

ADVISORY COMMITTEE
Probate Law Revision

Third Meeting

Date: Saturday, June 13, 1964
Time: 9 a.m.
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse

Suggested Agenda

1. Approval of minutes of May 16 meeting of advisory committee.
2. Report on publicity (Lundy).
3. Report on small estates (Zollinger).
4. Dower and curtesy
 - a. Proposed legislation on release of interests of incompetents (Rough Draft, 6/13/64).
 - b. Changes in nature of interest. See Staff Report No. 2.
 - (1) Report of subcommittee (Allison).
 - (2) Report on possibility of outside research assistance (Riddlesbarger).
5. Guardianship and conservatorship.
 - a. Proposed legislation (Rough Draft, 6/13/64), and report on 1963 legislation on investment by guardians in common trust funds (Zollinger and Lundy).
 - b. Report on 1963 legislation on oil, gas and mineral leases (Carson and Lundy).
 - c. Report on accounting by guardians (Zollinger).
 - d. Report on sales of real property of persons under legal disability without guardianship (Allison).
6. Next meeting of advisory committee.

ADVISORY COMMITTEE
Probate Law Revision

Third Meeting, June 13, 1964

Minutes

The third meeting of the advisory committee was convened at 9:05 a.m., Saturday, June 13, 1964, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland. The following members were present: Dickson, Zollinger, Allison, Carson, Gooding (arrived 10:05 a.m.) and Jaureguy. Butler, Frohnmayer and Riddlesbarger were absent. Also present was Robert W. Lundy, Chief Deputy Legislative Counsel.

Before the meeting was convened, Dickson called to the attention of those present a matter involving the preference to be given expenses of last sickness in the payment of the various charges and claims against estates of decedents that should be considered by the committee at an appropriate point in the course of its deliberations. He referred to ORS 117.110, and pointed out that before 1953 expenses of last sickness followed taxes due the United States in the order of preference of payment, but that the statute section was amended in 1953 to add expenses of last sickness to funeral charges in subsection (1) thereof. He expressed the opinion that, by reason of the applicable federal statute, expenses of last sickness could not be given preference over taxes due the United States, and indicated that he recently had ruled to this effect.

Dickson announced that he had been notified by the Board of Governors of the Oregon State Bar that the Board had appointed Allison to act in a liaison capacity between the Bar and all Bar committees and the advisory committee. Allison reported that he was in the process of preparing the annual report of the Bar Committee on Probate Law and Procedure, of which he currently is chairman; that the Bar committee's recommendations for changes in the probate law would be submitted to the advisory committee and the Law Improvement Committee for their consideration and action [Note: See Minutes, Probate Advisory Committee Meeting, 5/16/64, page 2]; and that he would send Lundy a copy of the Bar committee report.

1. Minutes of Last Meeting. After the meeting was convened, Jaureguy moved, seconded by Zollinger, that reading of the minutes of the last meeting (May 16, 1964) be dispensed with and that they be approved as submitted. Motion carried.

2. Report on Publicity. Lundy reported 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 May issue. Lundy expressed some doubt that news releases on committee activities would be published in newspapers unless particularly newsworthy, and asked whether he should continue routinely to send copies of all news releases to local newspapers and wire service representatives. Dickson expressed the view, and other members agreed, that this practice should be continued for public relations purposes, even though newspapers did not publish the news releases in every case.

Lundy also reported on the response to the form letter, 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, sent to all probate judges, all county clerks, executives of certain banks and trust companies, state and federal tax agencies, presidents of local bar associations and deans of the three Oregon law schools. He indicated that 116 letters had been sent and 8 responses received thus far. He noted that comments and suggestions on problem areas in Oregon's probate and related law embodied in these responses had been reproduced and distributed to members for insertion in the "Comments & Suggestions Received" section of their notebooks.

Allison commented that he had used the news release on the last meeting as the basis for an item published in a newsletter distributed to title companies.

3. Report on Small Estates. [Note: At the last meeting Zollinger had agreed to contact Campbell Richardson, attorney, Portland, who had volunteered to undertake some research for the committee in the area of summary proceedings for administration of small estates of decedents, in order to get that research started.] Dickson reported that he had asked Richardson to undertake research for the committee in the area of probate courts and their jurisdiction instead of in the area of small estates, and that Richardson had agreed to do so.

Zollinger reported that Dickson had suggested to him that Denny Z. Zikes, attorney, Portland, might be willing to undertake the small estates research, in lieu of Richardson; that he had contacted Zikes, who agreed to undertake the research with the understanding that the committee would not expect to receive a report on the research until late September or early October 1964. Zollinger indicated that he had sent Zikes a copy of Model Small Estates Act promulgated by the National Conference of Commissioners on Uniform State Laws in 1951 and some information on small estates legislation in other states; that Lundy, at his request, had sent Zikes some additional information on the subject.

Zollinger remarked that he had previously appointed Butler as chairman of a subcommittee to consider the matter

of summary proceedings for administration of small estates of decedents, and that Butler had prepared and submitted to him a report on the subject. Zollinger distributed copies of Butler's report to the members present and asked whether they wished to consider the report at this time. The committee agreed that such consideration should be postponed until a future meeting. Dickson suggested, and the committee agreed, that the matter of small estates should be scheduled for consideration at a meeting to be held in October 1964.

After brief discussion, the committee agreed that Zikes should report to Zollinger, rather than to Butler.

4. Dower and Curtesy.

a. Release of interests of incompetents. Allison referred to the rough draft of proposed legislation on release of incompetent's dower or curtesy (dated June 13, 1963), which Lundy had prepared pursuant to action by the committee at the last meeting [Note: See Minutes, Probate Advisory Committee Meeting, 5/16/64, page 4] and distributed to the members. Allison commented that if the committee ultimately approved the proposal to abolish the inchoate interest, which appears to be in line with a trend evidenced in recent revisions of the probate law in other states, there would be no problem of release of interests of incompetents to deal with. He suggested, and the committee agreed, that consideration of the rough draft be postponed pending consideration and action by the committee on the matter of abolishing the inchoate interest.

b. Changes in nature of interest. Allison recalled that at the last meeting he had expressed the opinion that abolishment of the inchoate dower and curtesy interest could not operate retroactively as to property acquired before the effective date of the abolishing legislation, on the theory that the inchoate interest was a property right. He commented that, after some study of the matter, he was satisfied that the inchoate interest could be abolished retroactively; that the interest was not a constitutionally protected property right and therefore could be changed or abolished.

Allison commented that at the last meeting the committee appeared to be in substantial agreement that the nature of the dower and curtesy interest should be changed from a life estate in one-half of the deceased spouse's land to a fee estate in an undivided one-fourth, but undecided on or initially opposed to a proposal to abolish the inchoate interest. He recalled that at the last meeting he had referred to an Alaska statute providing the surviving spouse some protection against inter vivos disposition of the family home or homestead by a requirement that both husband and wife join in a conveyance thereof. [Note: See Staff Report No. 2 ("Materials on Family Rights in Decedents' Estates -- A Staff Report to the Advisory Committee on Probate Law Revision," dated June 1964), pages 2 to 4.]

Allison pointed out that the practical effect of the Alaska statute was that the title companies required that both spouses join in any conveyance or mortgage, since from an examination of the title records it was impossible to determine whether property described was in fact the family home or homestead. He stated that in many cases titles were determined to be defective because of failure of both spouses to join in conveyances. He indicated that the problem was so acute that the 1953 Alaska legislature amended the statute by adding provisions that failure of a spouse to join in a conveyance did not affect its validity unless the spouse appeared on the title and that a conveyance would be valid unless the spouse who failed to join filed suit within one year after the recording of the conveyance or filed a notice of interest in the property within that period.

Allison expressed the view that the 1953 additions to the Alaska statute were not completely satisfactory because of the one-year waiting period before good title was assured. He suggested that the practical problem experienced under the Alaska statute constituted a strong argument against adoption of this approach in Oregon.

Allison suggested that, instead of the Alaska approach, the committee consider a proposal that the inchoate dower and curtesy interest be retained only in homestead property owned by one spouse as to which the other spouse had recorded in the title records a declaration of claim of such inchoate interest. He also suggested that the inchoate interest so retained be limited to property acquired during the marriage and that it not apply to property acquired by devise or inheritance, thus, in effect, limiting the interest to what in community property states is the community property. He indicated that the declaration of claim of inchoate interest might be filed in much the same manner as the present procedure for filing a declaration of homestead for exemption purposes. He stated that a guardian could file the declaration on behalf of an incompetent spouse. Allison commented that the interest of a spouse could easily be protected and preserved by such a declaration, but the filing thereof could readily be ascertained from a search of the title records, and in the absence of a recorded declaration the spouse owning the property would be free to convey or mortgage without joinder of the other spouse.

Allison reported that he had discussed his proposal with Jaureguy, who agreed that the proposal was practical, but indicated a belief that the filing of declarations would seldom be done because of lack of knowledge of the existence of the procedure.

Zollinger suggested that the committee consider and decide separately the matter of abolishing the inchoate dower and curtesy interest and the matter of protecting the interest

of a surviving spouse by means of the declaration proposed by Allison or some other method. All members present (Dickson, Zollinger, Allison, Carson and Jaureguy) agreed that Allison and Lundy should proceed with the preparation of a rough draft of proposed legislation changing the dower and curtesy interest to a fee estate in an undivided one-fourth of the land owned by a deceased spouse at the time of his death, thus abolishing the inchoate interest, although all members were not yet in agreement on such abolishment.

Jaureguy suggested that the undivided one-fourth should be of the net estate in land; that is, after payment of debts and administration expenses and subject to being sold for the best interests of the estate of the decedent and the heirs. He commented that if, for example, a decedent died owning land of a value of \$100,000 and owing debts amounting to \$75,000, the surviving spouse would get one-fourth, but children, if any, likely would get nothing. In response to questions by Allison, Jaureguy indicated that the undivided one-fourth interest in personal property a surviving spouse presently might take by electing against the will of a decedent was an interest in net personal property [Note: See ORS 113.050], and that, under his suggestion, the undivided one-fourth of the net estate in land would be the same kind of interest as descends to children in the intestate situation [Note: See ORS 111.020] and the undivided one-fourth to the surviving spouse would be the same whether taken in the intestate situation or in the testate situation by election against will. The committee agreed that the rough draft of proposed legislation should embody Jaureguy's suggestion.

The committee turned to consideration of the separate matter of protecting the interest of the surviving spouse by means of the declaration proposed by Allison or some other method. Allison commented that the protection contemplated would have two advantages: First, the protection against conveyance or mortgage of property inter vivos by an improvident spouse without the other spouse having any voice in the matter, and second, the possibility that if the proposal for abolishing the inchoate interest was submitted to the legislature, it might appear somewhat less drastic and generate less opposition if retention of some protection of this nature could be pointed to. He indicated that his conception of the interest protected was an inchoate interest, in a sense, in an undivided one-fourth of a fee estate, subject to limitations presently existing on the inchoate dower and curtesy interest; in other words, it would be the same as the present inchoate interest except it would be an undivided one-fourth interest in a fee estate.

Zollinger proposed that, instead of an undivided one-fourth interest in a fee estate of all land, the protected interest be a life estate in property owned by a deceased spouse in which the spouses resided at the time of the death

of the deceased spouse, without limitation on value and possibly without limitation on quantity, but subject to existing encumbrances. In answer to a question by Jaureguy, Zollinger indicated that, under his proposal, the personal representative would not have the right to satisfy encumbrances on the family residence out of personal property of the estate of the decedent without the consent of heirs other than the surviving spouse. Zollinger remarked that it appeared sensible not to consider the matter in terms of "homestead," but rather in terms of the family residence, without the limitations as to property exempt from execution, and that the interest of the surviving spouse should be limited to a life estate. In response to a question by Jaureguy, Zollinger commented that he saw no reason why the life estate should not be subject to sale.

Zollinger stated that he was not inclined to favor the final nature of a filed declaration that certain property was the family residence, and indicated that he preferred some limitations on such finality, such as penalties for a false declaration and some means of challenging or testing the truth or falsity of a declaration in a judicial proceeding while both spouses were living. Allison agreed that some provision was desirable to prevent overreaching or fraud by means of a declaration filed by a spouse, and suggested that perhaps the other spouse should be given notice of the filing and afforded a period of time in which to object thereto. Zollinger questioned the value of such notice in a situation where the purpose of the filing of a declaration by one spouse would not be clear to the other, for example where the other spouse moved out of the family residence. Allison responded that such a situation would give rise to a problem only if both spouses did not join in a conveyance or mortgage of the property and a declaration had been filed and not objected to, thus preventing the other spouse from giving clear title without joinder of the spouse who filed the declaration. He indicated that he did not think the problem in such a situation was particularly serious.

Gooding arrived at this point (10:05 a.m.). Dickson explained the current discussion to Gooding and summarized the preceding discussion.

Allison asked for the views of members on that part of his proposal limiting the protected interest to property acquired during the marriage and not acquired by devise or inheritance, or whether the interest should be in any property in which the spouses might reside. Zollinger expressed the view that Allison's proposed limitation should not be made if the committee adopted his suggestion that the interest be a life estate in the family residence. Other members appeared not to agree with Allison's proposal on this particular point.

Lundy asked for the views of members on the approach to protecting the interest of a surviving spouse by treating some inter vivos transfers by the other spouse as being in fraud of the marital rights of the surviving spouse and the transferred property subject to being recovered by means of an action brought by the surviving spouse. He referred to section 6 of the preliminary draft of proposed legislation relating to family rights in decedents' estates prepared in the course of the current Wisconsin study on probate law [Note: See Staff Report No. 2, page 15], section 474.150 of the Missouri Revised Statutes [Note: See Staff Report No. 2, page 27] and section 33 of the Model Probate Code [Note: See Staff Report No. 2, page 42]. Allison commented that he did not favor this approach since under it possible clouds on the title of property conveyed might exist for many years, and that he would rather have some record in existence at the time of a conveyance that could be relied upon. Other members appeared to agree with Allison on this point.

Dickson remarked that Zollinger's proposal would not protect a second wife as to business property her husband owned before his second marriage, where the husband lived with the second wife 30 years and before his death his children by his first wife persuaded him to convey the property to them with a life estate reserved to him. Allison called attention to a similar situation under existing law where there is joint ownership of property by a husband and a third party with survivorship rights, and thus no protection for the wife since she has no inchoate dower in such a joint estate with survivorship.

Allison suggested that the interest to be protected by a declaration filed by a spouse be in any property in the name of the other spouse alone, and not be limited to family residence or homestead property. Some members expressed approval of Allison's suggestion and others expressed disapproval, but it was agreed that Allison and Lundy should proceed with the preparation of a rough draft of proposed legislation incorporating the suggestion.

Allison commented that there would be two rough drafts of proposed legislation: One changing the dower and curtesy interest to a fee estate in an undivided one-fourth of the land owned by a deceased spouse at the time of his death, and the other providing a means of protecting the interest of a surviving spouse by a filed declaration claiming such interest in any property in the name of the other spouse alone during the marriage. There was a brief discussion of the terminology to be used in the rough drafts in lieu of dower and curtesy terminology. Allison indicated that he would work out some new terminology to describe the interests to be embodied in the rough drafts, and suggested that the declaration might be referred to as a declaration of right of inheritance. He

stated that he would prepare rough drafts embodying the ideas considered by the committee and tentatively approved for drafting purposes, and send them to Lundy.

Dickson suggested that Gooding, who at the last meeting had expressed some objection to abolishing the inchoate dower and curtesy interest and predicted similar objection by others in eastern Oregon, be asked to prepare and present objections to the rough drafts and offer alternative suggestions as to how to handle the matters involved, and that Gooding might be able to obtain the views of others in eastern Oregon on the matters. Gooding commented that he was not sure there would be as much opposition in eastern Oregon to abolishing the inchoate interest as he had previously thought. He questioned the purpose of his presenting opposing and alternative views if members of the committee were in agreement. Dickson remarked that all members were not necessarily in agreement. Jaureguy commented that the committee should have the views of persons other than members, and particularly of those in eastern Oregon. Dickson suggested that Gooding ask Riddlesbarger to join with him in presenting opposing and alternative views. Gooding agreed to undertake the assignment.

Zollinger suggested that the rough drafts be prepared and copies distributed to members as soon as possible, so that members would have an opportunity to consider them, prepare critical comment and be ready to discuss them at a meeting to be held in September. It was agreed that the rough drafts should be scheduled for consideration at a meeting to be held in September 1964.

Dickson suggested that the committee should endeavor to have ready for submission to the 1965 legislature proposed legislation in the areas of dower and curtesy, simplified administration of small estates of decedents and guardianship and conservatorship. He expressed the view that the proposed legislation in the area of dower and curtesy might be the most controversial and constituted a major hurdle to be crossed, and indicated that he would like to see this matter considered by the legislature before the committee embarked upon its program for 1965-1967.

5. Guardianship and Conservatorship. [Note: Before the meeting copies of the following had been distributed to members: (1) A rough draft of proposed legislation on guardianship and conservatorship (dated June 13, 1964) prepared by Lundy pursuant to and based upon action by the committee at the last meeting; (2) a report on investment by guardians in common trust funds prepared by Zollinger; (3) a report on oil, gas and mineral leases of wards' real property prepared by Carson; (4) a report on accounting by guardians prepared by Zollinger; and (5) a report on sales of property of persons under legal disability without guardianship prepared by Allison.] It was agreed that

consideration of the rough draft of proposed legislation on guardianship and conservatorship (dated June 13, 1964) prepared by Lundy should be postponed until the next meeting.

a. Investment by guardians in common trust funds.

Zollinger referred to his report on investment by guardians in common trust funds and explained his recommendation therein for amendment of the second sentence of subsection (1) of ORS 126.250 by placing time or other deposits of cash first in the list of property in which a guardian of the estate might invest without prior approval of the court and by placing common trust funds composed solely of other property in which a guardian might invest without prior approval of the court last in such list. [Note: A copy of this report constitutes Appendix A to these minutes.]

Lundy suggested that the second sentence of subsection (1) of ORS 126.250 might be made somewhat easier to read and understand if each category of property in which a guardian of the estate might invest without prior approval of the court was made a separate paragraph. Zollinger indicated he had no objection to this suggested change in the form of the sentence.

After discussion, Allison moved, seconded by Gooding, that Zollinger's recommendation on the change in substance of the second sentence of subsection (1) of ORS 126.250 and Lundy's suggestion on the change in form be adopted. Motion carried unanimously. Lundy was requested to prepare a rough draft of proposed legislation based on the motion.

Lundy questioned certain terminology used in the common trust fund provision. He asked whether the investment was "in the fund" or "in interests in the fund," and whether the fund was "composed of" the subjects of investment or "maintained for" investment in those subjects. Zollinger responded that investment "in participations in the fund" might be appropriate and that investments in the fund were evidenced by certificates representing shares in the fund, but commented that he did not consider changes in terminology necessary in the respects referred to by Lundy. Lundy suggested that the intent that only bank or trust company guardians might invest in common trust funds might be made more clear if the reference to common trust funds "as defined in ORS 709.170" were changed to "as provided in ORS 709.170." Zollinger indicated he had no objection to this suggested change, and commented that the terminology might be changed by specifically stating that the investment in a common trust fund was to be made by a corporate guardian authorized by ORS 709.170 to maintain such fund.

b. Oil, gas and mineral leases of wards' real property.

Carson referred to his report on oil, gas and mineral leases of wards' real property and explained his recommendations therein for deletion of the words "from a well drilled" in

ORS 116.890, 126.436 and 126.490 and with respect to the words "or other instrument" in ORS 126.436. [Note: A copy of this report constitutes Appendix B to these minutes.]

Zollinger commented that perhaps the use of the words "or other instrument" reflected a feeling on the part of the sponsors of the 1963 legislation that the right to explore or prospect for and extract, remove and dispose of oil, gas and minerals might not involve in all cases a lease, strictly speaking, but might involve in some cases an easement. Allison expressed the view that the use of the words "or other instrument" was confusing, indicated that he was unsure as to what these words might mean and suggested deletion of these words. In response to a question by Dickson, Allison commented that a right given to make seismographic surveys for oil might involve only a right of access.

Zollinger questioned the provision added to ORS 126.436 in 1963 requiring the court to fix the period of the oil, gas or mineral lease but specifying that the period should be "for a primary period of 10 years and so long thereafter * * *", and expressed disapproval of requiring the court to order such a term or condition of the lease about which the court had no knowledge and over which the court had no control. Carson suggested that perhaps the 10-year period should be a maximum, with the court being authorized to fix a lesser period. Zollinger indicated his doubt that Carson's suggestion was the best approach to the problem, and commented that the statute might either fix the period of the lease with no reference to inclusion thereof in the court order or that the provision fixing the period of the lease might be deleted and the matter left to the discretion of the court.

Lundy noted that the 1963 legislation inserted the word "surface" before "lease" in the second sentence of ORS 126.436, and added the new third sentence relating to oil, gas and mineral leases. He commented that the statute purported to govern all kinds of leases, and questioned whether "surface" leases included all leases other than the oil, gas and mineral leases described in the new third sentence.

Allison suggested that it might be advisable to attempt to ascertain more clearly the intention of the sponsors of the 1963 legislation on oil, gas and mineral leases in order that the committee might have some guidance in its efforts to improve the 1963 provisions. Zollinger commented that Ronald W. Husk, attorney, Eugene, and Vernon D. Gleaves, attorney, Eugene, might have been involved in the preparation of the 1963 legislation and that, if so, their explanation and comment should be invited. Dickson expressed the view that the committee should not take any action with respect to the provisions of the 1963 legislation until more information thereon had been obtained.

Lundy suggested that the committee might postpone consideration of the 1963 provisions on oil, gas and mineral leases as they pertain to guardianship and conservatorship until such time as the committee also considers similar 1963 provisions in the decedents' estates statutes, and that changes in the 1963 provisions, if any, be made in both areas at the same time. Zollinger concurred in this suggestion, and the committee agreed that the matter should be postponed as suggested.

c. Accounting by guardians. Zollinger referred to his report on accounting by guardians and explained his recommendations therein for amendment of subsections (4) and (5) of ORS 126.336. [Note: A copy of this report constitutes Appendix C to these minutes.]

Gooding referred to that part of Zollinger's proposed amendment of subsection (4) of ORS 126.336 providing for mailing or delivering copies of accounts of a guardian of the estate to certain persons "at or prior to the time of filing each account," and questioned the mailing or delivering "prior to" the filing. Dickson asked whether the mailing or delivering should be at least 10 days before the filing. Zollinger indicated that he did not favor a 10-day notice of filing accounts other than final accounts, that such notice was not necessary and that, under subsection (6) of ORS 126.336, settlement of accounts other than final accounts did not preclude objections thereto at the time of the final account. Lundy suggested, and Zollinger agreed, that, since the guardian would be required by Zollinger's proposed amendment to file proof of the mailing or delivering at the time of filing an account, the mailing or delivering should be "prior to" and not "at or prior to" the time of filing the account. Lundy also suggested, and the committee agreed, that the guardian should "cause" the mailing or delivering of the copies of the account.

Lundy referred to that part of Zollinger's proposed amendment of subsection (4) of ORS 126.336 providing for mailing or delivering copies of accounts to the "superintendent or other principal administrative officer" of a state institution (i.e., Oregon State Hospital, F. H. Dammasch State Hospital, Eastern Oregon State Hospital, Oregon Fairview Home or Columbia Park State Home) to which the ward had been committed, and asked whether the quoted words meant the superintendent or, in his absence, some other officer of the institution, or the superintendent whether designated by that title or another. He pointed out that the title of the executive heads of all the state institutions referred to presently was "superintendent." Zollinger responded that he intended the mailing or delivering to be made to the superintendent whether designated by that title or another, and expressed the view that "or other principal administrative officer" should be deleted.

Dickson suggested that, since the Board of Control is charged with administration of the statutes relating to responsibility for the cost of care of persons in state institutions, copies of accounts should be mailed or delivered to the Secretary of the Board, rather than to the superintendent of one of the state institutions. The matter of the possible abolishment or transfer of functions of the Board in the future was discussed, but the committee agreed that copies of accounts should be mailed or delivered to the Board and that, if the Board were abolished or its functions transferred in the future, the provision for mailing or delivering accounts of guardians could at that time be adjusted. Carson commented that mailing or delivering to the superintendents should be retained since personnel of the state institutions have occasion to check into the background on wards and the information contained in the accounts of guardians would be useful to them. Dickson suggested, and the committee agreed, that copies of accounts should be mailed or delivered to both the Board of Control and the superintendent of the appropriate state institution.

Lundy suggested that the reference to a state institution be the one to which the ward had been committed "or admitted," in order to cover the voluntary commitment situation. Carson suggested that, instead of the "committed or admitted" wording, the reference be to a state institution "in which the ward is a patient." Lundy questioned whether the "patient" wording would cover a ward committed or admitted but out of the institution on trial visit, and referred to the possibility of the use of outpatient services of the institution by wards not committed or admitted thereto. Zollinger suggested, and the committee agreed, that the reference should be to a state institution to which the ward had been "committed or admitted and not discharged."

Lundy referred to that part of Zollinger's proposed amendment of subsection (4) of ORS 126.336 providing for mailing or delivering copies of accounts to the "guardian of the person of the ward, if there be a guardian of his person other than the guardian of his estate," and suggested that the wording be changed to "separate guardian of the person, if any, for the ward." Zollinger commented that he preferred his wording, and the committee expressed approval thereof.

Lundy referred to that part of Zollinger's proposed amendment of subsection (4) of ORS 126.336 providing for mailing or delivering copies of accounts to the ward's spouse, or children, or parents or brothers and sisters, and suggested, and the committee agreed, that the alternatives specified in these provisions be set forth in a single paragraph, rather than in four separate paragraphs. He also suggested, and the committee agreed, that the proof of mailing or delivering filed at the time of filing an account under Zollinger's proposed amendment of subsection (4) be "proof satisfactory to the court" instead of the "certificate of the guardian or his attorney."

Dickson asked whether some wards, such as spendthrifts and adult wards who were not mentally incompetent, should receive copies of accounts other than final accounts. Jaureguy expressed the view that spendthrift wards should receive such copies. Zollinger suggested, and the committee agreed, that a ward "not a minor or an incompetent" should be added to the list of persons entitled to receive copies of accounts under his proposed amendment of subsection (4) of ORS 126.336, and that the wording "a ward not under legal disability" in subsection (5) be deleted.

The matter of authorizing objections to accounts other than final accounts under Zollinger's proposed amendment of subsection (4) of ORS 126.336 was discussed. Zollinger expressed disapproval of such authorization, indicated that, as provided in subsection (6) of ORS 126.336, settlement of such accounts was without prejudice to objections thereto made at the time of the final account and commented that the objections of other persons to accounts other than final accounts should not preclude objections thereto by the ward or his personal representative when the guardianship is terminated. After further discussion, the committee agreed that objections to accounts other than final accounts should not be provided for, and that the second sentence of subsection (5) of ORS 126.336 should continue to apply only to final accounts.

Lundy referred to the previous decision of the committee to delete the wording "a ward not under legal disability" from subsection (5) of ORS 126.336, and asked whether there should not be personal service of the final account on such ward. Zollinger agreed there should be such service, and indicated that he contemplated personal service of the final account on the persons entitled to receive copies of accounts under his proposed amendment of subsection (4) as well as persons referred to in subsection (5). Lundy asked whether the distinction between subsection (4) and subsection (5) was the manner of giving copies of accounts, rather than the categories of persons entitled to receive them, and the committee agreed that the manner of giving copies of accounts was the distinction.

Lundy was requested to prepare a rough draft of proposed legislation based upon Zollinger's proposed amendments of subsections (4) and (5) of ORS 126.336, and modifications thereof approved by the committee in the course of discussion thereof.

d. Sales of property of persons under legal disability without guardianship. Allison referred to his report on sales of property of persons under legal disability without guardianship and explained his recommendations therein for amendment of ORS 126.555 by increasing the maximum dollar amount limitation from \$1,000 to \$2,500, and extending

application of the statute section to cash sales, subject to confirmation by the court, of real and personal property of a person under legal disability. [Note: A copy of this report constitutes Appendix D to these minutes.]

Allison referred to the action by the committee at the last meeting restricting the \$1,000 maximum dollar amount limitation to the personal property of a person under legal disability, instead of the "estate" of such person. [Note: See Minutes, Probate Advisory Committee Meeting, 5/16/64, page 11.] He indicated that this restriction created some difficult drafting problems when he attempted to extend the application of ORS 126.555 to cash sales of real and personal property, and that for purposes of simplicity in drafting he increased the maximum dollar amount limitation to \$2,500 and retained the "estate" as the basis therefor for purposes of all transactions contemplated by the statute section.

Zollinger referred to the requirement of Allison's proposed amendment of ORS 126.555 that the cash sale of property be "subject to confirmation by the court," asked whether "confirmation" contemplated the filing of a report of sale and a hearing thereon by the court and commented that it might be sufficient if the sale were merely "approved" by the court. Allison expressed his approval of substituting "approved by the court" for "subject to confirmation by the court." Zollinger suggested that the sale be for cash "in an amount approved by the court." Allison commented that the court should approve the sale transaction rather than just the amount, and that the approval should be an affirmative requirement, rather than the sale being "subject to" the approval. The committee agreed that the sale should be approved by the court.

Dickson questioned the advisability of having the procedure set forth in ORS 126.555, and commented that the court had no practical supervision or control over funds or other property received by a person for another under legal disability under the statute section after the conclusion of the proceeding. He expressed the opinion that the only justification for the procedure was found in the situation involving settlement of small claims for damages, and that he did not favor using the procedure in other situations. Zollinger referred to his previous illustration of a need to extend the application of ORS 126.555 to sales of real property interests of small value [Note: See Appendix B, Minutes, Probate Advisory Committee Meeting, 5/16/64, page 12], and expressed the view that in such situations it should not be necessary to appoint a guardian of the estate. Dickson indicated that he agreed the procedure would be useful in such situations.

Zollinger expressed regret that a method of providing for settlement without guardianship of small personal injury claims of a minor had not been devised for the situation where, for example, the minor might own real property of relatively large

value but did not require a guardian of the estate therefor. Lundy noted that at one point in the course of its deliberations the advisory committee that produced the revision of the guardianship and conservatorship statutes enacted in 1961 considered a maximum dollar amount limitation on the procedure embodied in ORS 126.555 in terms of the value of the transaction (i.e., the debt or other chose in action to be settled or the property to be received), rather than in terms of the total estate of the person under legal disability, and suggested that this approach might be reconsidered. Zollinger expressed approval of this approach, and the committee agreed.

The matter of increasing the maximum dollar amount limitation in ORS 126.555 to \$2,500 was discussed at some length. Zollinger pointed out that the \$1,000 figure was presently used in procedures for disposing of small estates of decedents (ORS 116.020) and small guardianship estates (ORS 126.516). In answer to a question by Lundy, Zollinger indicated he did not think a distinction should be made between sales of property and other transactions covered by ORS 126.555 in terms of the maximum dollar amount limitation, although the \$1,000 figure was so small that the procedure would probably seldom be used in the case of cash sales of real property. Lundy commented that perhaps, as a result of future consideration by the committee of summary proceedings for administration of small estates of decedents and a definition of small estates for such purposes, the present concept of the value of "small" estates might be revised upward. Allison pointed out that the trend evidenced in recent probate law revisions in other states appears to be to increase materially the value of property that may be dealt with in an informal manner.

Allison suggested that perhaps the problem of the transaction involving a person under legal disability without guardianship was not so much a matter of limitations on availability of the procedure, such as on the value of the transaction, but a question of proper supervision and control over the use of the funds or other property involved. Dickson commented that perhaps close supervision and control by the court should not be sought, that the maximum dollar amount limitation should be increased and that reliance should be placed upon the character and integrity of the person who handled funds or other property of a person under legal disability. Zollinger expressed the opinion that the approach referred to by Dickson might be better than requiring a more expensive and complicated procedure, and that perhaps the advantages of a less expensive and complicated procedure outweighed the disadvantages of some lack of practical close supervision and control by the court. The committee agreed, at least tentatively, that the maximum dollar amount limitation in ORS 126.555 should remain \$1,000.

Lundy was requested to prepare a rough draft of proposed legislation based upon Allison's proposed amendment of ORS 126.555, and modifications thereof approved by the committee in the course of discussion thereof.

6. Next Meeting of Advisory Committee. The matter of whether or not meetings of the committee should be held during the summer months was discussed. Lundy commented on his availability to serve the committee during the balance of 1964, and indicated that his availability would be severely curtailed after the first part of August. The committee agreed to hold meetings during the summer months.

The next meeting of the advisory committee was scheduled for Saturday, July 18, at 9 a.m., in Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The matters to be scheduled for consideration at the next meeting were discussed. Lundy commented that the principal matter for consideration at the next meeting would probably be a rough draft of proposed legislation relating to guardianship and conservatorship, which would include revisions of certain provisions of the Oregon statutes on the subject based upon action by the committee at the last meeting and this meeting.

Zollinger indicated that Butler had prepared reports on Comment & Suggestion Nos. 12, 15 and 20, all relating to guardianship and conservatorship matters. [Note: Carson, as chairman of the Subcommittee on Guardianship and Conservatorship, had assigned to Butler, for his consideration and recommendation, certain of the comments and suggestions pertaining to guardianship and conservatorship reproduced in the "Comments & Suggestions Received" section of the advisory committee notebook. Because of unexpected illness, Butler was unable to undertake the assignment before the last meeting. See Minutes, Probate Advisory Committee Meeting, 5/16/64, page 12.] Zollinger distributed copies of Butler's reports to the members present, and commented that these reports should be considered at the next meeting.

Zollinger asked if the comments and suggestions received that were most recently reproduced and distributed to members contained matters on guardianship and conservatorship that should be assigned to someone for comment and recommendation. Lundy responded that only one of those comments and suggestions (Comment & Suggestion No. 30) pertained to guardianship and conservatorship; that this one was submitted by the county clerk of Gilliam County, who expressed the view that the responsibilities of a conservator with respect to inventories and appraisals were not clear; and that he had responded to the county clerk and pointed out that a conservator appeared to be subject to the same provisions of law applicable to a guardian of the estate with respect to inventories and appraisals (i.e., ORS 126.636 appeared to make the provisions of ORS 126.230 applicable to conservatorships).

Allison indicated that he would submit the recommendations for changes in the probate law by the Bar Committee on Probate Law and Procedure to the advisory committee at the next meeting.

The meeting was adjourned at 1:30 p.m.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, June 13, 1964)

REPORT
June 8, 1964

To: Members of the Advisory Committee
on Probate Law Revision

From: Clifford E. Zollinger

Subject: Investment by guardians in common trust funds

Prior to the enactment of the 1961 Guardianship Code, there was no statutory provision for investments by guardians without court approval. ORS 126.320 (2) declared that it was the duty of the guardian "with the approval of the court, to invest the funds of the ward in accordance with the statutes of the State of Oregon then pertaining to investments by fiduciaries." ORS 126.325 (2) added that "A guardian may, with the approval of the court, invest the funds of his ward in participations in common trust funds * * * ."

The 1961 Code provided in ORS 126.250 (1) for investment of the property of the ward pursuant to the Prudent Man Rule and provided further:

"No investment shall be made without prior approval of the court by order in any property other than interest-bearing obligations of or fully guaranteed by the United States or interest-bearing obligations of this state or any county, city, port district or school district of this state, issued in compliance with law, and the issuer of which has not defaulted in the payment of either principal or interest of any general obligation bond within five years next preceding the date of the investment."

The foregoing was amended in 1963 to permit a corporate guardian to invest the estates of its wards, without court order, in common trust funds consisting exclusively of interest-bearing obligations of or fully guaranteed by the United States and time or other deposits of cash.

The provision for investments in common trust funds was introduced in the middle of the subsection, following the authority to invest in obligations of or fully guaranteed by the United States and preceding the authority to invest in obligations of this state and certain of its political subdivisions.

At our last meeting, I reported on Comment & Suggestion No. 10 relating to the function of the Veterans Administration in respect to the estates of wards who receive federal

funds through the Veterans Administration. I prefaced my recommendation that ORS 126.250 (3) be deleted with the observation that:

"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."

I call attention to this error because it demonstrates that, at least to the casual reader, the statute in its present form may be read as meaning that guardians may not, without court approval, invest in obligations of this state or of counties, cities, port districts or school districts of this state, although such obligations may be included among the investments of common trust funds in which the estate of ward may be invested.

I am convinced that the construction which I put on the statute when I was reading it with another question primarily in mind is not a correct construction, but I think the statute should be amended so that the purpose of the 1963 amendment will be expressed more accurately.

I therefore propose that, in addition to the deletion of subsection (3), subsection (1) of ORS 126.250 be amended to read as follows:

"(1) A guardian of the estate may invest the property of the ward as provided in this section, ORS 128.020 and any other law applicable to investments by guardians. No investment shall be made without prior approval of the court by order in any property other than time or other deposits of cash, interest-bearing obligations of or fully guaranteed by the United States, [or common trust funds, as defined in ORS 709.170, composed of investments in interest-bearing obligations of or fully guaranteed by the United States, and time or other deposits of cash,] or interest-bearing obligations of this state, issued in compliance with law, and the issuer of which has not defaulted in the payment of either principal or interest of any general obligation bond within five years next preceding the date of the investment, or common trust funds, as defined in ORS 709.170, composed solely of assets in which guardians may invest without prior approval of the court."

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, June 13, 1964)

REPORT

June 9, 1964

To: Members of the Advisory Committee
on Probate Law Revision

From: Wallace P. Carson

Subject: Oil, gas and mineral leases of wards' real property

The title of chapter 417, Oregon Laws 1963, reads: "Relating to powers of executors, administrators and guardians; creating new provisions; amending ORS 116.745, 116.825 (decedents' estates), 126.436 and 126.490 (guardianship estates); * * * ." As is indicated by the title of this Act, certain of its provisions are applicable to decedents' estates and others are applicable to guardianship estates.

This report relates principally to the provisions of this Act that apply to guardianship estates, it being understood that its provisions affecting decedents' estates will be considered later by the Advisory Committee on Probate Law Revision when the statutes governing decedents' estates are considered.

The amendments made by this Act primarily concern leases providing for "exploring or prospecting for and extracting, removing and disposing of oil, gas and other hydrocarbons." The amendments apply, also, to "all other minerals or substances, similar or dissimilar." Nevertheless, the amendments ostensibly confine their application to substances "produced from a well drilled by the lessee" (emphasis supplied).

Accordingly, it would seem that the phrases indicated below should be deleted, by further amendment, from ORS 126.436 and 126.490, respectively, and, also, from ORS 116.890 (because of its application to a guardian, as well as to other fiduciaries):

ORS 126.436, line 17: [~~from-a-well-drilled~~].

ORS 126.490, line 10: [~~from-a-well-drilled~~].

ORS 116.890, lines 12 and 13: [~~from-a-well-drilled~~].

As has been suggested above, similar phrases appearing in the statutes governing decedents' estates should be considered by the Advisory Committee on Probate Law Revision at some appropriate time in the future. For examples, see ORS 116.745, 116.825, 116.880 and 116.890.

Other words contained in ORS 126.436, as amended by chapter 417, Oregon Laws 1963, that should be given attention are:

ORS 126.436, lines 11 and 12: "or other instrument."

Those words ("or other instrument") have been included in a sentence in ORS 126.436, as amended by chapter 417, Oregon Laws 1963, that, in part, reads: "An order authorizing the execution of a lease or other instrument for the purpose of exploring or prospecting for and extracting, removing and disposing of oil, gas and other hydrocarbons, * * *" (emphasis supplied).

In view of the fact that the words "or other instrument" have not been used in connection with the word "lease" in ORS 126.490, as amended by chapter 417, Oregon Laws 1963, or in other sections of the statutes governing leases that guardians may execute (for examples, see ORS 126.406 et. seq.), would it not be advisable either to cause "or other instrument" to be deleted from ORS 126.436, or to cause those words, or words of like meaning, to be inserted in the other sections of the statutes concerning leases that guardians may execute?

APPENDIX C

(Minutes, Probate Advisory Committee Meeting, June 13, 1964)

REPORT

June 10, 1964

To: Members of the Advisory Committee
on Probate Law Revision

From: Clifford E. Zollinger

Subject: Accounting by guardians

At pages 10 and 11 of the Probate Advisory Committee Minutes of its meeting on May 16, 1964, a record is made of the discussion of proposed amendments to subsections (4) and (5) of ORS 126.336. The section relates to accountings by guardians.

Subsection (4) provides that a copy of each accounting shall be given "to the person or institution having the care, custody or control of the ward."

Subsection (5) provides that the final account shall be served personally on a ward not under legal disability, the person or institution having the care, custody or control of a ward under legal disability, the executor or administrator of a deceased ward and a successor guardian. Provision is made for an appearance by any person so required to be served for the purpose of objecting to the final account.

There is no provision for appearances in response to the receipt of intermediate accountings. Subsection (6) provides for settlement of any account but that settlement shall be without prejudice to objections thereto at the time and in the manner that objections may be made to a final account.

Several questions are raised in this connection, among them:

In the case of an incompetent adult ward who is receiving care at a nursing home, does this require that the nursing home shall receive a copy of each accounting?

Does the provision requiring the guardian to "give" a copy of the intermediate accounting require evidence that this duty has been performed? Is a distinction to be made between "give" in subsection (4) and "serve" in subsection (5) of this section? Precisely what is the distinction?

Should a distinction be made between state institutions for the care of mentally diseased persons on the one hand and nursing homes and homes for the aged, whether privately or publicly owned and operated?

I suggest the following amendment to subsection (4):

(4) The guardian of the estate shall, [give a copy of each account to the person or institution having the care, custody or control of the ward.] at or prior to the time of filing each account, mail or deliver a copy thereof to:

(a) The superintendent or other principal administrative officer of any of the institutions described in ORS 426.010, 427.010 or 428.420 to which the ward shall have been committed and

(b) The guardian of the person of the ward, if there be a guardian of his person other than the guardian of his estate and

(c) The ward's spouse, if a resident of Oregon and not under legal disability or

(d) The ward's child or children resident in Oregon and not under legal disability, if the ward does not have a spouse resident in Oregon and free from legal disability or

(e) The ward's parent or parents resident in Oregon and not under legal disability, if the ward does not have a spouse or child resident in Oregon and free from legal disability or

(f) The ward's brothers and sisters resident in Oregon and not under legal disability, if the ward does not have a spouse or child or parent resident in Oregon and free from legal disability.

There shall be filed with each account the certificate of the guardian or his attorney that copies thereof have been mailed or delivered as herein provided, showing the names of the

persons to whom such mailing or delivery was made and the addresses to which or at which such copies were mailed or delivered.

Because "each account" includes the final account, there does not appear to be any occasion to repeat the foregoing in subsection (5), which may be amended to read:

(5) The guardian of the estate shall cause a copy of his final account to be served personally on a ward not under legal disability, [the person or institution having the care, custody or control of a ward under legal disability,] the executor or administrator of a deceased ward and a successor guardian. [Within 10 days after the date of the service,] Any person [or institution so] required by subsections (4) and (5) of this section to be served or to whom a copy of the account must be mailed or delivered may make and file in the guardianship proceeding written objections to the account within 10 days after the date of service, mailing or delivery thereof to or upon him.

I do not think that it is necessary to make any amendment to subsection (6).

APPENDIX D

(Minutes, Probate Advisory Committee Meeting, June 13, 1964)

REPORT
June 9, 1964

To: Members of the Advisory Committee
on Probate Law Revision

From: Stanton W. Allison

Subject: Sales of property of persons under legal disability
without guardianship

At the last meeting of the Advisory Committee I was requested to prepare a proposed amendment to ORS 126.555 to provide for sales of property of minimum value where no guardian is appointed. I suggest the following amendment to this section:

Section . ORS 126.555 is amended to read:

126.555. 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, including choses in action, is not more than [\$1,000] \$2,500, any court having probate jurisdiction, upon petition therefor and with such notice as the court may order or without notice, and without the appointment of a guardian of the estate for such person, may make an order authorizing a person designated in the order to sell for cash, subject to confirmation by the court, any or all of the real and personal property of the estate, to settle debts and other choses in action due to such person under legal disability and receive payment [thereof] therefor, and to receive property of such person under legal disability. The person so designated in the order of the court may deliver a bill of sale or a conveyance of such personal or real property sold, may give a release and discharge for any such debt or

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other chose in action or for any such property, and shall hold,
invest or use all funds or other property so received as or-
dered by the court.