

ADVISORY COMMITTEE

Probate Law Revision

Thirty-sixth Meeting

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

Dates) 1:30 p.m., Friday, May 19, 1967
and: and
Times) 9:00 a.m., Saturday, May 20, 1967
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland, Oregon

Agenda

1. Approval of minutes of April 1967 meeting.
2. Miscellaneous matters.
3. Intestate succession.
4. Advancements.
5. Adoption.
6. Illegitimacy
7. Felonious Death.
8. Wills.
9. Next meeting.

ADVISORY COMMITTEE
Probate Law Revision

Thirty-sixth Meeting, May 19 and 20, 1967
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The thirty-sixth 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, May 19, 1967, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

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

The following members of the Bar committee were present: Braun, Gilley, Krause, Meyers, Kraemer, McKenna, Piazza, Thalhoffer, Thomas, Richardson and Bettis. Biggs, Lovett, McKay, Mosser, Silven, Pendergrass, Copenhaver and Warden were absent.

Also present: James Sorte from the staff of Legislative Counsel.

Minutes of April Meeting

There being no objections, the minutes of the last meeting (April 21, 22, 1967) were approved as submitted.

Miscellaneous Matters

Chairman Dickson asked Zollinger to brief the committees on what had transpired since the March meeting of the committees. Zollinger explained to the committees that a meeting had been held concerning the prospect of Allison undertaking the drafting of the revised probate code and the prospect of Mapp attending the meeting in Colorado in June and July of 1967 of the American Bar Association Committee on a Uniform Probate Code.

Present at the meeting were Norman Stoll and William Love of the Law Improvement Committee, Chairman Dickson and Vice Chairman Zollinger of the Advisory Committee on Probate and Legislative Counsel, Robert W. Lundy. Zollinger said that the Advisory and Bar committee members

working on revising the Oregon Probate Code were indebted to Mr. Mapp for his generous offer to attend the sessions in Colorado without compensation for anything except actual out-of-pocket expenses. He said that the members of the Law Improvement Committee that attended the meeting were also very favorably impressed and had approved of the plans concerning both Mr. Allison and Mr. Mapp. Zollinger also reported to the committees that the Law Improvement Committee had indicated that the Probate Revision project is the most important project pending before the committee. Zollinger said that Allison was in a position to begin redrafting the code immediately, and that Judge Dickson is able to make space available in Multnomah County Courthouse. Sorte advised the committees that Lundy felt he would need authorization from the Legislative Counsel Committee before final approval of the plans concerning Allison and Mapp. Husband said he would discuss the matter with Lundy and have Lundy contact Allison and Mapp.

Procedure for Review of Drafts

Zollinger asked that the committees consider the method to be adopted for the review of the drafts that had been prepared and distributed to all members of the committees prior to the May 1967 meeting. He advised the committees that it had been suggested that the committees work through smaller groups such as subcommittees. He said that he did not approve of that procedure, and he would prefer having the consensus of opinion of the committees as presently constituted. He added that when there is a major policy decision the committees should voice their opinion as to policy and leave the particular wording to Allison. Frohnmayer said that he agreed with Zollinger. He also said that after the sessions in Colorado of the meeting on the Uniform Probate Code that the committees might like to reconsider any action they had taken. He was of the opinion that wherever possible, unless the policy considerations were otherwise, that the advisory and Bar committees should adopt as much of the language of the Uniform Probate Code as possible.

Dickson asked whether the drafts that had been distributed represented drafts of the entire proposed Oregon probate code. Sorte said that the drafts represented everything that the committees had considered except the area concerning inheritance tax. He explained that the drafts on tax had not been included with the other materials because at the last meeting (April 1967) the committees had suggested

major policy changes in the present code. One of the policy decisions was to favor an administrative determination of the inheritance tax. Under those circumstances the tax aspect would take an entire revision. As a consequence, the drafts on inheritance tax were not included with the other drafts. Sorte explained that one other matter that was not included with the materials was a draft on missing persons, chapter 127. That matter, he explained, had been referred to Mrs. Braun and Mr. Gilley for a report. Mrs. Braun had suggested that the estates of missing persons might be safeguarded under the existing provisions of the guardianship law. The committees had expressed approval of this plan, and had, at the April 1967 meeting, referred the matter to Mrs. Braun and Mr. Gilley for a report at the May 1967 meeting.

Zollinger said that the chapter on the powers of the probate court would need substantial revision, and that the present draft had been prepared by Legislative Counsel to form a basis for discussion. Other members of the committee were of the opinion that the chapter on definitions would also require some revision. It was agreed that the chapter on definitions would be amended periodically as the committees proceeded to go through the drafts.

Allison called attention to the fact that there had never been any final decision on the particular order of the chapters of the probate code. He reminded the committees that there had been three separate drafts of an outline of the probate code, but that no final action had been taken. Allison asked whether this was to be left to the discretion of the draftsman and was advised by Dickson that it would be placed on the agenda of the June 16,17, 1967 meeting.

Dickson asked for an expression of opinion as to whether the members would like to proceed in the order of the drafts as they had been received, or whether the order should be changed. The members favored proceeding in the order that the drafts were received.

Intestate Succession

Frohnmayr explained to the committees that the initial action on intestate succession had been taken in August and September of 1965. Following that action by the committees Legislative Counsel had suggested certain changes to what was originally called proposal number 2. He advised the committees that he had worked with Mr. Piazza and reviewed the suggestions of Legislative Counsel, and

that many of the suggestions were adopted and incorporated into the draft dated April 27, 1967.

Frohmayer explained there was a suggestion that the first part of the draft, definitions, should be placed in one chapter with other definitions that would be used throughout the probate code. He said that he was not certain that he was in agreement. He said, for example, that the definitions of "claims" as used in the chapter dealing with intestate succession would not be the same as the definition of "claims" in the chapter on claims of creditors.

Dickson suggested that since there are different meanings for the word "claims", that perhaps it would be better to use the word "obligations" in the chapter on intestate succession. Frohmayer and Jaureguy agreed with Dickson. Zollinger suggested that since the matter was not a policy decision that it be left to the discretion of the draftsman.

Definition of Net Estate

Frohmayer said that a question that occurred to him was whether or not the definition of net estate should either include or exclude exempt property. He suggested that a reference should be made in the definition section and refer to the ORS sections dealing with exempt property. This, he said, would alert a young lawyer to the other provisions of the code.

Definition of Issue

Dickson asked whether the definition of issue would be broad enough to include adopted children. Frohmayer answered that it had been suggested that the definition include adopted children, but that he was of the opinion that the sections dealing with adopted children were adequate to cover adopted children without adding anything to the word "issue" in the chapter on intestate succession.

Kraemer asked whether the same problem was applicable to illegitimate children, and Zollinger answered that the matter could be covered by a cross reference.

Frohmayer suggested that the word "lawful" preceding "issue" was superfluous.

Definition of Personal Property

Zollinger asked whether the inclusion of "chattels

Real" in the definition of personal property should be changed to "leasehold estates." Frohnmayer suggested the wording "leasehold interests."

Zollinger expressed the opinion that he would favor a definition of property similar to the definition provided in the Uniform Commercial Code. Under that definition there is included intangibles, royalties, copyright interests, etc.

Gilley asked whether it was necessary to define property in the chapter on intestate succession.

Frohnmayer referred to the definition used in the Wisconsin probate and expressed approval of that definition.

Zollinger indicated that consideration of the definitions should be postponed until the committees had proceeded further with the drafts. Zollinger also expressed approval of the suggestion of Kraemer that the definition of personal property be that it was everything that was not real property. Zollinger also favored including in the definition of property "any legal or equitable interest."

Section 2 of Draft dated April 27, 1967

Section 2 was amended as follows: "Any part of the net estate of a decedent which is not effectively disposed of by [his] will, constitutes the net intestate estate and shall descend and be distributed as prescribed in the following sections."

Section 3

Section 3 was amended as follows: "If the decedent [dies intestate, leaving] leaves a [surviving] spouse and issue, the [surviving] spouse shall have [an undivided] a one half interest in the net intestate estate of the decedent." [, in addition to provision for support.]

Section 4

Section 4 was amended to read: "If the decedent [dies intestate leaving] leaves a [surviving] spouse and no issue, the [surviving] spouse shall have all of the net intestate estate of the decedent." [, in addition to provision for support.]

Section 5

Section 5 was amended to read: "The part of the net intestate estate not passing to a [surviving] spouse shall pass:

(1) To the issue of the [intestate] decendent equally if they are in the same degree of kinship, or if in unequal degree, [those of] to the issue of more remote degree [take] by representation;

(2) If no issue survives the [intestate] decendent, to the surviving parents of the [intestate] decendent; when both parents of the [intestate] survive, and they are married to each other, they shall take the real property as tenants by the entirety and the personal property as joint owners with the right of survivorship, [if they are married to each other;] otherwise they shall take as tenants in common;

(3) If no issue or parent survives the [intestate] decendent, to the issue of either parent by representations;

(4) If no issue, parent or issue of either parent survives the [intestate] decendent, to the surviving grandparents of the [intestate] decendent; [when grandparents of the intestate survive him] if they are married to each other, they shall take [the] real property as tenants by the entirety and the personal property as joint owners with the right of survivorship [,]; otherwise they shall take as tenants in common;

(5) If no issue, parent, issue of either parent or grandparent survives the decendent, equally to the issue of deceased grandparents in the nearest degree of kinship to the decendent to and including the fifth degree as provided in ORS _____, without representation;

There was considerable discussion of whether or not subsection 4 of section 5 accurately expressed the policy desired by the committees. There was discussion over whether or not half bloods were treated the same as whole bloods and whether or not they should be. No final decision was made.

(6) There were no changes in subsection (6).

Section 6

Frohnmayr explained that the definition of "representation" in the Wisconsin code also set forth a chart to trace degrees of kindred. He said that both he and Piazza favored such a provision in the Oregon code. He also indicated that they would set forth a chart with somewhat more elaboration than the present Wisconsin code.

Zollinger expressed reluctance to set forth a diagram or chart in the code. He explained that a chart would not be in harmony with the existing code, and expressed his reluctance to add a diagram chart. No definite action was taken but most of the members of the committees seemed to favor having a chart or diagram in the proposed code.

Section 6 was amended to read:

"Representation" [refers to a] means the method of determining distribution [in which] when the [takers] distributees are in unequal degrees of kinship [with respect] to the [intestate] decedent and is accomplished as follows: After first determining who are in the nearest degree of kinship of those entitled to share in the net estate, the net estate is divided into equal shares, the number of shares being the sum of the number of living persons [who are] in the nearest degree of kinship and the number of persons in the same degree of kinship who died before the [intestate] decedent, [but who] and left issue surviving the intestate. Each share of a deceased person in the nearest degree of kinship [shall in turn be] is divided in the same manner among his surviving children and the issue of his children who have died leaving issue [who survive the] surviving [intestate] decedent. This division [shall] continue until each portion falls to a living person. All distributees except those in the nearest degree of kinship take by representation."

There was discussion concerning whether or not there should be included in the definitions section a definition of "intestate", and whether that definition should provide for both intestate and partially intestate situations. No definite action was taken.

Section 7

Section 7 was amended to read:

"As used in section 5, the degree of kinship [computed according to the rules of the civil law] is determined by counting upward from the [intestate] decedent to the nearest common ancestor and then downward to the relative, the degree of kinship being the sum of the counts [:], as follows:" [Note: There would be a diagram or chart here illustrating the manner of determining the count].

Section 9

Section 9 was amended so that "intestate" was replaced by the word "decedent" in every place that the former word appeared.

Section 10

There were no changes in section 10.

Section 11

Section 11 was amended to read:

"A person related to the intestate through more than one line is entitled only to the share which is the largest."

Proposed Official Comments to Probate Code Revision Project

Frohnmayr read the official comments that he had prepared to explain the changes made by the committees in the chapter dealing with intestate succession. The members expressed their approval of the comments and it was the general consensus of opinion that the new code should have appropriate comments concerning each chapter.

Illegitimacy [Note: This is the draft dated May 7, 1967, and distributed to all members of the committees prior to the May 19,20, 1967 meeting.]

After reading the draft, and discussing the wording "For the purpose of inheritance to, through and from an illegitimate child:" that is the beginning of the draft on illegitimacy, the committees adjourned at 5:00 p.m. until the following morning.

The meeting was reconvened at 9:00 a.m., Saturday, May 20, 1967, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

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

The following members of the Bar committee were present: Braun, Gilley, Krause, Kraemer, McKenna, Piazza, Thomas and Bettis. Biggs, Lovett, Meyers, McKay, Mosser, Silven, Thalhofer, Pendergrass, Richardson, Copenhaver and Warden were absent. Also present was Sorte from Legislative Counsel Committee.

Illegitimacy (continued)

After discussing the possibility of a father of an illegitimate child marrying the mother after the death of the illegitimate child, for the sole purpose of inheritance, it was decided that the rights of the father and the illegitimate child are fixed at the time of death, so that there is no real chance of the father taking advantage of an event of that kind. Gilley moved that the subsection (2) of section 1 be amended as follows: "(2) The child shall also be treated as the legitimate child of the father if: [during the lifetime of the child] The motion failed.

Mapp called attention to the fact that the courts construe statutes dealing with illegitimacy strictly, and he raised the question of what the words "by", "through" and "from" mean when referring to inheritance of the illegitimate and the parents of the illegitimate. Mapp then called attention to the wording of the Model and Wisconsin codes.

Piazza called attention to the fact that the other codes seemed to go into a good deal more detail spelling out the rights of the parties in such a situation.

Allison advised the committees that under the existing Oregon law the rights of the illegitimate child are provided for, and that perhaps the existing provisions should not be changed.

Zollinger asked whether it would be better to have a general provision to the effect that the child shall be treated as the legitimate child for all purposes, or whether it would take more elaboration than that. He was also of the opinion that the Wisconsin code adequately spelled out the rights and duties of an illegitimate child

and the parents of the child.

Frohnmayer suggested that the matter be left as is until after Mapp attends the session in Colorado, and then the committees reconsider the draft and compare it to the draft of the Uniform Probate Code Committee. Dickson agreed that the matter should be left to Mapp and Allison.

Piazza called attention to the fact that there are several different provisions in the code dealing with illegitimacy, and that he believed all of them should be reviewed and compared to the section dealing with the right of an illegitimate to inherit.

Krause said that the provision allowing the father to express the fact of his paternity in writing was too loose. He cited as an example a postcard written by a purported father in which the purported father might allude to the fact that he was the father. Others were of the opinion that such a set of facts, without other proof, would not persuade the court.

Official Comment Concerning Illegitimate Children

Frohnmayer read his proposed official comment on the rights of a illegitimate child, and the committees expressed their approval with minor changes.

Adopted Children

Frohnmayer read his proposed official comment on the section dealing with the rights of adopted children. Zollinger suggested that there be further explanation for the distinction made in the section for adjudication in the case of the natural mother and that of the natural father. Frohnmayer said that he would revise the comment to explain that with the father there is more chance of fraud and therefore a distinction.

McKenna questioned the wording that the illegitimate child shall "be considered" the natural child. He said he would prefer the code as it is presently worded as the language is stronger as to the rights of the illegitimate child. Frohnmayer suggested the wording "child shall be treated as the natural child." Kraemer suggested that the statute provide that the illegitimate child is the natural child. The committees decided to postpone further discussion of the matter until Mapp returns from

the sessions in Colorado.

Advancements [Note: Appendix A of these minutes is a draft on advancements. The members of the Advisory and Bar Committees should replace tab number 4 of the book of drafts with the appendix]

Frohnmayr read the draft. He said that he and Piazza had discussed subsection (4) of the draft, and had decided that the value of an advancement should be the value of the property as of the date of the advancement or the date when possession and enjoyment of the property passes to the advancee, whichever occurs first. As the draft is, in its present form, the advancement would be valued as of the date of the advancement, and this would be true even if possession and enjoyment were deferred for a considerable period of time.

Braun asked how the statute would be applied in a situation where there was a gift but the expression of the grantor was not made for several years after the gift was made. Frohnmayr said that he would think that the gift would be given the value as of the date that the grantor expressed the fact that the gift was an advancement.

Zollinger was of the opinion that the grantor should be forced to declare a gift intended to be an advancement at the time it is made or not at all. Frohnmayr disagreed. He cited an example of a person giving one of several children, substantial sums, over a long period of time, and suddenly realizing how unfair this was to the other children. He said that such a person should be able to make the written declaration of advancement at any time.

Frohnmayr read and said that he approved of the approach of Wisconsin and Iowa, that is to wait until the advancee has the possession and enjoyment to place a value on the advancement. Otherwise, where a person retains a life estate, reserving a remainder, the life estate would have to be valued. Frohnmayr moved that the committees approve the policy approach of Wisconsin and Iowa. The motion was seconded by Zollinger and carried.

Zollinger raised the question of the distributive share of the children of a deceased advancee. He asked for an expression of opinion as to whether or not the children of the advancee should receive a smaller proportional share because of the advancement to their

parent. Allison said that he would not penalize the children of the advancee because of the action by the advancee. He said he would favor disregarding the advancement in such a situation. Dickson agreed. Thomas said that it bothered him because to disregard an advancement if the advancee predeceases the grantor is to put a premium on the advancee receiving money from the grantor and spending it. Frohnmayer favored Allison's suggestion.

Zollinger suggested deleting "gratuitious" preceding transfer. Mapp disagreed and said that the word was essential to the theory of an advancement.

Allison suggested defining "advancement" in the first section of the draft on advancements.

Husband was of the opinion that if the person making a transfer of property wants it to be treated as an advancement he can make a will and indicate that intention.

Frohnmayer moved that the matter be referred back to him for redrafting, and the motion passed.

Feloneous Death

Frohnmayer explained to the committees that although he had not been assigned the discussion of the matter of felonious death, that he and Piazza had reviewed the draft and would proceed to discuss the matter. Frohnmayer noted that the matter of felonious death had much broader ramifications than those involved in probate situations. He said that when the matter had been initially discussed in August and September of 1965 the committees had spent many hours discussing the problem of whether conviction was required before the provisions of the statute would become applicable. He said that there are situations where there is a criminal conviction of a felony death and yet the slayer sues an insurance company and convinces the jury that he did not feloniously slay the other party. He said that the prior discussions had convinced the members that they could not set any rule on this point.

Allison said that the present provision in the Oregon probate code already goes further than a felonious death for just probate situations.

Dickson called attention to an Oregon case that held that you cannot deprive a person of property because that

person caused a felonious death, however, you can deprive the killer of the right to succeed to property.

Frohmayer agreed that the present Oregon case law prohibits taking property from the slayer. He indicated that the slayer would have the right to an undivided life interest in jointly owned property until his death at which time the heirs of the person slayed would succeed to the slayer's one half interest.

Thomas asked why the interest is only for the lifetime of the slayer and Zollinger replied that the statute could not deprive the slayer of due process of law.

Feloneous Death, Section 4

Subsection (5) of section 4 was amended to read:

"(5) Property in which the slayer holds a reversion or vested remainder held by a third person for the lifetime of the decedent continues in that person for a period of time equal to the normal life expectancy of a person of the sex and age of the decedent at the time of death."

Subsection (6) of section 4

There was added to subsection (6) of section 4 a subparagraph (c) to replace existing (c) and the present subparagraph (c) was changed to subparagraph (d). The new subparagraph (c) now reads:

"(c) To the appointees if the power has been exercised."

The new subparagraph (d) (formerly subparagraph (c) now reads:

"(d) In any case the property or any benefit therein does not pass to the slayer."

Zollinger asked for an opinion of the committees as to whether or not the probate code should provide for the rights of parties after one party feloniously slays another party. He suggested the committees consider either placing this in the probate code, or, as an alternative, having a separate proposal.

Allison expressed the view that it would be better

to have the subject of felonious death in the probate code rather than approach the legislature with a number of separate proposals.

The meeting adjourned for lunch at 12:15 p.m.

The meeting was reconvened at 1:45 p.m. The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Frohnmayer, Jaureguy, Lisbakken and Mapp. Carson, Gooding, Husband and Riddlesbarger were absent.

The following members of the Bar committee were present: Braun, Gilley, Kraemer, Piazza, Thomas and Bettis. Biggs, Krause, Lovett, Meyers, McKay, Mosser, McKenna, Silven, Thalsofer, Pendergrass, Richardson, Copenhaver and Warden were absent.

Also present was Sorte.

Wills

The subject of wills was placed on the agenda for the June 1967 meeting.

Powers and Duties of Court

There was some discussion of the chapter on the powers and duties of the court, but because the members felt it desirable to defer the matter until after reviewing changes made in the 1967 legislature, the matter was postponed until a later date.

Rights of Aliens to Inherit

The subject of the rights of aliens to inherit was passed because of previous committee action at the February, March and April, 1967 meetings of the committees.

Uniform Simultaneous Death

Because of action of the committees at the April 1967 meeting further consideration of the Uniform Simultaneous Death Act was temporarily passed.

Missing Persons (ORS Chapter 127)

Mrs. Braun and Mr. Gilley reported to the committees

that they had studied the matter of incorporating the chapter on missing persons into the guardianship chapter, and that they felt that this could be accomplished with relatively few changes. They proposed that there be a definition of missing persons, and that the section allowing the appointment of a general guardian provide that a guardian could be appointed when a person was missing as defined. They added that several other sections of the guardianship code would have to be amended, but that the changes would be relatively minor and would allow repeal of the present ORS chapter 127.

A motion was made, seconded and carried that the chapter on missing persons, (ORS 127) be incorporated into the existing guardianship law. The matter was referred to Mrs. Braun and Mr. Gilley for further study and a report at the June 1967 meeting.

The following matters were scheduled for the June 16,17, 1967 agenda:

1. Minutes of the May 1967 meeting.
2. Miscellaneous matters.
3. Wills (Discussion to be led by Mr. Riddlesbarger).
4. Election against Will and Dower and Curtesy (Discussion to be led by Mr. Allison).
5. Initiation of Probate (Discussion to be led by Mr. Gilley and Mr. Krause).
6. Family Support (Discussion to be led by Mr. Zollinger).
7. Title to Property (Discussion to be led by Mr. Frohnmayer).
8. Powers and Duties of Personal Representative (Discussion to be led by Mr. Butler).
9. Outline of Chapters of proposed Oregon probate code.
10. Conserving Property of Missing Persons (Chapter 127, Report by Mrs. Braun and Mr. Gilley).
11. Advancements (Mr. Frohnmayer).
12. Next meeting.

The meeting adjourned at 3:15 p.m.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, May 19, 20, 1967)

Proposed revised Oregon probate code
ADVANCEMENTS
1st Draft
January 11, 1967

This draft is based primarily on the draft prepared by Mr. Frohnmayer and distributed to the committees prior to the December 1965 meeting and discussion of the content thereof at the February 1966 meeting. The draft is an appendix to the February 1966 minutes.

Section 1. Advancements. (1) If a decedent dies intestate as to his entire estate, property transferred during his lifetime as an advancement to a person entitled to inherit a part of the estate shall be counted toward the intestate share of the advancee and, to the extent that it does not exceed the intestate share, shall be included in computing the estate to be distributed.

(2) A gratuitous inter vivos transfer of property is not an advancement unless the decedent expresses that intention in writing or the advancee acknowledges the advancement in writing.

(3) If an advancee dies before the decedent, leaving lineal descendants who inherit from the decedent, the advancement shall be considered as if it had been made to the descendant for purposes of that inheritance. If the descendant is entitled to a smaller share of the estate of the decedent than the advancee would have been entitled, the descendant shall be charged with the proportion of the advancement as the amount he would have inherited in the absence of the advancement bears to the amount the advancee would have inherited in the absence of the advancement.

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1st Draft
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(4) An advancement shall be valued as of the date of the advancement.

References: Advisory Committee Minutes:
9/18/65, p. 7; and Appendix
2/18, 19/66, pp. 22 to 24; and Appendix

ORS 111.110 to 111.170

Comment: Is the transfer of property only considered an advancement if it is gratuitous? If so, would this word be more properly placed in subsection (1) rather than (2)?

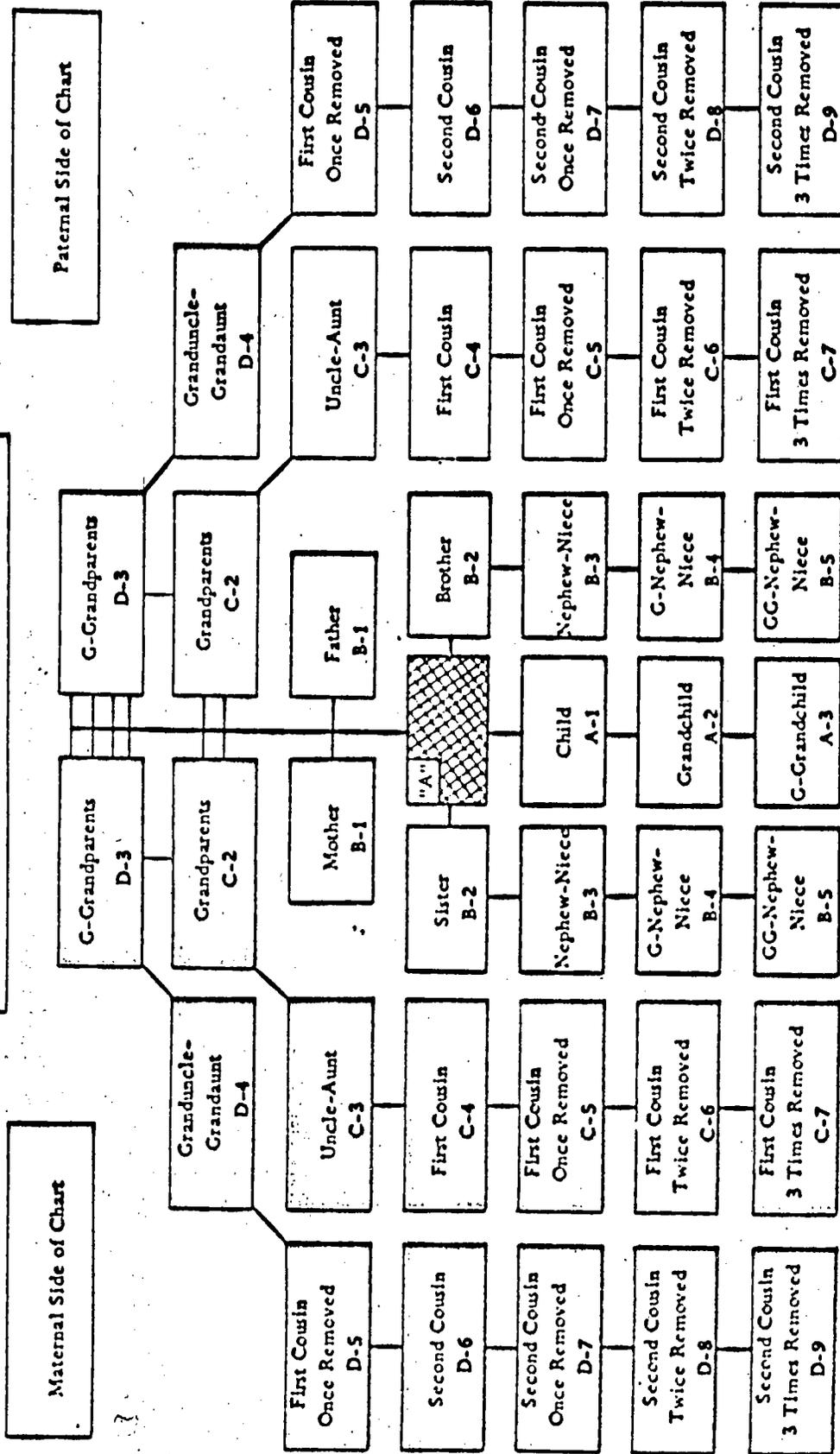
Could subsection (2) be stated in the affirmative rather than the negative, for example: "A gratuitous inter vivos transfer of property is an advancement only if decedent expressed that intention in writing or the advancee acknowledges the advancement in writing"?

Does the time of the instrument in which the decedent states his intention or the advancee acknowledges the advancement have any significance? In other words, could the deed be made on one day, and a year later in a separate memorandum the decedent state that it was his intention that the property transferred in the deed was an advancement?

Section 2. Repeal of existing statutes. ORS 111.110, 111.120, 111.130, 111.150, 111.160 and 111.170 are repealed.

Comment: This draft follows the draft prepared by legislative counsel which was in turn based on the draft discussed at the February 1966 meeting of the committee and printed as an appendix to the minutes thereof.

**THE BAKER CHART
ANCESTORS AND NEXT OF KIN UNDER THE CIVIL LAW
(REVISED)**



KEY TO CHART

- Maternal Kin of "A".
- Immediate Family of "A"
- Paternal Kin of "A".
- "A" designates lineal Descendants of "A".
- B, C, D, etc. Identifies nearest ancestors in common with "A".
- Members of "A's" immediate family cannot be said to be on either Paternal or Maternal side.
- 1, 2, 3, etc. Indicates Degree of Kinship to "A".

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PROPOSED OFFICIAL COMMENTS TO PROBATE CODE REVISION PROJECT

I.

INTESTATE SUCCESSION

1. For Summary of Chapter.

This chapter is a major revision of the existing Oregon law of intestate succession. In the drafting of these proposals, the committee was guided by the following objectives: First, to eliminate the complexities of the provisions for dower and curtesy; second, to treat similarly the provisions for the descent and distribution of real and personal property; third, to augment the share of the surviving spouse and minor children in the case of intestacy; fourth, to clarify language throughout where necessary to eliminate ambiguities and inconsistencies; and fifth, to eliminate some of the more archaic provisions of the law.

2. Comment to Section 1.

The use of statutory definitions in legislative acts promotes clearness in the meaning of the text of laws dealing with technical matters. The new Oregon probate code would follow the pattern of Iowa, Washington, Wisconsin and the Model and Uniform probate codes in placing a comprehensive definition section at the beginning of the code.

3. Comment to Section 2.

The revised draft deals throughout with the concept of the net estate. Section 2 defines the net intestate estate and specifies that any part or all of an estate as to which there is no will, or a will not making an effective disposition, will be dealt with under the provisions of the intestate succession chapter. This chapter is designed primarily for the small estate with normal family relationships; persons in the middle and upper wealth brackets are increasingly aware of the need for wills and estate planning. In most small estates the decedent wishes his spouse to have the bulk of the estate. Under the following provisions several significant changes are generally evident:

(a) All property is treated identically as part of the net estate. There is no priority, as between types of property for the payment of debts or claims and, unlike the present Oregon code, no difference in the shares of real and personal property receivable by the intestate heirs.

(b) Any system of intestate succession is to a certain extent arbitrary. The shares in any system of descent may alter radically upon the contingency of some person in a closer degree of kindred having predeceased the intestate.

The revised law attempts to approximate as closely as possible the desires of the average intestate. Any intestate succession statute can be defended on the grounds that the owner of wealth may make a different disposition if he wishes merely by executing a will, but the fact remains that many people do not make such wills and that human inertia is such that the situation is not likely to change greatly. Hence the intestate succession law--the "will" made for people by the law--must attempt to anticipate the wishes of people who die having made no testamentary disposition. No statute can anticipate all of the varying desires, facts and circumstances which surround testamentary dispositions without becoming unduly complex. The same statute must serve for the young man with a wife and minor children and for the older retired man whose children are grown and self-supporting, for a man with small resources and for the man with a fortune, for the man who has married several times and for the person who has never married. Any statute can be criticized because it does not satisfactorily meet some unusual situation. Generally, however, wealthy individuals have greater reason to execute wills, and the statute should, therefore, be designed with the moderate and small estate in mind. The existing statutes were drawn a century ago when the family was more independent and when attitudes toward ownership by a widow were different from modern views. Hence modern wills give a better indication to the proper pattern of descent than do present statutes.

(c) Existing Oregon law treats real property differently than personal property. These distinctions are products of our inherited system of descent and distribution, drawn from the English law of prior centuries and abandoned in England by statute in 1925. The result of these inherited and amended provisions is that inheritance rights are dependent upon the kind of property owned by the decedent. There is no longer any sound policy reason for retaining these distinctions, and the modern trend, embodied in this chapter, is toward a single system of inheritance (intestate succession) with abolition of common law dower and curtesy. The "net estate" concept is used to refer to the amount which should descend or be distributed. Support rights are rights or interests in addition to those which descend or are distributed as part of the net estate.

4. Comment to Section 3.

This section increases the amount passing to the widow where there is surviving issue. It attempts to provide adequately for the person closest to decedent and most likely to be dependent upon his estate for continued financial security. Particularly where the estate is small it is desirable to increase the share of the surviving spouse.

5. Comment to Section 4.

Section 4 preserves existing Oregon statutory law regarding the share of the surviving spouse when decedent leaves no issue. See ORS 111.020(2) and ORS 111.030(4).

6. Comment to Section 5.

This section involves several changes in Oregon law which modernize it to be more consonant with current thought on the distributional schemes most likely to approximate the wishes of the average intestate. Section 5 describes the scheme of distribution both in the case where decedent has left a surviving spouse and issue and in the situation where there is no surviving spouse but where issue or other kindred of the decedent survive. Subsection 1 retains the priority given in existing Oregon law to the issue of the intestate. It also codifies, in the definition of "representation" in section 6, existing Oregon law as to the meaning and operation of the right of representation. All of the shares are calculated with reference to the net estate of the decedent. Under existing Oregon law the rights of lineal descendants where decedent leaves a spouse are subject to a right of dower or curtesy with respect to the real property and in cases of intestacy to inheritance of one-half the personal property. Under the proposed law where there is a surviving spouse, the rights of issue (lineal descendants) are subject only to the one-half undivided interest in the net estate of the surviving spouse.

Subsection 2 preserves existing Oregon law, see ORS 111.020(2) and (3). This section in addition specifies the form of ownership of the property both when the surviving parents are married to each other and when they are not married.

Subsection 3 is consistent with existing Oregon law, ORS 111.020(3) in that it provides for the brothers and sisters of the intestate. It differs from existing Oregon law, however, in giving priority to all of the issue of the parents of the intestate, even when no brothers or sisters are living. Under existing Oregon law the issue of deceased brothers or sisters of decedent may take only by right of representation. In the event that all brothers and sisters should have predeceased the decedent, their descendants, if any, do not presently take by right of representation but only as next of kin. See I Jaureguy and Love, Oregon Probate Law and Practice section 12 at page 16-17 (1958). In the proposed section all issue of the parents of the decedent, including nephews and grandnephews, who are in the fourth and fifth degrees of kindred respectively would take to the exclusion of grandparents, aunts and uncles and first cousins of the deceased even though the latter are, respectively, in the second, third and fourth degrees of kindred

from the deceased. In providing for the right of representation, as to the issue of the parents of decedent, the proposed section represents a change from the existing statute, which is limited to the brothers and sisters of the intestate and to the issue of any deceased brother or sister by right of representation. By specifying "issue" of the parent, rather than brothers and sisters of the deceased, the statute's wording is clear that any lineal descendants of the intestate's parents, rather than merely his brothers and sisters, are entitled to take under this section either directly or by right of representation. This is contrary to existing Oregon case law, Bones v. Lollis, 192 Or. 376, 234 P2d 788; Andrews v. First Nat. Bank of Eugene, 192 Or. 230, 234 P2d 791; Op. Atty. Gen. 1934-36, P. 602. Those authorities have held that if decedent left nieces and nephews and also grandnieces and grandnephews the latter would take nothing even though their parents predeceased the intestate. Under the proposed statute the latter would be able to take by right of representation.

Subsection 4 is new but only declaratory of existing Oregon law since a grandparent is the nearest in degree if a decedent left no surviving spouse, parents, issue, brothers or sisters or issue of brothers and sisters. The subsection also specifies parallel to that for parents, the form of property ownership of the grandparents.

Subsection 5 limits inheritance to relatives claiming through the intestate's grandparents and within the fifth degree of kindred or less. More remote relatives are excluded. In recent years there has been a trend toward limiting inheritance by remote relatives under the intestacy laws. New York, by chapter 712 effective September 1, 1963, has adopted new rules of descent and distribution which eliminate collaterals in lines more remote than that of the grandparent. Likewise the proposed probate code of Wisconsin, section 852.01(2) limits inheritance by remote relatives unless within the fourth degree of kinship or less. Limitations on inheritance by collateral kindred were proposed in the Model Probate Code in 1946 and adopted in a slightly different form in Pennsylvania in 1947 and in Indiana in 1953. See report no. 1.1B of the New York Commission on Estates.

These limitations on inheritance were proposed for the following reasons:

(a) In modern times, with increased mobility and loss of close contact due to urbanization, the "family" is more restricted in size. Ties with remote relatives are weakened. Very few people can even name their second cousins. Normally a decedent does not want his property to pass to these remote relatives; if he does, he can easily make a will picking out

those he wishes to favor.

(b) Conversely the remote relative has no claim on a decedent's property. He is not likely to be dependent or to have rendered any of the services which might lead to an expectation of inheritance. Frequently he learns of his relationship to decedent only after the latter's death. For this reason he has been sometimes referred to as "the laughing heir". The inheritance is a mere windfall.

(c) With mobility of persons it is increasingly difficult to trace remote relatives. This increases the cost of settling estates, including those in which decedent left a will and made no provision for his relatives for the very reason that they were remote. Even with a will, these remote heirs must be notified as a matter of due process. Remote relatives often are foreign citizens, complicating the problems of notifying them and transferring property to them.

(d) Remote relatives having standing to contest wills may promote vexatious litigation for its nuisance value in the hopes of getting a settlement, even they have no possible moral claim to a share in the estate. A statute limiting inheritance by remote relatives thus in some measure will cut down on will contests.

(e) Although it is often said that escheat is not favored, a person's obligations to the community in which he lives may be far stronger than those to remote relatives of whom he has long ago lost track. It must always be remembered that the decedent can prevent escheat by making a will leaving the property as he pleases to remote relatives or to friends or to charity.

(f) Two other archaic doctrines are eliminated by the present provision. First, such remnants of the doctrine of Ancestral Estates as exist in present ORS 111.020(5) and discussed in Cordon v. Gregg, 164 Or. 306, 97 P2d 732, 101 P2d 414(1940), discussed in I Jaureguy and Love, Oregon Probate Law and Practice, section 15, pages 19 through 22, criticized and noted, 20 Or. L. Rev. 164 (1940). The proposed section also makes no such distinction as exists in present ORS 111.020(4) between next of kin and equal degree claiming through different ancestors. Hence the nearer ancestor rule as it exists in present Oregon law is abolished. Since inheritance by more remote collateral relatives is in any event limited by the proposed statute, there is no occasion for the nearer ancestor rule to arise.

Subsection 6 provides for escheat if the decedent leaves no surviving relatives within the preceding subsection. It is similar to the provision of ORS 111.020(6) and 111.030(5) except for the limitations on inheritance by more remote collateral relatives.

7. Comment to Section 6.

This section defines "representation" in greater detail than does present ORS 111.010(4). This definition is consistent with the present interpretation of Oregon law. See I Jaureguy and Love, Oregon Probate Law Practice, sections 9 and 10 (1958). This definition makes it clear that the pattern of stirpital distribution is to be determined at the level of the nearest living lineal descendant of the intestate, rather than at the level of the decedent's children, regardless of whether or not they predeceased decedent. The proposed definition is taken from Model Probate Code, section 22(c) and prevents the anomalous result of such cases as Maud v. Catherwood, 67 Cal. App. 2d 636, 155 P2d 111 (1945), noted 33 Calif. L. Rev. at 324 (1945). Since the operation of the right or representation may differ depending upon the stirpital level chosen as the root generation, it is desirable to specify the level in the definition. The present definition has been adopted by the tentative drafts of the Uniform Probate Code.

8. Comment to Section 7.

Section 7 represents the codification of existing Oregon law. The phrase "degree of kindred" is presently defined and interpreted in ORS 111.040. Supplemental wording defining the precise civil law method of computation is taken from the Model Probate Code of 1946, section 22(b) (5) at page 61. Washington has adopted a similar definition, Washington Probate Code, section 11.02.005(5).

9. Comment to Section 9.

Section 9 is consistent with the rule of construction in existing Oregon law laid down by section 111.010(5).

10. Comment to Section 10.

Section 10 is consistent with present Oregon law in ORS 111.040.

11. Comment to Section 11.

Section 11 is new.

PROPOSED OFFICIAL COMMENTS TO PROBATE CODE REVISION
PROJECT PROPOSAL #4

III.

INHERITANCE BY, THROUGH AND FROM AN ILLEGITIMATE CHILD

This section makes specific the inheritance rights of illegitimate children. The problem of illegitimate children is growing in incidence. It is important to modernize our statutes by, through and from illegitimate persons. Although illegitimacy is still against public policy, any change in the inheritance laws will not promote illegitimacy but merely protect the innocent child. In many jurisdictions the ancient stigma attaching to illegitimacy bars inheritance from collateral relatives, either through the mother or through the father. In light of the changing social attitude toward the illegitimate child, the right of the illegitimate child to inherit from collateral relatives ought to be expanded. Accordingly, this section allows inheritance through the mother in any case and through the father in a situation where the father has been established as provided in subsection 2.

PROPOSED OFFICIAL COMMENTS TO PROBATE CODE REVISION
PROJECT PROPOSAL #3

II.

INHERITANCE BY, THROUGH AND FROM AN ADOPTED CHILD

This section governs the effect of adoption on inheritance. It deals with the status of an adopted person for purposes of inheritance by such person from his adoptive relatives, by adoptive relatives from the adopted person (such as his children) and broadens the coverage to secure the rights of those claiming through the adopted child. This section generally terminates the relationship between an adopted person and his natural parents. The statute preserves the relationship only in the limited situation where a natural parent marries or remarries and the child is adopted by the stepfather or stepmother. This latter exception is consistent with the result reached by the Oregon Supreme Court in the case of Hood v. Hatfield, 235 Or. 38, 383 P2d 1021 (1963), noted 43 Or. L. Rev. 88 (1963) and it explicitly codifies the result of that case.

OFFICIAL COMMENTS TO COMMITTEE PROPOSAL ON ADVANCEMENTS

1. Comment to Section 1.

(a) This section changes present Oregon law in ORS 111.110 by expanding the doctrine of advancements to any person taking by intestate succession as opposed to the present limitation to the issue of the intestate.

(b) Since the intestate's share of real and personal property will be the same for all takers under the descent and distribution provisions, there is no need to distinguish between the real and personal property as is done in present ORS 111.150.

(c) Unlike the Iowa Code, Washington Code and Model Probate Code, this draft does not specify that the person to whom the advancement was made must have been entitled to inherit a part of the estate had the intestate died at the time of making the advancement. It would expand the doctrine of advancements to apply to persons who would not have been heirs had not the intestate died at the time of the advancement but who subsequently became heirs prior to the death of the intestate.

(d) This section specifies that the doctrine of advancements applies only to intestacy and only to persons sharing in the estate of one who has died intestate as to his entire estate. This limitation would not, however, seem to affect the holding of Clark v. Clark, 125 Or. 333, 342, 267 P. 534, 537, that a will might direct that a previous gift be considered an advancement in the determination of the shares into which an estate is to be divided.

2. Comment to Section 2.

This draft follows the approach of proposed Wisconsin probate code, section 852.11(1). The Iowa, Washington and Model probate codes provide that the presumption of a gift is rebuttable. However, the Wisconsin code is in accord with the more limited application of the statute of frauds already existing in Oregon law, ORS 111.120. Since the Wisconsin code represents the latest thinking on the matter and since the present draft does not change existing Oregon law, it would seem to be the preferred approach. The early case of Seed v. Jennings, 47 Or. 464, 83 P. 872 (1905) is in conflict with both the old Oregon statute and this new provision. That case suggested the common law presumption that the voluntary conveyance of property by a parent to a child is presumed to be an advancement, unless it is proved to be a gift. This dictum was contrary to the statute in force at the time and would, in any event, be overruled by the proposed version which reverses the presumption and makes it rebuttable only by evidence in writing.

3. Comment to Section 3.

This section is a substitute for ORS 111.170 and is consistent therewith. It is virtually identical to the Model Probate Code, section 29(c), Iowa Code, section 226, Washington Code, section 11.04.041. The person to whom an advancement is made is charged for it whether he takes per capita or by representation. See generally, Model Probate Code's comment at page 67. For a contrary approach see first tentative draft of revised part 2 Model Probate Code (July 10, 1966), section 211(c) which provides that if the advancee dies before the intestate, the advancement shall not be taken into account in determining descent and distribution of the net intestate estate.

4. Comment to Section 4.

This section adopts subsection (d) of section 310 of a preliminary draft of the Uniform Probate Code. The first tentative draft of the revised part 2 of the Model-Uniform Probate Code (July 10, 1966), section 211(b), however, states a different rule. It provides "The advancement shall be considered as of its value at the time when the advancee came into possession or enjoyment or at the time of the death of the intestate whichever first occurs." The latter approach is also that of the Washington, Iowa and Model probate codes. Section 4 above changes present Oregon law (ORS 111.160) which provides for valuation by the donor or donee in any one of three different writings or its estimated value when granted. The former method presents the possibility of inconsistent valuations arising from each of the authorized writings. In 1 Jaureguy and Love, Oregon Probate Law and Practice, sections 41-46, this problem is noted. The section here obviates the problem and provides only for an objective determination of the value of the advancement at one point in time.