ADVISORY COMMITTEE
Probate Law Revision

Second Meeting

Date: Saturday, May 16, 1964
Time: 9:30 a.m.
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse

Suggested Agenda

1. Approval of minutes of April 18 meeting of advisory committee.

2. Report on publicity (Lundy).

3. Report on liaison with Oregon State Bar and Bar committees (Chairman Dickson; Allison).

4. Report on possibility of outside research assistance (Riddlesbarger).

5. Report on content of immediate program (Zollinger).

   a. Dower and curtesy; election against will; related matters (Allison).

   b. Guardianship and conservatorship (Carson).

6. Next meeting of advisory committee.

ADVISORY COMMITTEE
Probate Law Revision

Second Meeting, May 16, 1964

Minutes

The second meeting of the advisory committee was convened at 10 a.m., Saturday, May 16, 1964, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland. All members, except Butler, were present. Also present was Robert W. Lundy, Chief Deputy Legislative Counsel.

1. Minutes of Last Meeting. Jaureguy moved, seconded by Gooding, that reading of the minutes of the last meeting (April 18, 1964) be dispensed with and that they be approved as submitted. Motion carried.

2. Report on Publicity. Lundy reported on measures taken since the last meeting to publicize the activities of the committee. He stated that news releases on the last meeting had been prepared and sent to the Oregon State Bar Bulletin, to newspapers published in the cities where committee members reside and to representatives of wire services headquartered in the State Capitol. He pointed out that the news release sent to the Bar Bulletin was published in the April issue. He stated that a form letter, signed by Dickson as chairman of the committee, calling attention to the existence and work of the committee and inviting comments and suggestions on problem areas in Oregon's probate and related law, had been sent to all probate judges, all county clerks, executives of certain banks and trust companies, state and federal tax agencies (i.e., State Tax Commission, State Treasurer and District Director of Internal Revenue), presidents of local bar associations and deans of the three Oregon law schools (a total of 116 letters). He indicated that the news release on the last meeting had been used by Allison as the basis for an item published in a newsletter distributed to all title insurance companies in Oregon and to many located outside the state.

Lundy further reported that he had received a letter from Professor Wendell M. Basye, Editor in Chief of the Oregon Law Review, indicating that Riddlesbarger had brought to his attention Staff Report No. 1 ("Probate Law Revision in Oregon -- An Initial Staff Report to the Advisory Committee on Probate Law Revision," dated April 1964), expressing his interest therein and requesting permission for its publication, with some revision, in a forthcoming issue of the Review. Lundy indicated that he had responded, giving Basye the permission requested and, pursuant to the wishes of the committee expressed at the last meeting, asking that the report so published specifically credit Mr. Lowell Mundorff for his work as chairman of the Bar Committee on Probate Law and Procedure in connection with the proposed new Oregon probate code drafted by that Bar committee in the early 1940's.

3. Report on Liaison with Oregon State Bar and Bar Committees. Dickson reported that he had contacted the Board of Governors of the Oregon State Bar and requested approval of the Board on appointment of Allison to act for the committee in a liaison capacity with the Bar and appropriate Bar committees. Dickson indicated his expectation that the Board would act favorably on his request at its next meeting.

Allison reported that the Bar Committee on Probate Law and Procedure, of which he currently is chairman, had met recently and decided upon a number of changes in the probate law to be proposed in its annual report. He stated that the Bar committee was recommending that these proposals, if approved by the Bar at its annual meeting next fall, be submitted to the advisory committee and the Law Improvement Committee for their consideration and action, instead of being submitted directly to the legislature. He expressed the view that, since the Law Improvement Committee had been created pursuant to action by the legislature for the purpose of undertaking the work of continuous substantive law revision and had inaugurated the probate law revision project, it would be inadvisable to bypass that committee with approved Bar committee proposals within the purview of the probate law revision project and the advisory committee established to assist on the project. He indicated his belief that the Bar, acting at its annual meeting, would approve the recommendation of the Bar committee.

4. Report on Possibility of Outside Research Assistance. Riddlesbarger reported on his efforts to locate sources of research assistance, other than the Legislative Counsel's office, that might be available to the committee. He indicated that he had written to the deans of the three Oregon law schools, inquiring as to the availability of faculty and student research assistance. He stated that Dean Orlando J. Hollis, School of Law, University of Oregon, had responded to the effect that the matter would be brought to the attention of that school's faculty and students, but had pointed out that at the present time, with the current academic term coming to an end, students at least would have little time to devote to research assistance for the committee. Riddlesbarger indicated that he also had written to the staff of Vanderbilt Law Review, which had previously indicated some interest in Oregon's law improvement program in correspondence with the Legislative Counsel's office, and the Harvard Student Legislative Research Bureau, but so far had received no response from them.

Riddlesbarger further reported that Charles M. Lovett, attorney, Portland, (a member of the Bar Committee on Probate Law and Procedure) had indicated an interest in doing some research work for the committee, and that Campbell Richardson, attorney, Portland, had volunteered to undertake some research

in the area of summary proceedings for administration of small estates of decedents. Zollinger agreed to contact Richardson in order to get the small estate research started. Dickson commented that Alfred A. Hampson, attorney, Portland, had evidenced an active interest in improving the probate law. Riddlesbarger suggested that each other member of the committee should make an effort to furnish him the name of one attorney who might be interested in assisting the committee in a research capacity.

5. Report on Content of Immediate Program. [Note: At the last meeting (April 18, 1964) Dickson appointed Zollinger as chairman of a subcommittee to coordinate efforts to specify the selected areas of the probate law to be covered by the committee's immediate program. Subsequently, Zollinger appointed Allison as chairman of a subcommittee to consider a revision of the statutes relating to dower and curtesy, their bar, their admeasurement and related matters; appointed Carson as chairman of a subcommittee to undertake a critical examination of the new guardianship and conservatorship statutes enacted in 1961 and the several criticisms thereof that have been received; and appointed Butler as chairman of a subcommittee to consider the matter of summary proceedings for administration of small estates of decedents. Because of unexpected illness, Butler was unable to undertake his assignment. The other two subcommittees (dower and curtesy and guardianship and conservatorship) considered the matters assigned to them and prepared reports thereon for submission to and consideration by the advisory committee.]

a. Dower and curtesy. Allison submitted and explained the report of his subcommittee on dower and curtesy. [Note: A copy of this report, altered somewhat as to form and style but not changed as to substance, constitutes Appendix A to these minutes. Briefly, this report (1) calls attention to a number of problems and defects in the present statutory provisions for release of dower and curtesy interests of incompetents and recommends that a simplified procedure (i.e., bar by conveyance executed by the guardian of an incompetent) be substituted therefor, and (2) proposes three changes in the nature of the dower and curtesy interest, which are (a) changing the interest from a life estate to a fee estate, (b) changing the amount of the interest from one-half to one-fourth and (c) limiting the interest to land owned by the deceased spouse at the time of death, thus abolishing the present inchoate interest.]

In response to a question by Frohnmayer as to the scope and purpose of committee discussion on the problems of dower and curtesy at this time, Dickson indicated that it was his thought that preliminary ideas on the matter should be presented and discussed, then some research done on ideas which the committee considers worth further investigation and then committee determination as to whether some proposals can be

agreed upon for submission to the 1965 legislature. Zollinger and others agreed in general with the approach outlined by Dickson.

(1) Release of dower and curtesy interests of incompetents. With respect to the proposal for substitution of a simplified procedure for the present statutory provisions for release of dower and curtesy interest of incompetents, Allison, Riddlesbarger and Zollinger commented that if the proposal to abolish the inchoate interest were adopted, there would be no problem of release of interests of incompetents to deal with. Following extended committee discussion of the matter of changing the nature of the dower and curtesy interest and initial adverse reaction to abolishing all inchoate interest, Dickson proposed that the committee proceed to have prepared a draft of proposed legislation on the matter of release of the interests of incompetents for consideration by the committee pending research and further consideration on the matter of changing the nature of the interest. Allison pointed out that the report of his subcommittee probably set forth sufficient guidelines for preparation of such a draft. Riddlesbarger moved, seconded by Zollinger, that Lundy prepare a rough draft of proposed legislation based upon the recommendation contained in the subcommittee report with respect to release of dower and curtesy interests of incompetents. Motion carried unanimously.

(2) Changes in nature of dower and curtesy interest. The proposals for changing the nature of the dower and curtesy interest were discussed at length.

(a) Changing interest from life estate to fee estate. A poll of the members present disclosed that all agreed that changing the dower and curtesy interest from a life estate to a fee estate would be feasible and desirable.

(b) Changing amount of interest from one-half to one-fourth. With respect to the proposal to change the amount of the dower and curtesy interest from one-half to one-fourth, Allison pointed out that the proposed amount was the same as the present amount of the interest in personalty which a surviving spouse may elect to take instead of under the will of the decedent (ORS 113.050). Riddlesbarger indicated that he was somewhat inclined to favor doing away with dower and curtesy altogether and simply have an allowance to the surviving spouse as determined by the court in terms of any property that might exist at the time of the death of the decedent, and suggested that the court, in making its determination, might look at the situation much in the same manner as it does in divorce cases. Gooding commented that in divorce cases each spouse was available to testify as to the situation, whereas in the case of a decedent's estate the decedent would not be available to afford the court the benefit of his testimony on the situation. Riddlesbarger responded that the court in the case of a

decedent's estate would have the benefit of the testimony of heirs and perhaps others, at least in the instance of a will contest.

Frohnmayer questioned the selection of one-fourth as the amount of the dower and curtesy interest and outlined some hypothetical situations in which this amount might not be equitable. He suggested the possibility of an approach, similar to that suggested by Riddlesbarger, wherein the court would have some authority, subject to suitable standards, to determine the amount of the interest. Carson pointed out that the suggestions made by Riddlesbarger and Frohnmayer, if adopted, might give rise to some difficult problems with respect to estate planning. Gooding commented that he was not satisfied that the one-fourth interest would be adequate in some situations, whereas in others it might be categorized as a windfall, but indicated that he would be willing to accept it, at least initially. He also indicated that he was interested in further exploration of the approach suggested by Riddlesbarger and Frohnmayer. Dickson, Jaureguy and Zollinger stated that they were not in favor of the approach wherein the court would have authority to determine the amount of the interest.

(c) Abolishing inchoate interest. With respect to the proposal to limit the dower and curtesy interest to land owned by the deceased spouse at the time of death, thus abolishing the present inchoate interest, Allison suggested that the proposal was not as radical as it might sound, and indicated the present limitations on the interest which were described in the report of his subcommittee. He pointed out that the proposal is similar to that embodied in a draft of proposed legislation which had been prepared in the course of a probate law study currently under way in Wisconsin, a copy of which Lundy had sent him. In answer to questions by Jaureguy and Frohnmayer, Allison explained the effect of the proposal, and compared it with the consequences of a decedent dying without a will. Jaureguy commented that the principal type of situation in which the surviving spouse would be prejudiced under the proposal would be where the decedent disposed of all his realty before his death. Riddlesbarger remarked that a decedent presently can defeat his surviving spouse's election as to personalty by disposing of all of it during his life. He further commented that the purpose of dower and curtesy as presently constituted was to protect the surviving spouse against disposition of realty by the decedent during his life, that if both spouses wanted to join in such disposition it was their own concern, that the problem was to protect the surviving spouse against the decedent who did not wish to protect the survivor by leaving some property interest to the survivor, and that if the survivor should be protected, he should have some right of veto of such disposition. Allison pointed out that Alaska statutes provide the surviving spouse

with some protection against inter vivos disposition of realty by means of an inchoate interest in the homestead, and that under such statutes both spouses must join in a conveyance of the homestead.

A poll of the members present on the proposal to abolish the inchoate interest disclosed initial adverse reaction on the part of some, while the remainder were undecided at this time and expressed a desire to devote more time to consideration of the proposal. There was an indication that some members might favor abolishing the inchoate interest with the exception of such an interest in the homestead, as provided in the Alaska statutes to which Allison had previously referred.

Allison expressed the opinion that if the inchoate interest were abolished, the abolishment would have to operate prospectively as to property acquired after the effective date of the abolishing legislation, and that the abolishment could not operate retroactively as to property acquired before that date, on the theory that the inchoate interest was a property right. Jaureguy, on the other hand, advanced the view that the inchoate interest could be abolished retroactively; that existing inchoate interests could be abolished.

It was the consensus of the committee that the matter of changing the nature of the dower and curtesy interest in the particulars proposed should be given more consideration and that some research should be done on the matter. Riddlesbarger agreed to contact Lovett and Hampson (Portland attorneys referred to previously in these minutes as perhaps being interested in doing some research work for the committee) and to determine whether either or both would be interested in undertaking some research on the problem of the nature of the dower and curtesy interest and the proposals made for changing it. Upon Zollinger's suggestion, the committee requested that Lundy supply to each member a copy of the Alaska statutes and a copy of the draft of proposed legislation relating to family rights in estates of decedents prepared in the course of the current Wisconsin study on probate law, both of which Allison had previously referred to. Lundy agreed to furnish the materials requested.

b. Guardianship and conservatorship. Carson submitted the report of his subcommittee on guardianship and conservatorship. [Note: A copy of this report constitutes Appendix B to these minutes. This report consists of the comments and recommendations by members of the subcommittee on matters assigned to them by Carson, primarily the comments and suggestions pertaining to guardianship and conservatorship that are reproduced in the "Comments & Suggestions Received" section of the advisory committee notebook.]

(1) Comment & Suggestion No. 2 -- Appraisal of estates of decedents and wards. Carson explained his recommendation in the subcommittee report on Comment & Suggestion No. 2 that subsection (3) of ORS 126.230 (appraisal of property of ward) and ORS 116.420 (appraisal of property of decedent) be amended to require appraisal of all property unless the court orders that less than all the property be appraised. Lundy pointed out that Comment & Suggestion No. 13 (which Carson had assigned to Butler, but which Butler, because of unexpected illness, was unable to report on) made a similar proposal with respect to subsection (3) of ORS 126.230.

Zollinger indicated that he did not favor the proposal as it applied to guardianship, and commented that in guardianship appraisal should be required only when it served a useful purpose. Frohnmayer and Gooding expressed agreement with Zollinger. Carson suggested that appraisal facilitated determination by the court of the amount of the bond of a guardian. Zollinger expressed the view that the burden of appraisal was greater than was justified for the sole purpose of determining the amount of the bond. Dickson commented that in practice, in determining the amount of the bond, he relied upon the inventory filed by the guardian, and that he seldom required appraisal except when the guardian proposed to sell property of the ward. Allison pointed out that initial appraisal of the property of a decedent is necessary for inheritance tax purposes, but that this reason for appraisal does not exist in the case of a guardianship. He commented that determination of the amount of the bond of a guardian does not have to be based upon appraised value of the property of the ward, and expressed agreement with Dickson on the point that appraisal was not necessary in guardianship except where property was to be sold. Zollinger moved, seconded by Gooding, that the amendment of subsection (3) of ORS 126.230 recommended by Carson and Comment & Suggestion No. 13 not be adopted. Motion carried unanimously.

Allison called attention to the fact that the Bar Committee on Probate Law and Procedure had submitted to the 1963 legislature proposed legislation that would have permitted the court to waive appraisal of property of a decedent in cases where the value thereof could be determined without appraisal, but that the legislature had not enacted the proposal. He indicated that the Bar committee intended to again make this proposal in its current annual report, and that this proposal, if approved by the Bar at its annual meeting next fall, would come before the advisory committee for consideration and action. The committee decided to postpone consideration and action on the amendment of ORS 116.420 (appraisal of property of decedent) recommended by Carson.

Frohnmayer asked whether the committee should communicate with persons who send in comments and suggestions and report

committee action thereon. Riddlesbarger remarked that this might be premature, since the committee might later decide to take different action. Zollinger indicated he was not in favor of corresponding with such persons individually and attempting to explain committee action to them, and suggested that the better approach would be to disseminate information generally that the committee was considering problems raised by such comments and suggestions.

(2) Comment & Suggestion No. 6 -- Guardianship; disposition of nonresident's property by foreign guardian. Carson explained his recommendation in the subcommittee report on Comment & Suggestion No. 6, concerning the suggestion of Judge Johnson that "some confusion seems to exist as to how to accomplish the provisions of" ORS 126.565, and pointed out that he was unsure as to what constituted the "confusion." Gooding moved, seconded by Carson, that Lundy communicate with Judge Johnson and request more detail on the "confusion." Motion failed, with Carson and Gooding voting yes, and Allison, Dickson, Frohnmayer, Jaureguy, Riddlesbarger and Zollinger voting no.

(3) Comment & Suggestion No. 23 -- Guardianship; access of guardian to ward's safe deposit box. Carson explained his recommendation in the subcommittee report on Comment & Suggestion No. 23, concerning the requirement of the presence of someone in addition to the guardian at the time of the first opening of the ward's safe deposit box. Allison stated that Mr. Keller (the source of Comment & Suggestion No. 23) had reported on the matter to the Bar Committee on Probate Law and Procedure; that the State Treasurer's office, on being contacted by Keller, had reacted favorably to the proposal that someone in addition to the guardian be present at the time of the first opening of the ward's safe deposit box; that the Bar committee had approved the proposal for inclusion in its current annual report; and that the proposal, if approved by the Bar at its annual meeting next fall, would come before the advisory committee for consideration and action. He suggested, and the committee agreed, that the matter should be postponed until such time as the Bar committee proposal was before the committee.

(4) Conservatorship; winding up affairs after termination. Carson explained his recommendation in the subcommittee report on amendment of subsection (3) of ORS 126.660 (winding up affairs of conservatorship after termination). Zollinger moved, seconded by Carson, that the committee adopt in principle the amendment recommended by Carson and that Lundy prepare a rough draft of proposed legislation based on the motion. Motion carried unanimously.

(5) Guardianship; winding up affairs after termination; winding up period. Carson explained his recommendation in the subcommittee report on amendment of ORS 126.530 (winding up

guardianship affairs by guardian) to permit the court to extend the 90-day winding up period.

Zollinger asked whether application to the court for extension of the 90-day winding up period should be made within that period. He suggested that the application for extension be served upon the persons, if any, entitled to receive the ward's property from the guardian, and that the application be made at least 10 days before expiration of the 90-day period, so that such persons would have an opportunity to appear and be heard on the requested extension. Frohnmayer agreed that there should be an opportunity for a hearing on the extension, but disagreed with the 10-day notice proposal, which might be the effect of requiring the application to be made at least 10 days before expiration of the 90-day winding up period. After further discussion, in which most members appeared to favor permitting the application for extension to be made after the 90-day period, Zollinger indicated that he was persuaded on this point.

Dickson asked whether one problem in connection with extension of the 90-day winding up period might be an undesirable postponement of delivery of property of a deceased ward by the guardian to the executor or administrator, and commented that in such a case one solution might be to permit the executor or administrator to obtain court approval for a partial delivery of the deceased ward's property. Zollinger suggested that some provision be made for the court, upon application by a deceased ward's executor or administrator, to order immediate delivery by the guardian to the executor or administrator of such of the ward's property not necessary in the winding up of the guardianship.

Allison suggested that ORS 126.530 be revised by dividing it into two parts, one part applying only when the guardianship is terminated by reason of the ward's death, and the other part applying when the guardianship is terminated for any other reason.

Zollinger referred to Comment & Suggestion No. 7 (which Carson had assigned to Butler, but which Butler, because of unexpected illness, was unable to report on), and suggested that some provision be added to the statutes that would assure that banks would honor checks issued by a guardian in winding up the affairs of the guardianship by clarifying the continuing control of the guardian over the ward's property during the winding up period.

Zollinger moved, seconded by Jaureguy, that ORS 126.530 be revised to (a) permit the court to extend the 90-day winding up period, with application therefor made either during or after that period, (b) permit the court to order a partial delivery of property of a deceased ward to the executor or administrator before expiration of the winding up period, (c) include

some provision clarifying the authority of the guardian as to the ward's property during the winding up period, particularly with respect to checks issued by the guardian during this period, and (d) make provision for winding up a guardianship terminated by reason of the ward's death separate from provision for winding up a guardianship terminated for any other reason; and that Lundy prepare a rough draft of proposed legislation based on the motion. Motion carried.

Carson suggested that the requirement of paragraph (d) of subsection (1) of ORS 126.336 that a guardian file his final account within 90 days after termination of the guardianship not be changed, and the committee agreed.

(6) Comment & Suggestion No. 5 -- Guardianship; private sale of real property; published notice. Jaureguy explained his recommendation in the subcommittee report on Comment & Suggestion No. 5 that subsection (2) of ORS 126.441 be amended to require publication of notice of private sale of real property by a guardian in a newspaper of general circulation published nearest to the place of sale, instead of in a newspaper of general circulation in the county in which the property is situated, when there is no newspaper published in the county in which the property is situated. After discussion, the committee agreed that the recommended amendment should not be made. Lundy was directed to bring to the attention of the committee the wording of subsection (2) of ORS 126.441 when the committee considers subsection (2) of ORS 116.760 (published notice of private sale of real property of decedent).

(7) Comment & Suggestion No. 8 -- Guardianship; bond of guardian; waiver of requirement. Jaureguy explained his recommendation in the subcommittee report on Comment & Suggestion No. 8 that a guardian should be required to have some bond. After discussion, the committee agreed with the recommendation and that ORS 126.171 should not be changed.

(8) Comment & Suggestion No. 9 -- Sale of real property of decedents and wards; terms of sale. Jaureguy explained his recommendation in the subcommittee report on Comment & Suggestion No. 9, concerning terms and conditions prescribed by the court for the sale of real property of decedents and wards. After discussion, the committee agreed that the guardianship statutes (ORS 126.436 and 126.456) on the subject should not be changed, and that consideration of the decedents' estates statutes (ORS 116.755 and 116.810) on the subject should be postponed.

(9) Comment & Suggestion Nos. 14 and 18 -- Guardianship; accounting by guardian. Jaureguy explained his recommendations in the subcommittee report on Comment & Suggestion Nos. 14 and 18, concerning subsections (4) and (5) of ORS 126.336 (accounting by guardian). Lundy recounted some background on the drafting of subsections (4) and (5) of ORS 126.336 prior to enactment

in 1961, and pointed out that the two subsections appear to overlap and perhaps were inconsistent in so far as a guardian's final account is concerned. Frohnmayer questioned the desirability of giving a copy of each account of a guardian to the State Hospital, for example, under subsection (4). Dickson commented that it might be desirable to give a copy to the Board of Control to assist in administration of the statutes (ORS 179.610 to 179.770) relating to responsibility for the cost of care of persons in the State Hospital and other state institutions. Zollinger expressed the view that the Board of Control did not need a copy of each account for this purpose, but indicated that perhaps the Board of Control should receive a copy of the inventory. He also suggested that a sequence of persons to receive copies of accounts under subsection (4), starting with the competent spouse of the ward, then the competent adult children, then the competent parents and then the competent brothers and sisters. Allison moved that the matter of revision of subsections (4) and (5) be referred to Zollinger for his consideration and recommendation to be submitted at the next meeting of the committee. Motion seconded and carried. Zollinger agreed to undertake the assignment.

(10) Comment & Suggestion No. 10 -- Guardianship; Veterans Administration participation. Zollinger explained his recommendation in the subcommittee report on Comment & Suggestion No. 10 that subsection (3) of ORS 126.250 be deleted and that no change be made in ORS 126.131 and 126.346. After discussion, Zollinger moved, seconded by Frohnmayer, that the recommendation be adopted and that Lundy prepare a rough draft of proposed legislation based on the motion. Motion carried.

(11) Comment & Suggestion No. 11 -- Guardianship; handling claims of minors and incompetents and transferring property without guardianship. Zollinger explained his recommendations in the subcommittee report on Comment & Suggestion No. 11, concerning handling claims of minors and incompetents and transferring property without guardianship. After discussion, Zollinger moved, seconded by Carson, that the recommendation to restrict the $1,000 limitation in ORS 126.555 to personal property, including choses in action, of the person under legal disability be adopted and that Lundy prepare a rough draft of proposed legislation based on the motion. Motion carried.

The recommendation relating to cash sales of real property of a person under legal disability by a person under court order, but without guardianship, was discussed. Allison commented that he would like to see the concept of at least a short-term guardianship retained in such cases, with a guardian appointed for the particular purpose and discharged upon satisfactory proof to the court that he has carried out his task pursuant to the court order. Zollinger suggested that it might be appropriate to consider a guardian's bond in a larger amount in such cases. After further discussion, the committee agreed that the

matter should be referred to Allison for his consideration and recommendation to be submitted to the committee. Allison agreed to undertake the assignment.

(12) Comment & Suggestion No. 16 -- Guardianship; gifts from ward's estate; expenditures for ward's relatives. Zollinger explained his recommendation in the subcommittee report on Comment & Suggestion No. 16 that no change be made in ORS 126.295 (gifts from ward's estate; expenditures for ward's relatives). After discussion, Frohnmayer moved, seconded by Jaureguy, that the recommendation be adopted. Motion carried unanimously.

[Note: Comment & Suggestion Nos. 7, 12, 13, 15 and 20 were assigned to Butler, who, because of unexpected illness, was unable to report on them.] It was pointed out that the committee had previously disposed of Comment & Suggestion Nos. 7 and 13. The committee agreed to postpone consideration of Comment & Suggestion Nos. 12, 15 and 20 until Butler had an opportunity to consider and report on them.

Lundy pointed out that since enactment of the present Oregon guardianship and conservatorship statutes in 1961 there had been two enactments that had changed those 1961 statutes (ORS 116.890, 116.900, 126.436 and 126.490, relating to lease of real property of wards for purposes of exploring for or obtaining oil, gas and minerals; and ORS 126.250, relating to investment by guardians in common trust funds without prior court approval). Lundy suggested that, if the committee agreed, he might examine the provisions of these two enactments and bring to the attention of the committee any problems discovered. The committee agreed that Lundy should do this.

6. Next Meeting of Advisory Committee. The next meeting of the advisory committee was scheduled for Saturday, June 13, at 9 a.m., in Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The meeting was adjourned at 2:15 p.m.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, May 16, 1964)

Subcommittee on Dower and Curtesy

Report to Advisory Committee

May 16, 1964

Mr. Allison, the chairman of this Subcommittee on Dower and Curtesy, was appointed by Mr. Zollinger pursuant to the latter's appointment by Judge Dickson on April 18 as chairman of a subcommittee to coordinate efforts to specify the selected areas of the probate law to be covered by the immediate program of the Advisory Committee and to submit recommendations thereon at the meeting of the Advisory Committee scheduled for May 16. Mr. Zollinger is an ex officio member of this subcommittee. Mr. Allison appointed the other members of this subcommittee, who are Mr. Jaureguy and Mr. Riddlesbarger. The members of this subcommittee met on May 7, 1964, to consider preliminary problems involved in a revision of that area of the probate law relating to dower and curtesy, particularly ORS chapter 113.

Preliminary consideration was given to the provisions for release of dower and curtesy interests of incompetents contained in ORS 93.170 and 113.610 to 113.670. These provisions are criticized in Comment & Suggestion Nos. 3, 17 and 26, reproduced in the "Comments & Suggestions Received" section of the Advisory Committee notebook. These criticisms are considered valid.

ORS 93.170 provides that any real property acquired in sole right by a spouse while the other spouse is committed "to a public insane asylum" may be conveyed without the joinder of the insane spouse during the commitment if the deed is accompanied by a certificate of the superintendent of the "insane asylum." Thus, in contrast to the overinvolved procedure for release of these interests of other incompetents, rights of dower and curtesy are effectively abolished as to property acquired and conveyed during the commitment of the other spouse. On the other hand, ORS 113.610 to 113.670 set up a procedure for release of these interests entirely separate and distinct from the guardianship statutes. The statutory procedure has the following defects:

1. The proceeding is brought in an equity court, not in the probate court where a guardianship may be pending.

2. The proceeding must be brought where the other spouse resides or where the property is situated, not where the guardianship may be pending.

3. The petitioner is the spouse who wishes to sell or mortgage, not the guardian.

4. Service must be made, in addition to the incompetent and his guardian, on his "next of kin, and all persons interested in the land." The problems of proper parties to be served are obvious.

5. If no guardian has been appointed, the court of equity shall appoint a guardian.

6. Persons served in the state have 10 days to appear, but the preceding statute section (ORS 113.620) requires that the hearing must be not less than four weeks from the order.

Mr. Zollinger suggested that the statute sections commented upon (ORS 93.170 and 113.610 to 113.670) be repealed, and that in their stead ORS 113.410 (bar of dower by conveyance) be amended to provide for bar by a conveyance executed by the guardian of an incompetent as provided in ORS 126.476, and that ORS 126.476 (exchange, partition, sale or surrender of ward's property) be amended to include, in subsection (2) thereof, cases where the interest of the ward is an inchoate dower or curtesy interest. The subcommittee supports this suggestion of Mr. Zollinger.

The subcommittee than considered the more fundamental question of a new definition of the interest. There was general agreement that an undivided fee interest, as provided in the 1963 Iowa Probate Code, would constitute on many counts a more substantial, workable and valuable property interest than the present life estate in an undivided one-half part of the land, "including any equitable estate in land."

The present dower or curtesy is valueless on vacant or nonincome property unless sold during the life estate, or unless admeasured and then sold. The difficulties of arriving at values of these interests are well known. Since they must be figured on an actuarial basis, the interest of the young widow or widower with a high life expectancy is much greater than that of the old survivor with usually much greater needs. Thus, the present system of admeasurement or sale value works exactly in reverse on the basis of need and relief to the aged survivor.

It was the consensus of your subcommittee that dower and curtesy should be an undivided one-fourth interest in the realty to conform with the undivided one-fourth interest in personalty allowed under ORS 113.050. Such an undivided fee interest would permit simple determination of the value in case of a sale or an admeasurement, and would permit simple allocation of rents and profits to the tenant in dower or curtesy. It would not operate to the disadvantage of the elderly survivor.

The next question considered was whether this undivided one-fourth interest should be limited to the property of which the deceased spouse died seised, which would then conform to the present interest in the personalty.

Upon analysis this proposal is not as radical as it sounds. This is now the rule for dower or curtesy interests of nonresidents (ORS 113.080). ORS 93.170 bars interests if acquired and conveyed during a commitment. ORS 113.090, which limits to 10 years after death the right to recover dower or curtesy, bars many undisclosed or unrealized inchoate interests. Practically all real estate holdings are now taken as tenants by the entirety or as tenants in common by the husband and wife. The requirement that the wife or husband join in a deed or mortgage to release inchoate dower or curtesy interests is universal. The inchoate interests are terminated by divorce or failure to survive the other spouse.

There may be some social benefit in giving one spouse an effective veto power over the sale or mortgage of property held in the name of the other spouse. As stated, that today is the unusual title holding.

On the other hand, if the proposal is adopted, the survivor would still be entitled to the homestead and to support (ORS 116.005 to 116.025). She would be entitled to one quarter of the real and personal property as against the will. The survivor's interest would be substantial, easily determined and a more valuable estate than under present law. The loss of the inchoate interest might well have a minimum practical effect and would eliminate many of the most difficult areas of interests of incompetents first discussed.

Stanton W. Allison, Chairman
Subcommittee on Dower and Curtesy

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, May 16, 1964)

Subcommittee on Guardianship and Conservatorship

Report to Advisory Committee

May 16, 1964

Mr. Carson, the chairman of this Subcommittee on Guardianship and Conservatorship, was appointed by Mr. Zollinger pursuant to the latter's appointment by Judge Dickson on April 18 as chairman of a subcommittee to coordinate efforts to specify the selected areas of the probate law to be covered by the immediate program of the Advisory Committee and to submit recommendations thereon at the meeting of the Advisory Committee scheduled for May 16. Mr. Zollinger is an ex officio member of this subcommittee. Mr. Carson appointed the other members of this subcommittee, who are Mr. Butler and Mr. Jaureguy.

Mr. Carson assigned among the members of this subcommittee, for their consideration and recommendation, the comments and suggestions pertaining to guardianship and conservatorship that are reproduced in the "Comments & Suggestions Received" section of the Advisory Committee notebook and a few other matters pertaining to this area of the probate law.

This report sets forth, for consideration and action by the Advisory Committee, the comments and recommendations by the members of this subcommittee on the matters assigned to them.

Comment & Suggestion No. 2

Subject: Appraisal of estates of decedents and wards.

Source: George H. Layman, Attorney, Newberg,

Commentator: Mr. Carson.

To the extent that this comment and suggestion relates to complete, or partial, appraisal of the estate of a ward, the existing provisions of ORS 126.230(3) do not appear to me to be objectionable, and, as I understand, this subcommittee is not expected at this time to report upon suggested amendments of the statutes governing appraisal of the estate of a decedent.

If any amendment of ORS 126.230(3) is to be recommended, I suggest that the recommendation be that that subsection be amended to read, in substance:

126.230 Inventory and appraisal of ward's property.

* * * * * * * * *

(3) The court may order [~~all or any part of~~] less than all the property of the ward appraised as provided in ORS 116.420 to 116.435. Otherwise, all the property of the ward shall be appraised as provided in ORS 116.420 to 116.435.

Recommendation of a like amendment of ORS 116.420, concerning appraisal of the estate of a decedent, might well be considered by the Advisory Committee on Probate Law Revision at the appropriate time.

Comment & Suggestion No. 6

Subject: Guardianship; disposition of nonresident's property by foreign guardian.

Source: Judge Charles M. Johnson, District Court, Clatsop County.

Commentator: Mr. Carson.

The comment and suggestion received by the Advisory Committee on Probate Law Revision in respect of ORS 126.565 is to the effect that confusion seems to exist in respect of the provisions (or some provision) of the section.

Although it does appear to me that the section could be clarified by causing it expressly to require that the "foreign guardian" therein mentioned be a "foreign guardian of the estate" of the nonresident, I do not suggest that that matter is the cause of the confusion that has been commented upon.

In his letter to me of May 8, 1964, concerning various matters, including this comment and suggestion, Mr. Robert W. Lundy has asked whether details concerning the confusion should be obtained from the judge from whom the comment and suggestion was received. I believe that this should be done.

Comment & Suggestion No. 23

Subject: Guardianship; access of guardian to ward's safe deposit box.

Source: William M. Keller, Attorney, Portland.

Commentator: Mr. Carson.

From a copy of a report dated February 20, 1964, that appears to have been made to the Probate Committee of the Oregon

State Bar by one of the members of that committee upon the question whether that committee should recommend legislation of this nature, the following excerpt is taken:

"ARGUMENTS AGAINST THE
SUGGESTED PROCEDURE

"1. The State Treasurer's office has no interest in a person's property prior to his death.

"2. It is impossible to prevent all defalcation; therefore, it is useless to impose heavy administrative duties to attempt to prevent the rare instance of defalcation under the circumstances suggested.

"3. Many people, particularly elderly, invalid or semi-senile individuals, exercise poor judgment in giving authority to others to enter their safe deposit boxes. The suggested solution only solves a small facet of the problem.

"4. The suggested solution would have no [e]ffect on the entry to a safe deposit box by a joint tenant, having joint access with a person under guardianship.

"The writer has considered such suggestions and recognizes that it is impossible to pass legislation which will make all people honest. However, it is pointed out that the real issue is the fact that, the letters guardianship or conservatorship, issued by the Court itself, can, under present procedures, be used as an instrument of fraud. The writer would oppose any attempt to require the Treasurer's office or bank official to be present at the opening of every safe deposit box. Such might prevent fraud, but it would also no doubt prevent the use of such form of custodial care. In a free society, a person is entitled to privacy, even at the expense of permitting him to make an unfortunate choice of agents, or to otherwise vest his confidence in persons not worthy thereof.

"If it is remembered that the purpose of the suggested legislation is to prevent the Court itself from being used as an instrument of fraud and defalcation, most of the objections which have been raised, vanish."

The arguments quoted above properly could, in my opinion, be supplemented by these additional observations, among others: Those wards who own assets, or evidences of assets, such as those commonly placed in safe deposit boxes, but who do not make use of safe deposit boxes, would not be protected by

enactment of this proposed legislation. Although the same observation might be made in respect of the safe deposit boxes to which deceased persons had rights of access at and before their deaths, nevertheless, the principal objective of the statute (ORS 118.440) which relates to the safe deposit boxes to which deceased persons had rights of access at and before their deaths, is to aid enforcement of the inheritance tax statutes, whereas this proposed legislation would not necessarily be of any benefit for that purpose.

Subject: Conservatorship; winding up affairs after termination.

Source: Mr. Zollinger.

Commentator: Mr. Carson.

[Note: In a letter to Mr. Carson dated April 20, 1964, Mr. Zollinger suggested that provisions for winding up a conservatorship and the discharge of the conservator be added to ORS 126.606 to 126.660. Mr. Zollinger's suggestion is not reproduced in the "Comments & Suggestions Received" section of the Advisory Committee notebook.]

The statute governing termination of a conservatorship (ORS 126.660) would, in my opinion, be improved by an amendment prescribing in detail the procedure for the winding up of a conservatorship in the event of its termination by reason of the death of the ward. One manner in which this could be accomplished would be that of amending ORS 126.660(3) to read:

> (3) Upon termination of a conservatorship as provided in this section, the conservator shall account to the ward, if <u>living and</u> competent, [~~and otherwise to the ward's personal representative.~~] <u>or, if living and incompetent, to the guardian of the estate of the ward, or, if the ward has died, the affairs of the conservatorship shall be wound up in the same manner as provided in ORS 126.530 to 126.545.</u>

Subject: Guardianship; winding up affairs after termination; winding up period.

Source: Mr. Carson.

Commentator: Mr. Carson.

[Note: The following comment and recommendation is not addressed to a comment and suggestion reproduced in the "Comments & Suggestions Received" section of the Advisory Committee

notebook. Rather, it pertains to another matter which Mr. Carson wishes to bring to the attention of the Advisory Committee.]

Because a disadvantageous situation can arise out of the 90-day limitation prescribed by ORS 126.530 for winding up the affairs of the estate of an incompetent ward following his death, I suggest that that section be amended to the extent, at least, indicated below:

> 126.530 Winding up guardianship affairs by guardian. Within 90 days after the date of termination of a guardianship of the estate, or, if necessary, within such further time as the court by order may allow, the guardian of the estate shall wind up the affairs of the guardianship, and his authority and duties and the provisions of law applicable thereto shall continue for such purpose, as follows:
>
> (1) The guardian shall pay from the guardianship estate:
>
> * * * * *
>
> (c) If the guardianship is terminated by the death of the ward, and if the estate of the ward is solvent, and with prior approval of the court by order, expenses for the proper care, maintenance and support of the ward's surviving spouse and minor children during the [~~90-day~~] winding up period.
>
> * * * * *
>
> (4) Except as otherwise provided in subsection (5) of this section, if the guardianship is terminated by the death of the ward, and if the sale, mortgage or pledge of property of the guardianship estate is necessary for the payment of all expenses and claims referred to in paragraphs (a) and (b) of subsection (1) of this section, and if such sale, mortgage or pledge cannot be made and the proceeds used to pay all such expenses and claims within the [~~90-day~~] winding up period, the guardian shall pay none of such expenses and claims, but such expenses and claims are liens upon and shall be paid first from property delivered under subsection (3) of this section.

For example, this hypothetical situation may be considered: Substantial sums of money are owed on account of expenses and claims lawfully payable out of the estate of an incompetent ward. There are insufficient funds and potential

proceeds of mortgaging, pledging or selling personal properties of the estate with which to pay the expenses and claims. The guardian fails in his efforts to obtain an adequate and satisfactory mortgage loan on the security of any of, or all, the properties of the estate. A guardian's sale of the real property of the estate could provide the funds required for payment of all the expenses and claims. Consequently, the guardian commences proceedings for the sale of the real property of the estate. The guardian's petition for authority to sell the real property is filed before termination of the guardianship (ORS 126.530 (2) (c)) occurs by reason of death of the ward. The court, by order, authorizes the guardian to proceed with the sale. The proceedings for the sale of the real property progress to, and beyond, the final publication of the guardian's notice of sale. Reasonable grounds exist for the guardian's anticipating receipt of a satisfactory bid to purchase the real property before expiration of the 90-day winding up period. Actually, however, it so happens that, while negotiations for the sale remain pending between the guardian and a prospective purchaser, the 90-day period expires. Therefore, the guardian's sale of the real property "cannot be made and the proceeds used to pay all such expenses and claims within the 90-day winding up period," the sale proceedings are abandoned, and the guardian can pay "none of such expenses and claims" (ORS 126.530(4)). If the court could and would have (by order granted upon proper showing made by the guardian concerning the existing circumstances) extended the winding up period for an additional period of 30 days, the sale could have been consummated, and the sale proceeds could have been used in paying all such expenses and claims, within the additional 30-day period.

In view of the unqualified requirement of ORS 126.530 that the affairs of the guardianship be wound up within the prescribed 90-day period, I presume that ORS 126.535 was not intended to, and does not, authorize the court to extend the 90-day period. In any event, I submit that the court should expressly be allowed to exercise the discretion that this proposed amendment would allow.

Comment & Suggestion No. 5

Subject: Guardianship; private sale of real property; published notice.

Source: Mr. Jaureguy.

Commentator: Mr. Jaureguy.

The first sentence of ORS 126.441(2) should be amended to read:

"Except as otherwise provided in this subsection, before proceeding to sell real property at private sale, the guardian shall cause a notice of the sale to be published in a newspaper published in the county in which the property is situated, or if no newspaper is published in such county, then in a newspaper of general circulation published nearest to the place of sale . . ."

Comment & Suggestion No. 8

Subject: Guardianship; bond of guardian; waiver of requirement.

Source: Judge John C. Warden, District Court, Coos County.

Commentator: Mr. Jaureguy.

The letter from Judge Warden has been answered. ORS 709.240 provides that no bond need be given by a trust company when acting as guardian. In any case, the amount of the bond is discretionary with the court.

Comment & Suggestion No. 9

Subject: Sale of real property of decedents and wards; terms of sale.

Source: Judge Teunis J. Wyers, District Court, Hood River County.

Commentator: Mr. Jaureguy.

Judge Wyers suggests that the last sentence of ORS 126.436 is not entirely clear. It reads:

"A sale ordered shall be made as provided in ORS 126.441 to 126.466, and subject to such additional terms and conditions as the court may consider necessary or proper."

Perhaps this should be amended to read:

"and subject to such additional terms and conditions, if any, as the court may consider necessary or proper."

Comment & Suggestion No. 14

Subject: Guardianship; accounting by guardian.

Source: Harold V. Johnson, Attorney, Eugene.

Commentator: Mr. Jaureguy.

I would suggest that ORS 126.336(4) be amended as follows:

> "(4) The guardian of the estate shall give or mail a copy of each account to the person or institution having the care, custody or control of the ward, within 30 days after the same is filed."

Harold Johnson also suggests another amendment to ORS 126.336. He suggests that ORS 126.336(5) be amended to provide that service of the final account must be made "at least ten days prior to the date order approving final account is to be presented to the Court." It seems to me that this is implicit in the statute as it now is, which provides that within 10 days after the service those served may make and file in the guardianship proceeding written objections to the account. Should the guardian obtain an order approving the account before the expiration of such 10 days, such order would necessarily be set aside or modified if proper objections were filed within 10 days after the date of service.

Comment & Suggestion No. 18

Subject: Guardianship; accounting by guardian.

Source: James R. Ellis, Attorney, Portland.

Commentator: Mr. Jaureguy.

James R. Ellis of Portland suggests that in some cases if the "institution having the care, custody or control of the ward" (ORS 126.336(4)) sees the account and learns what the ward's assets are, "the cost of the nursing home's care is going to increase sharply." I would suggest that (1) there should be no necessity for any such service if there is a guardian of the person, and (2) in any case, such service should not be made upon a hospital or nursing home or any other institution except to an (to quote Mr. Ellis) "institution to which the ward has been committed."

Comment & Suggestion No. 10

Subject: Guardianship; Veterans Administration participation.

Source: Judge Samuel A. Hall, District Court, Curry County.

Commentator: Mr. Zollinger.

Prior to 1961, ORS 126.350 (repealed by chapter 344, Oregon Laws 1961) provided that when a ward received funds through the Veterans Administration, the VA might require the guardian to serve its representative with copies of all accounts, petitions for sale, lease or mortgage of property of the estate, petitions for allowances of any nature from funds of the estate and petitions for the investment of the funds of the estate. It also provided for such service at least 10 days prior to the time of hearing, unless waived in writing, and that the VA might appear in opposition to the petition or to require an accounting.

These provisions are preserved in ORS 126.346. They are criticized in Comment & Suggestion No. 10 as casting unnecessary burdens upon guardians, lawyers and courts, consuming time and expense to no purpose "if the court is doing its duty." The criticism may carry overtones of resentment.

Reference is also made to other sections relating to the Veterans Administration, ORS 126.131 and 126.250.

ORS 126.131 identifies the persons who are to be served with citation to show cause why a guardian should not be appointed and provides for service of citation upon the Veterans Administration when the proposed ward receives money from the United States through the Veterans Administration. This was not formerly required, but is appropriate because, as will appear in this note, the Veterans Administration should be afforded an opportunity to object to the appointment of a guardian or to the appointment of the petitioner or his nominee as guardian or to the amount of the bond or the sureties on the bond.

ORS 126.250 relates to investments by guardians and permits investments without court approval (1) in governments and (2) by corporate guardians in common trust funds consisting solely of governments, municipals and time or savings deposits and with court approval in other prudent investments. It preserves the prior provisions of ORS 126.350(3) requiring that notice of proposed investment be served upon the Veterans Administration and, to avoid any possible question, such notice is required even with respect to investments which may be made without court approval. In this respect, Comment & Suggestion No. 10 is justified. This is an unnecessary burden.

ORS 126.250(3) should be amended or deleted. Approval by or notice to the Veterans Administration should not be required for investments by individual guardians in governments or by corporate guardians in governments or qualifying common trust funds. I suggest that the provisions of ORS 126.346 are sufficient in this respect and that the whole of ORS 126.250(3) should be deleted.

It is noted that the former limitations upon guardian's compensation imposed by ORS 126.350 no longer exist and it may be observed that the reasonable compensation which the court may allow to the guardian and the reasonable fees of the attorney for the guardian may and should include compensation for services involving any duties to the Veterans Administration or pursuant to any of these statutes. Perhaps this suggestion should be communicated to the Bar Committee on Economics of Law Practice.

A principal reason for preserving ORS 126.346 and ORS 126.131 is that the Veterans Administration is charged with responsibility under Federal law, 38 U.S. Code 3202, to determine that the guardian is making proper application of funds which are paid to a guardian. I am surprised and somewhat critical of provisions authorizing discretionary suspension of payments for failure to account to the Administration or for maladministration of the estate. This, however, may not be modified by state law.

The Veterans Administration discharges its statutory duties through its Department of Veterans Benefits. Its chief attorneys act on its behalf in the determination whether to distribute to a custodian without requiring a guardianship and, where a guardian is appointed, in advising with the court in the selection of a person to serve in that capacity. The chief attorneys also determine whether accountings are made and, if made, are sufficient, whether funds are properly applied, whether investments should be approved, etc. This is treated at length in Title 38, Code of Federal Regulations, Part 13, defining the duties of the chief attorneys. They are such as require compliance with ORS 126.131 and 126.346. I do not recommend any amendment of these Sections.

Reports of this length may merit and frequently receive attention focused on the last paragraph. To avoid disappointment to readers who are less than avid, I repeat: I recommend that subsection (3) be deleted from ORS 126.250; I recommend no change in ORS 126.131 and 126.346.

Comment & Suggestion No. 11

Subject: Guardianship; handling claims of minors and incompetents and transferring property without guardianship.

Source: Judge Samuel A. Hall, District Court, Curry County.

Commentator: Mr. Zollinger.

A. This comment and suggestion proposes judicial approval of settlement of personal injury claims of minors and incompetents without the appointment of a guardian when the court is satisfied that the settlement is in his interest and that the proceeds will be applied for his benefit. ORS 126.555 does all this and more. It permits a person designated in an order to settle debts and other choses in action, both contract and tort claims, to receive payment thereof and to give acquittances therefor. It provides that funds so received shall be held, invested or used as the court shall order. It applies, however, only to those cases in which the value of the estate of the minor or incompetent does not exceed $1,000.

If the substance of the suggestion is that there should be no limitation in amount, I do not agree. The burdens of a guardianship are real and any which are not necessary should be modified or removed, but those which are deemed necessary are not less necessary because the estate consists of or includes a personal injury claim.

It would be reasonable to propose two amendments to ORS 126.555 - that the maximum value of the estate to which it may apply be increased from $1,000 to, say, $2,500, and that real property owned by the minor or incompetent be excluded from the determination of value. Concerning the increase in amount, I do not feel qualified to make a recommendation. This figure has been used in some other statutes, including ORS 117.315 affecting distribution of decedents' estates, ORS 126.516 relating to the termination of guardianships, ORS 708.520 and ORS 722.375 providing for payment without probate by banks and savings and loan associations. It seems rather clear that the burdens of guardianship are not made more necessary or more bearable by the circumstance that the minor or incompetent claimant owns real property or an interest in real property.

If the minor child has inherited real property from his father - an undivided interest in the home in which he lives with his mother and sister, valued at $25,000 - there is no more reason to require the appointment of a guardian in order to settle a $500 personal injury claim than there would be if he did not own any real estate.

ORS 126.555 now provides: "Where it appears that a guardian of the estate for a person under legal disability has not been appointed and that the value of the estate of such person is not more than $1,000, any court having probate jurisdiction may" etc. This should be amended to read " * * * and that the value of the personal property of such person, including choses in action, is not more than" etc.

B. This comment and suggestion also proposes, without any specific suggestion, that provision be made for transfer of title of real property without guardianship. I am sympathetic with the proposal. The elaborate procedures for sale of real property are certainly inappropriate when the estate of the minor or incompetent is of small value. I can not forget the occasion on which I conducted a guardianship sale of an undivided 1/64th interest in a vacant lot, then went back and did it over again because, early in the proceeding, I entered an order before the return day.

I invite consideration of two proposals:

1. Amend ORS 126.555 to provide also that real property of a person under disability may be sold by a person designated by order of a court having probate jurisdiction, when no guardian of the estate of such person has been appointed and the court finds that the value of his real property in this state does not exceed $1,000. The remaining provisions of the section as it is now enacted would apply to such sales and the proceeds thereof. I think I would limit such sales to cash sales.

2. When a guardian has been appointed, ORS 126.441 now provides for sale of property of a value not exceeding $1,000 without publication of notice of sale. The question arises whether any other corners can and should be cut in order to minimize burdens. I have none to recommend.

Comment & Suggestion No. 16

Subject: Guardianship; gifts from ward's estate; expenditures for ward's relatives.

Source: Judge George R. Duncan, Circuit Court, Marion County.

Commentator: Mr. Zollinger.

ORS 126.295 is one of several new provisions enlarging the powers of probate courts in guardianship proceedings. Others include power to approve elections for or against taking under the will of the ward's deceased spouse and the election among options under life insurance policies.

This section permits the guardian, with the approval of the court, to make reasonable gifts to charitable and religious institutions, e.g., to continue to contribute to the ward's church and to continue to support the charitable institutions in which he had been active while competent, but only to the extent that his estate is not required for his support or the support of others to whom he owes a duty of support.

Subject to the same limitations, the section also permits the guardian, with the approval of the court, to provide or contribute to the support of others to whom the ward does not owe a duty of support but who are or have been related to the ward by blood or marriage, e.g., the orphaned nephew of the ward who has been a member of his household or the children of his deceased spouse.

Subject to the same limitations, the section permits the guardian, with court approval, to pay or contribute to payment of expenses of medical care and treatment and funeral expenses of persons who are or have been related by blood or marriage to the ward, e.g., his mother-in-law.

The suggestion is that the court shall be authorized to enter such orders only when notice of the application has been given to the ward and his spouse and children or, if there be no spouse or child, then to his parents, if any, otherwise to his next of kin.

I do not agree that the court's power to approve such application of the ward's estate upon the guardian's petition should be conditioned upon notice or citation to the relatives of the ward. I would not be critical of an amendment providing, as it is provided in ORS 126.555, that the court may act "with such notice as the court may order or without notice," but I prefer not to propose amendments which do not appear to be needed. On this account, I drag my heels.

If I am overruled, I object strenuously to any requirement for notice to any person under disability. There is little point in notice to the ward, who has been adjudged incompetent to make such decisions. There is still less point in requiring notice to the infant child or the senile parent of the ward. Beyond these relationships, next of kin are affected only to the extent that their windfall inheritance may be reduced in value.

I prefer no change to some change in ORS 126.295. If any change is made, I prefer that the court be authorized to act without notice or upon such notice as the court shall order. If notice is required, I prefer that the persons to be notified shall be limited to the spouse, if competent, the adult children, if competent, and, if there be no competent spouse or adult child, the competent parent or parents of the ward.

The following comments and suggestions were assigned to Mr. Butler. Because of unexpected illness, he was unable to undertake the assignment. Time did not permit reassignment of these matters to another member of this subcommittee. The Advisory Committee may wish to consider and act upon these matters without background comments and recommendations by this subcommittee, or to postpone such consideration and action until this subcommittee has had an opportunity to prepare such background comments and recommendations.

Comment & Suggestion No. 7

Subject: Guardianship; winding up affairs after termination; bank deposits.

Source: Judge Charles M. Johnson, District Court, Clatsop County.

Comment & Suggestion No. 12

Subject: Guardianship; appointment of guardian; service of citation.

Source: Judge Edwin L. Jenkins, District Court, Washington County.

Comment & Suggestion No. 13

Subject: Guardianship; appraisal of estates of wards.

Source: Judge Edwin L. Jenkins, District Court, Washington County.

Comment & Suggestion No. 15

Subject: Guardianship; appointment of guardian; factors considered.

Source: Judge George R. Duncan, Circuit Court, Marion County.

Comment & Suggestion No. 20

Subject: Guardianship; filing name and address of guardian.

Source: Samuel M. Bowe, Attorney, Grants Pass.