persons damaged." Similar statutes of 23 states are cited (i.e., Alabama, Arizona, California, Colorado, Florida, Indiana, Iowa, Kansas, Maine, Massachusetts, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oklahoma, Oregon, South Dakota, Utah, Washington, West Virginia, Wisconsin and Wyoming).

"A further penalty, in addition to liability for damages, is imposed in Kansas, where a person who knowingly withholds a will for more than a year from the date of testator's death is barred from all rights under the will. * * * In Ohio the custodian is barred of all rights both testate and intestate if he withholds the will for three years."

"One more feature of these statutes should be mentioned. It is frequently provided that the custodian must surrender the will within a specified time, usually thirty days after being informed of the testator's death * * *. No time limit has been written into the Model Probate Code; in the absence of any rule, a reasonable time is implied, and it is felt that this is sufficiently definite."

In considering the comment and statutory note under section 63, Model Probate Code, above, keep in mind that the Model Probate Code was published in 1946.

REPORT
March 10, 1966

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

From: Mr. Mapp and Mr. Riddlebarger

Subject: Rough Draft on Execution of Wills

ROUGH DRAFT

Sec. 1. Who may make wills. Any person 18 years of age or older or who has lawfully married, and who is of sound mind, may dispose of his property by will.

Sec. 2. Execution of Will. A will shall be writing and shall be executed by the signature of the testator and of at least two attesting witnesses on the instrument as follows:

a. The testator shall:

(1) Himself sign, or, at his direction and in his presence have someone else sign his name for him,
or,

(2) Acknowledge his signature already made in accordance with subsection (1) above, and

(3) Perform one of the acts described in subsections (1) and (2) above in the presence of each of the attesting witnesses.

b. The attesting witnesses shall each sign in the presence of the testator.

COMMENT Regarding Section 2. Section 2 preserves the substantive requirements of the present Oregon law regarding the execution of wills, but incorporates certain judicial interpretations

in the section so that the actual requirements are clearly stated in the statute. For example, the present statute states that the will should be attested by two or more competent witnesses. As the Oregon courts have interpreted this as meaning that the testator must either sign or acknowledge in the presence of the witnesses, it is felt desirable to specifically state this requirement in the statute.

Sec. 3. Person signing testator's name to sign his own name as witness. Any person who signs the testator's name to any will by his direction shall subscribe his own name as a witness to such will, and state thereon that he signed the testator's name at his request.

Sec. 4. Validity of Will. A will is legally executed if the manner of its execution complies with the law in force of

- (1) this state at the time of execution or at the time of the testator's death, or
- (2) the domicile of the testator at the time of execution or at the time of his death, or
- (3) the place of execution at the time of execution.

COMMENT Regarding Section 4. While much has been written regarding the purposes of formalities in connection with the execution of wills, it would seem that their principal functions are (1) evidentiary and (2) protective.

If the will is written, we have evidence of its content. If it is signed by the testator we have evidence that it was the instrument he intended as his will.

The presence of witnesses tends to create an environment calculated to caution a testator as to the gravity of his acts, hopefully protecting him from his own precipitous conduct. Moreover, they protect an earlier true will from a subsequent instrument executed under duress, or by an incompetent person.

Unfortunately, we often articulate these formalities as requirements which the State imposes on a would-be testator, as though they reflected some minimal behavioral standard dictated by public policy. But the foregoing summary of formalities should disclose that they are designed solely to protect the testator. In truth, the State should be understood to assure its domiciliary that, as a governmental service to him, no will executed by him in this state will be probated unless it satisfies the statutory formalities.

But if this be so, why can't we assume that a will executed by a non-domiciliary, or executed outside this state, in accordance with formalities less protective than ours in force in the domicile or at the place of execution, reflected the choice of the testator? We offer him more protection, but should we impose more protection on him?

The subcommittee recognizes that this section would thus permit the original probate in Oregon of a holographic will in certain circumstances. The holographic will is felt to satisfy the evidentiary requirements of the usual formalities as it is a written instrument and is signed by the testator. It affords the testator somewhat less protection because it does not provide for witnesses who can assure the court that the will was not executed under duress or by a testator of dubious competence.

Perhaps the greatest practical objection to the holographic will is that it is customarily made by the testator without the assistance of counsel. Thus, it is often extremely difficult to interpret. However, this difficulty is not caused by the absence of witnesses, and is therefore also present where an attested will was prepared by the testator himself. It would seem that unless we are willing to refuse probate to "home-made" attested wills, we ought not to reject "home-made" holographic wills.

Moreover, even if there are reasons for continuing Oregon's disapproval of holographic wills, it would seem that the advantages of this position are out-weighed by the difficulty of attempting to maintain the position in the face of the increasing mobility of elderly persons who tend to make their wills in one jurisdiction according to the laws in force there, and then move to other jurisdictions. Rejecting these wills can create extreme hardships.

The Section 4 recommended by the subcommittee departs from the language originally recommended in the Riddlesbarger draft, which in turn was substantially based on Section 50 of the Model Probate Code and Section 283 of the Iowa Code, because

neither of those provisions would admit the will of a non-resident which happened to be executed in Oregon in accordance with the law of the domicile of the non-resident.

Should the committee decide that no will should be admitted to original probate in Oregon unless it is written, signed by the testator, and attested, irrespective of the laws in force at the place of execution or the domicile of the testator, the following language would be suggested:

Sec. 4. Validity of Will. A will is legally executed if it is written, signed by the testator, attested, and is otherwise executed in accordance with the law in force of

- (1) this state at the time of execution or at the time of the testator's death, or
- (2) the domicile of the testator at the time of execution or at the time of his death, or
- (3) the place of execution at the time of execution.

March 18, 1966

PRETERMITTED HEIRS

ROUGH DRAFT

Section 1. (1) If a testator dies survived by a child not named or provided for in the will of the testator and not a member of a class named or provided for in the will, the child shall have that share of the estate of the testator he would have had if the testator had died intestate.

(2) If a testator dies survived by a descendant of a deceased child and the deceased child and descendant are not named or provided for in the will of the testator and not members of a class named or provided for in the will, the descendant shall have that share of the estate of the testator he would have had if the testator had died intestate.

(3) The share of the estate that a child or a deceased child's descendant is entitled to have as provided in this section shall be taken proportionately from the shares of others entitled thereto in the following order:

(a) Property not disposed of by the will.

(b) Property disposed of by the will.

(4) A child or deceased child's descendant is not entitled to have a share of the estate as provided in this section unless he files in the probate proceeding, not later than six months after the date of the entry of the order admitting the will to probate, a claim therefor.

Section 2. ORS 114.250 and 114.260 are repealed.

NEW YORK PROPOSED PRETERMITTED HEIR STATUTES

The following two statute sections relating to pretermitted heirs are contained in a bill introduced at the 1966 session of the New York legislature. This bill (Senate Intro. No. 816, Assembly Intro. No. 1549) is designated the "Estates, Powers and Trusts Law," and constitutes a revision of New York's substantive law of estates prepared by the New York Temporary State Commission on Estates, whose comments on the statute sections are set forth thereunder.

§5-3.2 Revocatory effect of birth of child after execution of will

(a) Whenever a testator, during his lifetime or after his death, has a child born after the execution of a last will, and dies leaving the after-born child unprovided for by any settlement, and neither provided for nor in any way mentioned in the will, every such child shall succeed to a portion of the testator's estate as herein provided:

(1) If the testator has one or more children living when he executes his last will, and:

(A) No provision is made therein for any such child, an after-born child is not entitled to share in the testator's estate.

(B) Provision is made therein for one or more of such children, an after-born child is entitled to share in the testator's estate, as follows:

(i) The portion of the testator's estate in which the after-born child may share is limited to the portion passing to the living children under the will.

(ii) The after-born child shall receive such share of the testator's estate, as limited in subparagraph (i), as he would have received had the testator included all after-born children with the living children upon whom benefits were conferred under the will, and given an equal share of the estate to each such child.

(iii) To the extent that it is feasible, the interest of the after-born child in the testator's estate shall be of the same character, whether an equitable or legal life estate or in fee, as the interest which the testator conferred upon his living children.

(2) If the testator has no child living when he executes his last will, the after-born child succeeds to the portion of such testator's estate as would have passed to such child had the testator died intestate.

(b) The after-born child may recover the share of the testator's estate to which he is entitled, either from the other children under subparagraph (a) (1) (B) or the testamentary beneficiaries under subparagraph (a) (2), ratably, out of the portions of such estate passing to such persons under the will. In abating the interests of such beneficiaries, the character of the testamentary plan adopted by the testator shall be preserved to the maximum extent possible.

Sources: DEL § 26.

Changes: Substantially revised.

Comments: This section substantially revises DEL § 26 to eliminate a serious defect in the policy underpinning of that statute by which an after-born child who qualifies for an elective share of his parent's estate will receive a substantial portion of such estate although the parent has made no provision for other children living at the time the will was executed. The new section undertakes to correct this distortion of the reasonably presumable intention of the normal parent.

No change has been effected in the principle underlying DEL § 26, embodied in paragraph (a) of the new section, which disqualifies an after-born child from taking an elective share where the testator has given some concrete evidence that the after-born child was not inadvertently or unintentionally disinherited (see, McLean v. McLean, 207 N.Y. 365)

§5-3.3 Action in supreme court by child born after execution of will, by surviving spouse upon revocation of will by marriage or by subscribing witness with interest under will

In the event that the administration of a decedent's estate in the

surrogate's court has been completed and the estate distributed, an action may be maintained in the supreme court by an after-born child under 5-3.2, a surviving spouse under 5-1.3 or a subscribing witness under 3-3.1 to enforce rights under such sections against testamentary beneficiaries or distributees, as the case may be.

Source: DEL § 28.

Changes: Slightly revised.

Comments: This section re-enacts DEL § 28, slightly revised to make an action in the supreme court to enforce the specified rights contingent on the unavailability of a suitable remedy in the surrogate's court.

REPORT

March 7, 1966

To: Members of the Subcommittee on Heirship Determination

From: Robert W. Lundy
Chief Deputy Legislative Counsel

Subject: Rough Draft on Pretermitted Heirs.

At the joint meeting in January of the Advisory Committee on Probate Law Revision and Bar Committee on Probate Law and Procedure, a subcommittee was appointed to study and report at the joint meeting in March on the matter of proceedings for the determination of heirship, both generally and as to pretermitted heirs. The subcommittee consists of Mr. Riddlesbarger (chairman), Mrs. Braun, Mr. Gilley, Professor Mapp and Mr. Zollinger.

At the January meeting Mr. Riddlesbarger asked me to prepare a draft of a proposed pretermitted heir statute for consideration by the subcommittee. In preparing this draft I was to take into consideration those matters on which the advisory and Bar committees appeared to be in agreement and to pinpoint those matters on which there appeared to be uncertainty.

This report contains my draft of a proposed pretermitted heir statute and some comment thereon. I respectfully request that you keep in mind that it was prepared by one relatively uninformed on probate matters.

ROUGH DRAFT

Section 1. (1) If a testator dies survived by a child not named or provided for in the will of the testator and not a member of a class named or provided for in the will, the child shall have that share of the estate of the testator he would have had if the testator had died intestate.

(2) If a testator dies survived by a descendant of a deceased child and the deceased child and descendant are not named or provided for in the will of the testator and not members of a class named or provided

for in the will, the descendant shall have that share of the estate of the testator he would have had if the testator had died intestate.

(3) The share of the estate that a child or a deceased child's descendant is entitled to have as provided in this section shall be taken proportionately from the shares of others entitled thereto in the following order:

(a) Property not disposed of by the will.

(b) Property disposed of by the will.

(4) A child or deceased child's descendant is not entitled to have a share of the estate as provided in this section unless he files in the probate proceeding, not later than six months after the date of the entry of the order admitting the will to probate, a claim therefor.

COMMENT

Generally. At the January meeting a motion carried by which the approach of the present Oregon pretermitted heir statute (i. e., ORS 114.250) was adopted as the approach to be embodied in the proposed statute, with certain clarifications in the description of pretermission and in the remedy of pretermitted heirs. See Minutes, 1/14,15/66, page 7. It was agreed, apparently, that ORS 114.260, relating to the effect of advancements to pretermitted heirs, should not be perpetuated, on the ground that the general statutes on advancements would apply. For convenience in reference, ORS 114.250 is set forth below.

114.250 Pretermitted heirs to have portion of estate. If any person makes his will and dies, leaving a child or children, or, in case of their death, descendants of such child or children, not named or provided for in such will, although born after the making of such will or the death of the testator, every such testator, so

far as regards such child or children or their descendants, not provided for, shall be deemed to die intestate; and such child or children, or their descendants, shall be entitled to such proportion of the estate of the testator, real and personal, as if he had died intestate; and the same shall be assigned to them, and all the other heirs, devisees and legatees shall refund their proportional part.

Mr. Allison and Mr. Richardson were assigned the task of preparing a proposed statute in conformity with the motion referred to above and the discussion following adoption of that motion. Their draft was submitted and considered later at the January meeting. See Minutes, 1/14, 15/66, pages 15 to 17. For convenience in reference, that draft is set forth below.

If a testator dies survived by a child or by a descendant of a deceased child and neither the child nor the deceased child or his surviving descendant has been named or provided for by the testator's will and is not a member of a class named or provided for therein, such testator, so far as regards such surviving child or descendant, shall be deemed to die intestate, and such surviving child or descendant of the deceased child upon compliance with this section shall inherit and receive such a share of the estate as would have been inherited by and distributed to him if the testator had died intestate. If the pretermitted heir is not named in the petition for probate of the will, notice of claim of the pretermitted heir must be given by a petition for allowance of such claim filed in the probate proceeding not later than six months after the date of entry of the order

admitting the will to probate, with citation to the executor and all persons named in the petition for probate of the will. Any such party aggrieved by an order allowing or disallowing the claim entered pursuant to such petition may have the matter tried in the circuit court as provided in ORS chapter 28 by commencing a proceeding therein within 30 days of the entry of the order in the probate proceedings.

You may wish to refer to the complete record of discussion by the committees on the matter of pretermitted heirs. If so, see:

1. Minutes, 12/17, 18/65, pages 12 to 16; Appendix A, pages 9 and 10 (sections 18 and 19).
2. Minutes, 1/14, 15/66, pages 1 to 9, 14 to 17; Appendices A and B.

In the course of discussion by the committees on the matter of pretermitted heirs, attention was called to pertinent provisions of the 1963 Iowa Probate Code (section 267), the 1965 Washington Probate Code (section 11.12.090) and a draft submitted for consideration by a committee of the Wisconsin Bar Association in February 1964 (see Minutes, 1/14, 15/66, pages 3 and 4).

For your information, this report is accompanied by a copy of statute sections relating to pretermitted heirs contained in a bill introduced at the 1966 session of the New York legislature. This bill is designated the "Estates, Powers and Trusts Law," and constitutes a revision of New York's substantive law of estates prepared by the New York Temporary State Commission on Estates, whose comments on the statute sections are set forth thereunder. Also accompanying this report is a copy of an extract of a study on the matter of pretermitted heirs published in 1957 by the New York Law Revision Commission. This extract purports to summarize the pretermitted heir statutes of the several states at that time.

Subsections (1) and (2). Subsections (1) and (2) of my draft describe pretermittance as to children of a testator and descendants of deceased children. These subsections are based upon pertinent portions of ORS 114.250 and the Allison and Richardson draft, and I am fairly confident that they reflect, in substance, the views of a

majority of the members of the committees as recorded in the minutes.

In form, my draft sets forth the provisions for pretermitted children and pretermitted descendants of deceased children in separate subsections. I am inclined to believe that this formal device, although necessitating some duplication of wording, facilitates clarity in describing the two classes of pretermitted heirs.

You may question the absence of the word "last" before the word "will" in subsections (1) and (2). I suggest that "last" is unnecessary, and that "the will" means "last will." Note that ORS 114.250 does not use "last" in describing the will. It may be of interest that the wording of ORS 114.250 remained unchanged by the legislature from 1853 to 1953, and included "last," which was eliminated in the revision of 1953.

The wording of subsections (1) and (2) is that the pretermitted heirs shall "have" a share of the testator's estate. The wording of ORS 114.250 is that the pretermitted heirs shall "be entitled," and that of the Allison and Richardson draft is "inherit and receive." "Have" is used in sections 3 and 4 of Committee Proposal #2, relating to descent and distribution of real and personal property.

Subsections (1) and (2) do not contain the phrase to the effect that a testator, so far as regards a pretermitted heir, is deemed to die intestate. I do not believe this phrase is necessary, in view of the fact that a pretermitted heir's share is described as an intestate share.

It appears that the portion of ORS 114.250 describing pretermitted descendants of deceased children does not strictly mean what it seems to mean. This is illustrated by the Oregon Supreme Court's decision in Towne v. Cottrell, (1963) 236 Or. 151, and the comment on this decision in the most recent issue of the Oregon Law Review (Volume 44, Number 3, April 1965, at page 250). Towne involved a will in which a testatrix, with two living children and four children of a deceased child, acknowledged the death of the one child, made a specific devise to one of the deceased child's children and left the remainder to the two living children. The court held that the omitted grandchildren were not entitled to claim under the pretermitted heir statute on the ground that they were constructively "named" in the will; that naming the deceased parent and providing for one of his children sufficiently "named" his other children. I have not attempted to codify the effect of Towne in subsection (2), and suggest that there is no necessity to do so. Since Towne appears to be based upon court interpretation of "named," and "named" is perpetuated in subsection (2), I believe the decision would

be applicable in construing subsection (2), and that it is probably a good idea to leave such matters of interpretation to the court.

The Law Review comment referred to above, by the way, states that a deceased child's descendant is named in a will, for purposes of ORS 114.250, when reference is made to him by class, citing Neal v. Davis, (1909) 53 Or. 423.

Am I correct in assuming that adopted and illegitimate children of a testator and adopted and illegitimate descendants of deceased children of a testator are eligible to be pretermitted heirs under present Oregon law? As to adopted children and descendants, this would appear to be the case under ORS 109.041, 109.050, 111.210 and 111.212. As to illegitimate children and descendants, this would appear to be the case under ORS 109.060 and 111.231. Committee Proposals #3 and #4 contemplate repeal of ORS 111.210, 111.212 and 111.231, and substitution of new sections in lieu thereof. I presume the "inheritance" referred to in these new sections is not limited to that of a child from his parent, but also applies to that, for example, of a grandchild from his grandparent.

Subsection (3). Subsection (3) of my draft describes, generally, the manner in which shares of pretermitted heirs are to be taken from portions of a testator's estate otherwise to be distributed. This subsection is based upon an exchange between Mrs. Braun, Mr. Allison and Mr. Zollinger reported on page 16 of the minutes of the January meeting. See also Minutes, 1/14, 15/66, page 8; and Appendix B. I must admit, however, that in subsection (3) I have moved into an area of uncertainty as to the intent of the committees.

Subsection (3), I believe, falls into the category of abatement provisions. You may wish to consider a general abatement provision, which includes abatement for payment of pretermitted heir shares, and thus obviate an abatement provision applicable only to pretermitted heir shares. For general abatement provisions, see section 184, Model Probate Code, and sections 436 and 437, 1963 Iowa Probate Code. I cannot find any Oregon statutes relating generally to abatement that are comparable to the Model Code and 1963 Iowa Probate Code provisions, but ORS 116.720, 116.730, 116.735 and 117.310 to 117.330 seem to embody certain aspects of abatement.

Subsection (4). Subsection (4) of my draft precludes assertion of pretermitted heir claims if not filed in the probate proceeding within the same time period allowed for contest of the will. This subsection is based upon a motion adopted at the January meeting and reported on page 9 of the minutes thereof. See also Minutes, 1/14, 15/66, pages 8, 9, 15, 16; and Appendix B.

The Allison and Richardson draft goes beyond the filing of pretermitted heir claims to provide for citation upon such filing and appeal to the circuit court in a declaratory judgment proceeding in the case of objection to allowance or disallowance of such claims by the probate court. Subsection (4) stops with the claim filing requirement and, for several reasons, makes no further provision on procedure for recovery of pretermitted heir shares. First, I am too uncertain at this point as to the intent of the committees on this procedure. Second, this procedure is dependent to some extent on what you plan to propose on determination of heirship generally. Third, this procedure also is dependent on proposals made by the subcommittee chaired by Judge Thalhofer, which may result in upgrading the jurisdiction of the probate court and importing more finality and exclusiveness into the court's disposition of probate proceedings. Fourth, it may not be desirable to prescribe a special procedure for disposition of pretermitted heir claims if there is some possibility of handling shares of pretermitted heirs generally in the same manner as shares of legatees, devisees, and other heirs.

There are two principal differences between subsection (4) and that portion of the Allison and Richardson draft dealing with the filing of pretermitted heir claims. Subsection (4) requires filing by all those who would avail themselves, in the probate proceeding or in another proceeding, of the pretermitted heir statute. The Allison and Richardson draft requires such filing only by those not named in the petition for probate of the will, on the theory explained at the January meeting that claims, if any, of persons named in the petition would be apparent from the petition and will. However, perhaps the theory of the filing of claims should be as much to require promptness on the part of all allegedly pretermitted heirs in giving notice of their intention to claim as such, even though they may be known, as it is to discover the existence of hitherto unknown persons who may be pretermitted heirs.

Subsection (4), unlike that portion of the Allison and Richardson draft dealing with claim filing, omits provision for citation to the executor and all persons named in the petition for probate of the will. Is citation necessary? Might it be assumed that the personal representative, for example, would be aware of pretermitted heir claims filed in the probate proceeding and that he would communicate this knowledge to legatees and devisees? If a special hearing by the probate court on pretermitted heir claims is contemplated, citation may be called for. On the other hand, if the probate court can dispose of pretermitted heir claims at the hearing on the personal representative's final account or in an order of final distribution, it would seem

that notice given of these proceedings could include mention of pretermitted heir claim determination. I must confess that my question as to the necessity of citation on filing pretermitted heir claims may be based to some extent on the fact that, pursuant to a view expressed at the January meeting, I undertook to spell out the details on citation in my draft, but abandoned this when the draft began to assume considerable length and some complexity, and problems arose that could not be resolved satisfactorily in the absence of some expression of intent of the committees.

Determination of claims and distribution of shares. My draft contains no provision as to procedure for determination of pretermitted heir claims or distribution of pretermitted heir shares in the probate proceeding or otherwise. As mentioned in the comment for subsection (4), several factors are responsible for this omission.

At the January meeting at least one member expressed the view that, if possible, determination of pretermitted heir shares should be made and distribution of pretermitted heir shares accomplished in the probate proceeding. May I suggest that the statutory provisions on settlement and distribution might encompass this determination and distribution as to pretermitted heirs without special provision therefor in the pretermitted heir statute itself, and that, if possible, objections to such determination and distribution and appeal therefrom, if any, be handled as are objections to and appeal from other aspects of probate court decrees on final accounts of personal representatives or orders of final distribution. Jaureguy and Love (see 2 Jaureguy & Love, Oregon Probate Law and Practice § 829, at page 290) point out that there is no express Oregon statutory provision requiring an order of distribution.

For your information, this report is accompanied by a copy of sections 182 to 195, Model Probate Code, relating to distribution and discharge. See also sections 469 to 481, 1963 Iowa Probate Code, and sections 11.72.002, 11.72.006 and 11.76.010 to 11.76.250, 1965 Washington Probate Code.

Incidentally, for a provision on determination of heirship generally, see section 195, Model Probate Code.

REPORT
March 14, 1966

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

From: Campbell Richardson and Robert W. Lundy

Subject: Rough Draft on Issuance and Form of Letters of
Representation.

One of the matters scheduled for consideration by the Advisory and Bar Committees at the meeting to be held March 18 and 19, 1966, is revision of sections 9 and 12 of Mr. Gilley's draft on initiation of probate or administration, contained in his report dated January 10, 1966. These sections deal with issuance of letters of administration where a will is set aside, declared void or inoperative, with the form of letters testamentary and of administration and with proceedings when a will is found and proven after administration is granted, and are derived from ORS 115.200, 115.210, 115.340 and 115.350.

At the February meeting, Mr. Richardson was assigned the task of revising sections 9 and 12. His revision, with certain changes therein made by Mr. Lundy and for which Mr. Richardson should not be held responsible, is embodied in the following rough draft.

ROUGH DRAFT

Section 9. Issuance of letters of representation where admission of will revoked. If, after a will has been proved and letters of representation issued thereon, an order or decree is entered revoking the admission of the will to probate, those letters shall be revoked and new letters of representation issued.

Section 9a. Form of letters of representation. (1)
Letters of representation issued to executors or to administrators with the will annexed may be in the following form:

_____ administrator(s) of the estate of the
decedent.

In testimony thereof, and to evidence the authority of
the above personal representative(s) as of the date hereof to
administer the estate of the above decedent according to law,
I, as clerk of the court, have heresunto subscribed my name
and affixed the seal of the court on _____, 19__.
(month) (day)

(Seal)

_____, Clerk of the Court

By _____, Deputy

(3) Letters of representation issued to special adminis-
trators may be in a form similar to the applicable form set
forth in subsection (1) or (2) of this section, with such vari-
ations as are proper in the particular case.

Section 12. Proceedings when will proved after adminis-
tration granted. If, after administration of an intestate
estate has been granted and letters of representation issued
thereon, a will of the decedent is offered and proved, those
letters shall be revoked and new letters of representation
issued.

REPORT
March 14, 1966

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

From: Wade P. Bettis, Donald G. Krause and Robert W. Lundy

Subject: Rough Draft on Notice of Estate Administration.

One of the matters scheduled for consideration by the Advisory and Bar Committees at the meeting to be held March 18 and 19, 1966, is revision of sections 10 and 13 of Mr. Gilley's draft on initiation of probate or administration, contained in his report dated January 10, 1966. These sections deal with personal representatives mailing copies of wills and orders admitting those wills to probate to named heirs, legatees and devisees and with personal representatives publishing notice to creditors, and are derived from ORS 115.220 and 116.505.

At the February meeting, Mr. Bettis and Mr. Krause were assigned the task of revising sections 10 and 13. Their revision, with certain changes therein and additions thereto made by Mr. Lundy and for which Mr. Bettis and Mr. Krause should not be held responsible, is embodied in the following rough draft. Because the changes and additions made by Mr. Lundy are substantial in some respects, the original revisions by Mr. Bettis and Mr. Krause are set forth in this report following the rough draft.

ROUGH DRAFT

Section 10. Copy of notice and will to heirs, legatees and devisees; notice to Land Board. (1) Immediately after his appointment a personal representative shall cause a copy of the published notice provided for in section 13 and a copy of the will of the decedent admitted to probate, if any, to be mailed to each known heir of the decedent and to each legatee or devisee, if any, of the decedent, at the last-known address of the heir, legatee or devisee. If the personal representative is also an heir, legatee or devisee of the decedent, copies of the published notice and will need not be

mailed to the personal representative.

(2) If the decedent died intestate and there are no known heirs of the decedent, immediately after his appointment a personal representative shall cause a copy of the published notice provided for in section 13 and a statement that there are no known heirs of the decedent to be mailed to the clerk of the State Land Board.

(3) If any known heir or any legatee or devisee of a decedent is an alien not residing within the United States or its territories, immediately after his appointment a personal representative shall cause a copy of the published notice provided for in section 13 and a statement containing the name and, if known, address of the heir, legatee or devisee to be mailed to the clerk of the State Land Board.

(4) A personal representative shall file in the probate proceeding, within 30 days after the date of his appointment, proof by affidavit of the mailing required by this section.

Section 13. Publication of notice by personal representative. (1) Immediately after his appointment a personal representative shall cause a notice of his appointment to be published in a newspaper published in the county in which the probate proceeding is pending, or if no newspaper is published in that county, then in a newspaper designated by the court, once a week for two consecutive weeks, or two publishings in all. The notice shall include:

- (a) The name of the decedent and the fact of his death.
- (b) The name and address of the personal representative.

(c) If a will of the decedent has been admitted to probate, a statement of that fact and that any interested person may contest the probate or validity of the will at any time within six months after the date of the entry of the order admitting the will to probate.

(d) A statement requiring all persons having claims against the estate of the decedent to present their verified claims to the personal representative at a specified place in this state within six months after the date of the first publication of the notice.

(2) A personal representative shall file in the probate proceeding, before he files his final account, proof by affidavit of the publication of notice required by this section. The affidavit shall include a copy of the published notice.

Section 13a. Notice by successor personal representatives.
If a personal representative dies, is removed by order of the court or his resignation is accepted by the court and a successor personal representative is appointed after the mailing of copies of notice and will required by section 10 and after the publication of notice required by section 13, the successor personal representative need not cause copies of notice and will to be mailed as provided in section 10 or cause notice to be published as provided in section 13. However, if the time within which persons having claims against the estate of the decedent were required by the notice caused to be published as provided in section 13 by a former personal representative did not expire before the death, removal

or resignation of the predecessor personal representative:

(1) Immediately after his appointment the successor personal representative shall cause a notice of his appointment and of the death, removal or resignation of his predecessor personal representative to be published in a newspaper published in the county in which the probate proceeding is pending, or if no newspaper is published in that county, then in a newspaper designated by the court, once a week for two consecutive weeks, or two publishings in all.

(2) The time after the date of that death, removal or resignation and before the date of first publication of the notice by the successor personal representative shall be added to the time within which those claims are required to be presented, and a statement of the time so added shall be included in the published notice by the successor personal representative.

(3) The successor personal representative shall file proof of his published notice as provided in subsection (2) of section 13.

SECTION 10 (MR. KRAUSE)

Section 10 Copy of Notice and Will to Heirs, Legatees and Devisees. Upon the entry of an order admitting any will to probate, or appointing a personal representative, said personal representative shall forthwith cause a copy of the published notice to heirs and creditors to be mailed to each heir, legatee and devisee, and a copy of the decedent's will

to each legatee and devisee at his last-known address. Proof of such mailing shall be made by affidavit and filed within thirty days after the entry of such order.

NOTE: This is ORS 115.220 with the additional requirement that a copy of the published notice to creditors and heirs be sent to all of the heirs, legatees and devisees. Copies of the will are also sent to each legatee and devisee as in the former statute. This new section also in effect gives the personal representative thirty days within which to send out the will and copies of notice.

SECTION 13 (NR ETTDYS)

Section 13. Publication and Mailing of Notice by
Personal Representative

Every personal representative of a decedent's estate shall:

- (a) Publish a notice once a week for two consecutive weeks in a newspaper published in the county, if there is one, otherwise in such newspaper as designated by the court. The notice shall apprise all interested persons of the death of the decedent and the name and address of the personal representative of his estate. The notice shall also require all claimants against the estate to present their verified claims to the personal representative at a specified place in the state and within six months from the date of the first publication of such notice.

- (b) Immediately mail a copy of the notice as published to the last-known address of all the decedent's heirs at law, so far as known, and to each of the devisees and legatees who are named in his will. If there are no known heirs at law or devisees or legatees, such notice shall be mailed to the State Land Board.
- (c) File with the clerk of the probate court prior to the filing of the final account an affidavit of publication containing a copy of the notice as published, and an affidavit of mailing.

NOTE: This section revises ORS 116.505 in the following particulars:

1. Reference is made to a "personal representative" instead of to "executor or administrator," assuming that the former term is to be used primarily in the code revision.
2. Requires two publications instead of four.
3. Permits the court rather than "court or judge" to designate a paper if none is published in the county.
4. The notice is not only to creditors but to all persons interested in the estate and informs of the death, the name and address of the personal representative and a place in the state (rather than in the county) where claims are to be presented.
5. The notice requires claims to be verified (as now required by ORS 116.515) and omits reference to present requirements of "proper vouchers" which seems to me to be superfluous.

6. Specifies that six months for filing claims commences on date of first published notice. A creditor reading a last publication might be misled in thinking that he has six months from that date.

7. Provides a new provision for immediate mailing of copy of notice as published to all heirs and devisees and legatees so far as known, and to their last-known address; and if there aren't any of these classes, then to the State Land Board.

8. The filing with the clerk is to be done prior to filing of the final account, rather than within the six months of the notice; and is to include proof of both the publication and of the mailing.

MEMORANDUM
February 28, 1966

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

From: Robert W. Lundy
Chief Deputy Legislative Counsel

Subject: Matters for consideration at March meeting.

This memorandum lists matters tentatively scheduled for consideration by the committees at their joint meeting on March 18 and 19, 1966. The matters listed are those that were mentioned at the February meeting.

As requested at the February meeting, I am sending this list to you considerably in advance of the March meeting. A notice of and suggested agenda for the March meeting will be sent to you early in the week of the March meeting.

If any of you would like changes made in this list (for example, rearrangement of the order of the matters listed, addition of matters not listed or deletion of listed matters on which assignments will not be completed by the March meeting), please let me know as soon as possible, preferably before March 11.

I must report, with regret, that the final version of the minutes of the February meeting will not be edited, reproduced and distributed for another two weeks. If any of you require information on the discussion at the February meeting in order to complete assignments on matters for consideration at the March meeting, please let me know; I may be able to extract from the rough minutes the information you need.

LIST OF MATTERS FOR MARCH MEETING

1. Inheritance by nonresident aliens.

Revised draft by subcommittee (Allison, Lisbakken, Lovett, Barrie and Schwabe).

At the February meeting, Allison, on behalf of the subcommittee, submitted a draft of a proposed statute. This draft was re-referred to the subcommittee for revision, which apparently was to include: (1) Reduction from 20 years to 10 years of the period

within which a nonresident alien would be permitted to establish eligibility and withdraw a deposit; (2) exemption of deposits from the seven-year presumption of abandonment under the Uniform Disposition of Unclaimed Property Act (see ORS 98.306); (3) requirement of new evidence for a second and each subsequent claim by a nonresident alien during the 10-year period; (4) provision that a claim by a nonresident alien be handled as a part of the original estate proceeding, but with no necessity to reopen the estate for this purpose; and (5) provision for disposition of a deposit after 10 years by distribution to eligible heirs, or if none, by escheat.

2. Probate courts and jurisdiction thereof.

Progress report by subcommittee (Thalhofer (chairman), Copenhaver, Field, Gooding and Warden).

3. Testamentary additions to trusts.

Report on phrase "the validity of which is determinable by the law of this state" (Riddlesbarger).

See Minutes, 12/17,18/65, pp. 5, 6; Appendix A, p.2, §6; Appendix B, p. 2.

4. Heirship determination (generally and pretermitted heirs).

Report by subcommittee (Riddlesbarger (chairman), Braun, Gilley, Mapp and Zollinger).

See, specifically, Minutes, 1/14,15/66, p. 17.

See, generally as to pretermitted heirs, Minutes, 12/17,18/65, pp. 12 to 16; Minutes, 1/14,15/66, pp. 1 to 9, 14 to 17, and Appendices A and B.

5. Delivery of wills by custodians or possessors.

See ORS 115.110, 115.130 and 115.990.

See Minutes, 12/17,18/65, p. 21; Appendix A, p. 14, §32.

6. Foreign wills.

Drafts of revisions of ORS 114.060 and 115.160 (Mapp and Riddlesbarger).

See, as to ORS 114.060, Minutes, 11/19,20/65, p. 5; Minutes, 12/17,18/65, Appendix A, p. 1, §2; Minutes, 1/14,15/66, pp. 29, 30.

See, as to ORS 115.160, Minutes, 1/14,15/66, pp.28 to 30.

See, generally, Uniform Probate of Foreign Wills Act.

7. Letters testamentary and of administration.

Revised draft on issuance of letters of administration where will set aside, declared void or inoperative, on form of letters testamentary and of administration and on proceedings when will found and proven after administration granted (Richardson).

See Report by Gilley, dated 1/10/66, containing rough draft on initiation of probate or administration, pp. 7 to 9, §9, and p. 10, §12.

In the course of the discussion of section 9 of Gilley's draft at the February meeting, the following matters were raised: (1) An objection to the wording as to a will being "set aside, declared void or inoperative"; (2) an objection to the forms of letters stating that the executor or administrator is authorized by the letters to administer the estate; and (3) a suggestion that the forms of letters state the date of issuance.

8. Notice of probate proceeding.

Revised draft on notice and copy of will to beneficiaries under will and heirs, published notice to creditors and, in the case of intestacy, notice to the State Land Board (Bettis and Krause).

Alternative revised draft by subcommittee of dissenters (Allison, Carson and Zollinger). The revised draft by Bettis and Krause should be sent to the subcommittee of dissenters by March 11.

See Report by Gilley, dated 1/10/66, containing rough draft on initiation of probate or administration, p. 9, §10, and p. 11, §13.

Based on discussion at the February meeting, the revised draft by Bettis and Krause apparently should include provision for the following matters:

(1) Notice to beneficiaries under will and heirs should be published in combination with published notice to creditors.

(2) Copy of published notice and will should be mailed to beneficiaries under will and heirs, so far as they and their addresses are known, to their last known addresses.

(3) Mailing of notice and will copies to beneficiaries and heirs, and filing proof thereof, should be done within short period after order admitting will to probate or appointing personal representative.

(4) Mailing of notice and will copies to personal representative who is beneficiary or heir should be specified unnecessary.

(5) Notice should be mailed to State Land Board in intestate situation after appointment of personal representative.

(6) Consideration should be given to notice in situations involving replacement of personal representatives, as where a will is found after an administrator is appointed or a personal representative dies, resigns, or is removed. See sec. 11.40.150, 1965 Washington Probate Code.

9. Bond of personal representative.

Revised draft on bonds of personal representatives (Frohnmayer and Hornecker).

See Report by Hornecker and Krause, dated 1/14/66, containing rough draft on executors and administrators generally, pp. 2 to 5.

Based on discussion at the February meeting, in preparing the revised draft the following matters apparently should be considered:

(1) A bond should be required in all cases. See ORS 126.171.

(2) The amount of the bond should be in the discretion of the court, but not less than \$1,000.

(3) The bond should be a corporate surety bond; personal surety bonds should not be permitted.

(4) Factors for the court to consider in fixing the amount of the bond should be set forth, such as protection of creditors and estate beneficiaries, size of estate, liquidity of estate, income produced by estate, probable amount of indebtedness and probable taxes.

(5) Whether additional bond, as well as new bond, should be provided for. See ORS 126.176.

(6) Whether failure to give new bond should automatically remove the personal representative.

(7) Whether a new bond should discharge sureties on the old bond. See ORS 126.176.

10. Removal, death or resignation of personal representative.

Revised draft on removal, death or resignation of personal representative (Frohnmayr and Hornecker).

See Report by Hornecker and Krause, dated 1/14/66, containing rough draft on executors and administrators generally, pp. 5 to 7.

Based on discussion at the February meeting, in preparing the revised draft the following matters apparently should be considered:

(1) As to removal, if citation cannot be served personally on the personal representative, then service should be made on his attorney. Should service also be made on the personal representative's surety?

(2) Provision should be made for procedure for accounting by personal representative after removal. Compare ORS 126.506 and subsection (1) of ORS 126.336.

(3) As to removal, the words "the probable loss" were objected to as unnecessary.

(4) Whether subsection (2) of ORS 115.500 is duplicated by provision in the banking statute should be determined. See ORS chapter 711, for example.

(5) Whether there should be published notice of intention to resign by a personal representative and whether there should be approval of resignation by the court.

See item 8 (6) above, on notice in situations involving replacement of personal representatives.