

ADVISORY COMMITTEE

Probate Law Revision

Thirty-seventh Meeting

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

Dates) 1:30 p.m., Friday, June 16, 1967  
and: and  
Times) 9:00 a.m., Saturday, June 17, 1967  
Place: Judge Dickson's courtroom  
244 Multnomah County Courthouse  
Portland, Oregon

Suggested Agenda

1. Minutes of the May 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 (Discussion to be led by Mr. Frohnmayer).
12. Next Meeting.

ADVISORY COMMITTEE  
Probate Law Revision

Thirty-seventh Meeting, June 16 and 17, 1967  
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The thirty-seventh 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, June 16, 1967, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

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

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

Also present was Robert W. Lundy, Legislative Counsel.

Miscellaneous Matters

Lundy reported that the presiding officers of the Oregon legislature, acting in the current absence of a Legislative Counsel Committee, had approved reimbursement from Legislative Counsel Committee funds for expenses incurred by Mapp in attending the work session of the Reporters on the proposed Uniform Probate Code, from June 12 to July 15, 1967, at the University of Colorado Law School in Boulder, Colorado. Dickson noted that he had received a post card from Mapp, in which the latter indicated he had become an active participant in the work session, rather than merely an observer. Mapp's Colorado address is: Thomas W. Mapp, Uniform Probate Code Project, Kittredge Halls, Boulder, Colorado 80302.

Lundy reported that the legislative presiding officers also had approved the engagement of Allison's services to prepare a final draft of a revised Oregon probate code to be proposed by the advisory committee and submitted to the Law Improvement Committee. Lundy indicated that compensation for Allison's services and incidental secretarial and other

expenses would be paid from Legislative Counsel Committee funds allocated to the Law Improvement Committee and law revision program. Allison commented that he had been provided with office space (Room 251) in the courthouse across the hall from Dickson's courtroom, and had obtained the part-time services of a secretary and other facilities to assist him in his work.

Allison outlined the procedure he planned to follow in his drafting work on the proposed revised probate code. He indicated that, following consideration by the committees of the drafts contained in the blue notebooks distributed to members before the May 1967 meeting, he would proceed to revise those drafts in accordance with action thereon by the committees and make such changes in form and wording as were necessary to achieve clarity in meaning and other aims of good draftsmanship. He stated that he would then send the revised drafts, together with any necessary explanation of changes or questions, to those members of the committees who originally had worked on the areas covered by the drafts, with the request that those members review the revised drafts and offer suggestions and comments. Following this review by the particular members concerned, Allison indicated, he would again revise the drafts, if necessary, and lay them aside for incorporation in a final draft of the proposed revised code and subsequent consideration by the committees as a part of a whole.

Allison indicated that responses relating to his revised drafts by members of the committees who reviewed those drafts, as well as other correspondence to him by members, should be addressed to him at 251 Multnomah County Courthouse, Portland, Oregon 97204, in care of Department No. 7, Circuit Court, Fourth Judicial District.

Zollinger remarked that one of the most important tasks of the committees was to promote acceptance of the proposed revised probate code, and that a significant aspect of this task was the preparation and publication of good editorial comment on the parts and sections that ultimately make up the code. He suggested that the draftsman should assume some responsibility for such editorial comment, both in initial preparation thereof and in reviewing, evaluating and suggesting necessary revision of comment prepared by particular members of the committees on particular areas of the code. Dickson remarked that editorial comment should be available to the committees when they considered a final draft of the code. In response to an inquiry by Gilley, Dickson expressed the view, with which there appeared to be general agreement, that the editorial comment published should not reflect the differing

views of committee members on particular points, and that a united front should be presented on matters approved by a majority of the advisory committee. Riddlesbarger suggested that the editorial comment published in the study draft of the proposed Wisconsin probate code constituted a good model to follow in preparing editorial comment for the proposed Oregon code.

Dickson observed that when committee members accepted speaking engagements on the proposed revised code, a presentation limited to a half hour, for example, was inadequate for the purpose, and that more time should be sought. He suggested that the seminar approach, with several committee members involved, might be desirable.

#### Disposition of Human Bodies

Dickson referred to the provisions of ORS chapter 97 relating to the disposition of human bodies, and suggested that some clarification and improvement of these provisions might be considered as a part of the probate revision project. Allison indicated that he would note the matter for future consideration by the committees.

#### Wills

Riddlesbarger pointed out that the Legislative Counsel's office had prepared a first draft, dated January 30, 1967, relating to the subject of wills, and that this draft was contained in the blue notebooks distributed to members before the May 1967 meeting, following tab 10. He indicated that he had prepared a revision of that first draft, and proceeded to distribute copies of the revision to committee members present. [Note: A copy of Riddlesbarger's revision constitutes Appendix A to these minutes.] Riddlesbarger explained that, in the sections of the revision, words in parentheses were words of the first draft to be omitted, while words underscored were new words to be inserted.

Section 1. Who may make a will. Riddlesbarger suggested that consideration might be given to deletion of "or who has been lawfully married" from section 1 of the revision, noting that the comparable section of the proposed Wisconsin Probate Code (section 853.01) did not contain such a provision, but indicated that he did not recommend such deletion. In response to a question by Jaureguy, Lovett commented that the minimum age for marriage in Oregon was 18 for males and 15 for females, with consent, and that the minimum age in some other states was less than in this state.

Riddlesbarger explained his preference for "make a will" to "dispose of his property by will," commenting that the property disposition concept could be incorporated in the definition of the term "will" as a testamentary instrument disposing of one's property, or that merely appoints an executor, or that merely revokes or revives another will. Zollinger indicated that he favored retention of "dispose of his property by will" in section 1, and then adding to the section a second sentence defining the term "will," rather than having the definition in another section at the beginning of the proposed revised code. He expressed the view that the definition of "will" in section 3, 1963 Iowa Probate Code, was a satisfactory one. After further discussion, Riddlesbarger suggested, and it apparently was agreed, that section 1 should state that a person may by will dispose of his property, appoint (or nominate) an executor or revoke or revive another will, followed by a definition of "will" as including a codicil.

Section 2. Execution of a will. Riddlesbarger pointed out that section 2 of the revision would require a testator to publish the will in the presence of each of the witnesses. He expressed the view, with which Dickson agreed, that the witnesses should be made aware of what they were signing.

Zollinger suggested that "declare that the instrument is his will" be used in (1)(a) and (2)(a) of section 2, instead of "publish the will." He also suggested that "thereon" be substituted for "to the will" in the second sentence of (1)(d) of section 2.

The question of whether, in order to satisfy the requirement of publishing or declaring the will, the testator himself must state that the instrument is his will was discussed briefly. Riddlesbarger asked whether the testator might act through an agent in this regard; for example, a statement by the testator's attorney. Butler remarked that such a statement by the testator's attorney in the presence of the testator, and the testator's failure to contradict such statement, might meet the requirement of declaring the will.

Braun and Richardson raised the question of instruments not wills but testamentary in nature and, in order to cover certain contingencies, executed with the same formalities as wills, and noted that such instruments could not be declared wills as required by section 2. Zollinger commented, and Dickson and Butler agreed, that such instruments should not be treated as wills, and that the testamentary purposes of such instruments could be accomplished by true wills in the event of any uncertainty.

Gilley and Richardson, referring to (2)(d) of section 2, expressed concern as to what acts would unmistakably indicate that the will had been signed by the testator or his proxy. After further discussion, Gilley moved, seconded by Braun, that (2)(d) of section 2 be deleted. Motion carried.

Section 3. Witness as beneficiary. Riddlesbarger explained the substitution of "gives" for "bequeathed or devised" in the last sentence of section 3 of the revision. Allison suggested it might be desirable to retain "bequeathed or devised." He also remarked that the last sentence might be relocated at the beginning of the section.

The definition of an interested witness in subsection (3) of section 853.07, proposed Wisconsin Probate Code, was discussed. Gilley moved, seconded by Zollinger, that the substance of the Wisconsin definition be included in section 3. Motion carried.

Section 4. Validity of a will. The comment under section 4 of the first draft was discussed briefly. No change was made in section 4 of the revision.

Section 5. Testamentary additions to trusts. Riddlesbarger pointed out that subsections (7), (8) and (9) of section 5 of the first draft were not contained in section 5 of the revision. He suggested that subsection (7) was covered by section 21 of the revision, and that subsections (8) and (9) were not appropriate since section 5 differed from the Uniform Act in some respects. Zollinger expressed the view that subsection (8) appeared to be of some value in calling for consideration of court decisions on similar statutes in other states. After further discussion, it was agreed that subsection (8) should be added to section 5 of the revision as subsection (7) thereof, but that subsections (7) and (9) should not be added to section 5 of the revision.

Referring to section 21 of the revision (a savings clause as to wills made prior to the effective date of the proposed revised code), Lundy observed that the proposed revised code probably would contain a number of savings clauses, and that all provisions of the code should be considered in determining the need for savings clauses applicable thereto.

Section 6. Manner of revocation or alteration exclusive. No change was made in section 6 of the revision.

Section 7. Express revocation or alteration. Riddlesbarger commented that he had questioned the provision of

section 7 of the revision requiring two witnesses to the injury or destruction of a will by a person other than the testator, noting that the comparable section of the proposed Wisconsin Probate Code (section 853.11) did not contain such a provision, but that he did not recommend deletion of the provision from section 7.

Riddlesbarger pointed out that the proposed Wisconsin section (section 853.11(1)) contemplated partial revocation of a will. The matter of partial revocation was discussed, and the concensus was that section 7 should not authorize partial revocation of a will.

Section 8. Revocation by marriage. Gilley referred to subsection (2) of section 8 of the revision, and questioned the requirement therein that the antenuptial agreement or marriage settlement make "provision" for the surviving spouse. Richardson expressed the view that the agreement or settlement should make such "provision," and stated that if a testator wanted to make no provision for his surviving spouse, he should specify this by his will.

Braun indicated that she was inclined to favor deletion of all of section 8, but most other committee members appeared to oppose such deletion.

Zollinger referred to subsection (2) of section 853.11, proposed Wisconsin Probate Code, and suggested that the Wisconsin provision appeared to constitute a clear and appropriate statement of the committees' purpose in regard to revocation of a will by marriage of the testator. After further discussion, Zollinger moved, seconded by Gilley, that the Wisconsin provision be substituted for section 8 of the revision. Objection was raised to that part of the Wisconsin provision relating to a contract between the testator and his spouse entered into after marriage. Butler moved, seconded by Gilley, to amend the main motion to delete "or after" from the phrase "contract before or after marriage" in the Wisconsin provision. Motion to amend carried. Main motion, as amended, carried.

Section 9. Revocation by divorce or annulment. Richardson questioned deletion from section 9 of the revision of the words in parentheses (i.e., "and the effect of the will is the same as though the former spouse did not survive the testator"). It was agreed that the words in question should not be deleted.

Section 10. Revocation does not revive prior will. No change was made in section 10 of the revision.

Section 11. Devise of life estate. Allison suggested that "or bequest" not be deleted from section 11 of the revision, if the application of the section was to be extended to personal property. Zollinger commented that there was no purpose in making section 11 apply to personal property. Allison responded that in such event "or legatee" should also be deleted from section 11. Zollinger indicated that "devise" would be defined to include "bequest" and vice versa.

Section 12. Devise passes all interest of testator.  
No change was made in section 12 of the revision.

Section 13. Property acquired after making will.  
Riddlesbarger noted that the section of the proposed Wisconsin Probate Code (section 853.29) similar to section 13 of the revision provided: "A will is presumed to pass all property which the testator owns at his death and which he has power to transmit by will, including property acquired after the execution of the will." He also pointed out that the comment under the proposed Wisconsin section described three types of statute on the subject of after-acquired property that had been passed in this country.

Dickson suggested, and Zollinger concurred, that section 13 be revised to read: "An interest in property acquired by a testator after he makes his will passes as provided in the will." Dickson commented that, under his suggested wording, if there were no provision in the will, the after-acquired property would pass by intestacy. Lisbakken questioned whether the will would have to specify after-acquired property in order for such property to pass "as provided by the will," and indicated her preference for the wording of the proposed Wisconsin section. After further discussion, Dickson's suggested revision of section 13 was approved by a majority of the committee members.

Section 14. Encumbrance or disposition of property after making will. In response to a question by Riddlesbarger, Lundy commented that the source of section 14 of the revision appeared to be subsection (3) of ORS 114.230, and not ORS 114.150. Lundy noted that the second sentence of ORS 114.150 related to the subject of discharge of encumbrances, which was dealt with in a separate draft in the blue notebooks.

Section 14 A. Bond or agreement to convey property devised as a revocation. Riddlesbarger pointed out that section 14 A of the revision was based upon ORS 114.140, that the substance of the section had previously been approved by the committees, but that for some reason the section had

not been included in the first draft.

Sections 14 B and 14 C. Riddlesbarger explained that sections 14 B, relating to non-ademption of specific gifts in certain cases, and 14 C, relating to renunciation of gift under will, were verbatim copies of sections of the proposed Wisconsin Probate Code (sections 853.35 and 853.21, respectively). He noted that the subject matter of the two sections had not previously been considered by the committees, and recommended that the sections be considered for inclusion in the proposed revised code.

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

The meeting was reconvened at 9 a.m., Saturday, June 17, 1967, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Carson, Jaureguy, Lisbakken and Riddlesbarger. The following members of the Bar committee were present: Biggs, Braun, Gilley, Kraemer, Krause, Lovett, McKay, Meyers, Richardson, Thalsofer and Thomas. Also present was Lundy.

Wills (continued)

Sections 14, 14 A, 14 B and 14 C (continued). Riddlesbarger noted that the background of sections 14 and 14 A of the revision, including previous committee consideration and action in regard thereto, was unclear, and that the matter had been left to Allison and Lundy to investigate and report thereon at the next meeting of the committees. He commented that sections 14 B and 14 C of the revision were before the committees for the first time at this meeting, and that in view of this circumstance Allison had suggested postponement of consideration of those two sections until the next meeting. Riddlesbarger pointed out that section 14 C would involve inheritance tax consequences and as such should be considered by the inheritance tax subcommittee consisting of Carson, Braun and Lisbakken.

Dickson requested that a report by Allison and Lundy on sections 14 and 14 A and committee consideration of sections 14 B and 14 C be placed first on the agenda for the meeting of the committees in July 1967.

Section 15. When estate passes to issue of devisee or legatee; anti-lapse. Allison suggested, and it was agreed, that the first sentence of section 15 of the revision be altered to read that "the descendants take by representation

Section 21. Act not to affect wills made prior to Act. Riddlesbarger pointed out that the matter of savings clauses to be included in the proposed revised code had been discussed at the Friday session of the meeting, and that section 21 of the revision constituted one such savings clause. He commented that the subject of savings clauses would be considered by the committees at a future time.

Drafting Procedure by Allison

For the benefit of committee members not present at the Friday session of the meeting, Allison repeated the explanation given at that session of the procedures he planned to follow in his drafting work on the proposed revised code. [Note: See page 2 of these minutes.]

Election Against Will; Dower and Curtesy

Allison noted that a first draft, dated April 28, 1967, on the subject of election against will and abolition of dower and curtesy was contained in the blue notebooks distributed to members before the May 1967 meeting, following tab 11. He explained that he had prepared a second draft on the subject, together with some editorial comments thereon, and proceeded to distribute copies of the second draft and editorial comments to committee members present. [Note: A copy of Allison's second draft and editorial comments thereon constitute Appendix B to these minutes.]

Section 1. In response to a question by Richardson, Allison outlined the previous action by the committees resulting in the intestate share of the surviving spouse being an undivided one-half interest, if there was issue of the intestate, and the election against will being an undivided one-fourth interest.

Butler noted that the wording of subsection (1) of ORS 113.050, as amended by section 1 of the second draft, was that the surviving spouse had an election "to take under the will," and questioned whether the wording was appropriate in those instances in which the will made no provision for the surviving spouse. The appropriateness of the wording was discussed and several suggestions for different wording made. Allison pointed out that section 236, 1963 Iowa Probate Code, used the wording "elect to take against the will." Riddlesbarger referred to the wording "elect to take the share provided by this section" used in section 861.05, proposed Wisconsin Probate Code. Dickson suggested that the matter of devising appropriate wording be left to Allison as draftsman.

the property"; and that the second sentence of the section be deleted. He pointed out that "representation" was defined in a section of the draft on intestate succession previously considered and acted upon by the committees.

Section 16. Children born or adopted after execution of will (pretermitted children). Zollinger suggested that the word "maximum" in the last sentence of subsection (4) of section 16 of the revision be deleted.

Riddlesbarger commented that section 16 did not contain a provision on the remedy available to pretermitted children, and that this matter had previously been referred to the subcommittee on the probate court and jurisdiction thereof for consideration in connection with the general subject of remedies in probate.

#### Probate Courts and Jurisdiction

Dickson requested that the matter of probate courts and jurisdiction thereof be placed on the agenda for the next meeting of the committees in July, and indicated that at that meeting he would appoint a subcommittee to study the matter further. He asked Lundy to report at the July meeting on legislation on the subject enacted at the 1967 regular session of the Oregon legislature.

#### Wills (continued)

Section 17. Delivery of will by custodian; liability. No change was made in section 17 of the revision.

Section 18. Disposition of wills deposited with county clerk. No change was made in section 18 of the revision.

Sections 19 and 20. Riddlesbarger noted that the revision retained section 19 of the first draft, but not section 20 thereof. In response to a question by Riddlesbarger, Lundy pointed out that sections 19 and 20 amended existing ORS sections to make them consistent with provisions of the proposed revised code, and remarked that inclusion of these existing sections in the code itself was not contemplated. He commented, and Allison agreed, that the code revision bill probably would include a large number of such amendments to existing ORS sections, and that these amendments would be located at the end of the bill. Lundy explained that the amendment of ORS 107.110 by section 20 was necessitated by the proposed repeal of ORS 114.130, referred to in ORS 107.110, and enactment of a similar new section by the first draft.

Riddlesbarger asked whether the committees wished to consider the sections of the proposed Wisconsin Probate Code, particularly sections 861.05 and 861.07, on the subject of the elective share of a surviving spouse. He pointed out that section 861.05, for example, provided for reduction of the elective share by certain property given the surviving spouse under the will. Richardson expressed the view, with which Jaureguy agreed, that election against will should take into account property passing to the surviving spouse outside of the will; for example, insurance proceeds, inter vivos trust income and jointly owned property. Allison commented that the approach taken by the proposed Wisconsin sections went considerably beyond the present Oregon concept of election against will. He suggested, and Butler agreed, that adoption of the Wisconsin approach would constitute a controversial change in Oregon law that the legislature might not be willing to accept, whereas less difficulty in this regard probably would be had with the simple substitution of election against will as to real property for dower and curtesy.

After further discussion on the Wisconsin approach to the matter of the elective share of a surviving spouse, Braun moved, seconded by Richardson, that the committees consider further the adoption of the Wisconsin approach. Motion carried. Dickson appointed a subcommittee, consisting of Riddlesbarger, as chairman, Braun and Richardson, to prepare a proposal adopting the Wisconsin approach and submit it for consideration by the committees at the next meeting in July.

Sections 2 to 12. Allison explained briefly sections 2 to 12 of the second draft, pointing out that most of these sections were amendments to existing ORS sections deleting references therein to dower and curtesy.

Statute of limitations. Allison called attention to the fact that the second draft did not repeal or amend ORS 113.090, which prescribed a 10-year limitation, after the death of a decedent, on actions or suits brought to recover or reduce to possession dower or curtesy by the surviving spouse of the decedent. He expressed the view that it would be desirable to retain the ORS section, even though it would be applicable only for a maximum period of 10 years after the effective date of the proposed revised probate code.

Dickson suggested, and Zollinger agreed, that it might be desirable to remove ORS 113.090 from the probate code and

relocate the section in the general ORS chapter on statutes of limitations (i.e., ORS chapter 12). Lundy commented that ORS 113.090 could be so relocated and renumbered under the editorial authority of the Legislative Counsel's office in publishing ORS, but that any change in the substance of the section would have to be accomplished by legislation. Lundy noted that not all of the present Oregon statutes of limitations were located in ORS chapter 12.

#### Initiation of Probate or Administration

The committees began a consideration of the first draft, dated March 27, 1967, on the subject of initiation of probate or administration, which was contained in the blue notebooks distributed to members before the May 1967 meeting, following tab 12.

Section 1. Venue. Gilley referred to section 1 of the first draft, noted that it was a substitute for ORS 115.140 and explained the section briefly. Zollinger commented that it should be made clear that section 1 applied to venue only, and not to jurisdiction. Allison remarked that jurisdiction in probate generally was geared to the domicile of the decedent, the place where he died or the place where his property was located.

Several members suggested that a provision that any circuit court in the state had jurisdiction in probate appear in a separate section preceding section 1 or be incorporated in section 1. Gilley commented, and Thomas agreed, that improper venue could be objected to and changed, but that if no such objection was made, jurisdiction would not be affected. Gilley suggested including in section 1 a specific provision that if the proceeding was commenced in a county of improper venue, such would not affect jurisdiction of the court, but that the proceeding would be subject to change of venue. He pointed out that jurisdiction was dealt with in the first draft, dated May 3, 1967, pertaining to powers of court, which was contained in the blue notebooks, following tab 2. Thalhofer referred to subsections (1) and (2) of ORS 109.310, relating to jurisdiction and venue in adoption proceedings, and suggested, and Gilley and Zollinger agreed, that those subsections might furnish an appropriate model for revision of section 1.

Allison remarked that he did not favor venue in the county of the place of abode of the decedent, and Dickson agreed. In response to a question by Thomas, Zollinger suggested the possibility of a definition of "place of abode." In response to a question by Biggs, Riddlesbarger remarked

that under certain circumstances the place of abode of a decedent might be the hospital in which he died. Dickson expressed the view that the key criterion in determining venue should be the location of property of the decedent, and not the domicile or place of abode of the decedent. Allison proposed that subsection (1) of section 1 be revised to include the county in which the decedent left assets as proper venue, and perhaps also the county in which the decedent died. Gilley indicated that he favored venue only in the county of the domicile of the decedent, and Riddlesbarger agreed. Zollinger remarked that it would be easier to determine the location of property of the decedent than to determine his domicile.

Richardson commented that creditors of decedents would be likely to oppose provision for proper venue in several counties, and that such creditors would favor proper venue only where the activities of a decedent were centered. Dickson suggested that the interests of creditors could be served by requiring the personal representative's notice to be published in several counties; for example, in every county in which the decedent had assets.

Gilley noted that the section of the proposed Wisconsin Probate Code (section 856.01) on venue limited venue in the case of a domiciliary decedent to the county of his domicile, and provided for stay of proceedings in all but the county where proper venue was finally determined and for change of venue. He also pointed out that the matter of probate jurisdiction was governed by a statute section separate from the one on venue in Wisconsin.

Zollinger moved, seconded by Dickson, that it be recorded as the consensus of the committee members present that section 1 provide that proper venue, in the case of both domiciliary and nondomiciliary decedents, be in the county in which the decedent was domiciled, or had his place of abode, or where he died or where his assets were situated, and that a provision similar to the last sentence of subsection (2) of ORS 109.310 be added to section 1. Motion carried. Gilley and Riddlesbarger indicated that they were still opposed to multiple venue, Riddlesbarger remarking that such venue put a premium on who first was able to commence the proceeding.

Section 2. Proceedings commenced in more than one county.  
Section 2 of the first draft was referred to several times during the course of the discussion on section 1. Dickson suggested that change of venue under section 2 be made discretionary in the court upon a showing that venue should be

elsewhere, and that although proper venue might be in the first county, the court could transfer the proceeding to another county of proper venue. Zollinger moved, seconded by Dickson, that Dickson's suggestion be approved. Motion carried.

Section 3. Pleadings and mode of procedure. Gilley noted that section 3 of the first draft was substantially the same as ORS 115.010, with the principal exception being the authorization in section 3 for an agent or attorney of a person making a petition, report or account to verify it. After extended discussion on verification by an agent, Gilley moved, and it was seconded, that the words "agent or" be deleted from the fourth sentence of section 3. Motion carried.

Lundy suggested, and Allison agreed, that section 3 might more appropriately be located in that part of the proposed revised code relating to powers of court in probate.

Dickson suggested that subsection (2) of section 3 might more appropriately precede subsection (1). It was also suggested that the word "verified" in subsection (2) be deleted, since the requirement of verification appeared in the fourth sentence of section 3.

Section 4. Appointment of special administrator. Allison suggested that the word "final" in the references to the final account of a special administrator in subsection (3) of section 4 of the first draft should be deleted.

Richardson proposed that the wording of paragraph (b) of subsection (1) of section 4 be revised to read "loss, injury or deterioration," in order to achieve consistency with similar wording elsewhere in section 4. Zollinger expressed the view that "deterioration" need only appear in the first sentence of subsection (1) of section 4. After further discussion, Richardson's proposal apparently was approved.

The meeting was recessed at 12:05 p.m.

The meeting was reconvened at 1:30 p.m. The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Carson, Jaureguy, Lisbakken and Riddlesbarger. The following members of the Bar committee were present: Biggs, Braun, Gilley, Krause, Lovett, Meyers, Thalhofer and Thomas (arrived 2:25 p.m.). Also present was Lundy.

Initiation of Probate or Administration (continued)

Section 3. Pleadings and mode of procedure (continued). Gilley, at Carson's suggestion, proposed that the committees reconsider their action on section 3 of the first draft at the Saturday morning session of the meeting in regard to verification of papers by agents. Carson noted that authorization for verification by agents had been deleted by such previous action of the committees, and argued that such authorization should be retained in the case of agents for corporations. After further discussion, Gilley moved, and it was seconded, that the wording of the fourth sentence of section 3 be revised to authorize verification by agents of corporations. Motion carried.

Section 5. Petition for appointment of personal representative. Gilley referred to section 5 of the first draft, and suggested that "account" be inserted between "Security" and "number" in subsection (1), and that the reference to court jurisdiction in subsection (3) be deleted. He expressed the view, and it was agreed, that subsection (4) was unnecessary and should be deleted. Dickson noted that references to the petitioner in subsection (2) should be changed to references to the person nominated to be the personal representative.

Zollinger referred to subsection (5) of section 5, and commented that the ages of all heirs, devisees and legatees were not necessary; only the ages of such of them as were minors. After further discussion, it was agreed that subsection (5) should require the ages and birth dates of minors, but not the ages of others.

Zollinger questioned the need of the requirement in subsection (6) of section 5 that the petition include an estimated value of the property belonging to the decedent. The use of such estimated value in determining the amount of the filing fee and the amount of the personal representative's bond was discussed. It was pointed out that such estimated value was insufficient information for such determination, and that sufficient information for those purposes would become available and could be supplied after the filing of the petition. Braun remarked that undesirable situations could result from undue publicity given to estimated values of estates included in petitions. It was suggested, and agreed, that subsection (6) be revised to read: "Any facts that would be of assistance to the court in fixing the amount of the bond of the personal representative."

Section 6. Qualification of personal representative.  
Butler referred to subsection (6) of section 6 of the first draft, and stated that it was his recollection that the last previous action by the committees on the matter of nonresident personal representatives was to allow a nonresident to serve as an executor, but not as an administrator, if he appointed a resident agent to accept service of summons and process. Lundy commented that his recollection on the subject was the same as Butler's. It was agreed that subsection (6) should be revised to allow a nonresident to serve as an executor but not as an administrator.

Gilley remarked that the committees by previous action had decided to include judges of the county, district, circuit and Supreme courts in the classes of persons not qualified to serve as personal representatives, and noted that for some reason section 6 did not contain such a provision. Riddlesbarger asked whether pro tem judges should be specifically included in the categories of judges to be disqualified. Butler asked whether judges of the Tax Court should also be so included.

Lundy noted that some county judges not only had no probate functions, but had no judicial functions at all, and asked whether, in view of this fact, county judges with no judicial functions should be disqualified to serve as personal representatives. Zollinger commented that under the proposed revised code county judges would have no probate functions, and suggested, and it apparently was agreed, that county judges should be deleted from the disqualified categories of judges. Thalhofer pointed out that no judges were specifically disqualified to be guardians under ORS 126.161.

In response to a question by Biggs, Gilley remarked that a recalled judge was no longer a judge and thus would not fall within the categories of judges not qualified to be personal representatives. Biggs expressed the view that a recalled judge should be so disqualified, especially if the ground for recall was misconduct, the same as a suspended or disbarred attorney.

After further discussion, it apparently was agreed that a provision should be added to section 6 to the effect that judges of the district, circuit, Tax and Supreme courts were not qualified to be personal representatives.

Zollinger suggested that "readmitted" be substituted for "reinstated" in subsection (5) of section 6.

Section 7. Preference in appointing personal representative. Gilley commented that section 7 of the first draft did not appear to completely reflect the previous committee action on the subject matter at the January 1966 meeting. [Note: See Minutes, Probate Advisory Committee, 1/14,15/66, pages 21 to 24. The wording of the section approved at the January 1966 meeting was:

"The court shall appoint as personal representative a qualified person or persons whom the court finds to be suitable, giving preference to the following persons in the following order or their respective nominees:

- "(1) The executor named in the will;
- "(2) The surviving spouse of the decedent;
- "(3) The nearest of kin of the decedent or the respective nominees of any of them."]

Zollinger expressed the view that the nominee of the executor should not be given preference in the appointment of a personal representative over the surviving spouse or the surviving spouse's nominee. After further discussion, it apparently was agreed that section 7 should be revised to coincide with the wording approved at the January 1966 meeting, but with no specific preference to the nominee of an executor.

Section 8. Testimony of attesting witnesses to will. Gilley suggested deletion of "may" after "witness" in the last sentence of subsection (2) of section 8 of the first draft, and deletion of "facts" after "in the same manner as" in subsection (3).

Zollinger referred to subsection (4) of section 8, and questioned the necessity of requiring, in the absence of evidence of attesting witnesses, evidence of the genuineness of the testator's signature if the genuineness of the witnesses' signatures could be proved. Biggs suggested, and it apparently was agreed, that subsection (4) should be revised to require evidence of genuineness of the signature of the testator or at least one of the witnesses.

Krause commented that, in the absence of evidence of attesting witnesses, something more than evidence of genuineness of signatures should be required. Gilley suggested that the attestation clause of a will should recite the fact of publication of the will. Carson pointed out that what

was involved was probate in common form, and remarked that the requirements for such should not be too strict. Dickson noted that the evidence of witnesses could be preserved, under subsection (1) of section 8, by affidavits made at the time of execution of the will, and that this practice could be used to resolve the problem of unavailability of witnesses at the time of probate in common form, although such affidavits could not be used, as indicated in subsection (3), in probate in solemn form.

Dickson suggested, and it was agreed, that subsection (4) of section 8 should precede subsection (3).

Determining validity of will in testator's lifetime. Riddlesbarger reminded the committee members of the suggestion made by Professor Hans A. Linde, School of Law, University of Oregon, that some consideration might be given to authorization for a procedure to determine the validity of a will during the testator's lifetime. Butler remarked that the availability of such a procedure might impose a significant burden on the courts. Thomas suggested that the problems sought to be resolved by Linde's suggestion might be alleviated to some extent by the use of depositions. Braun commented that problems of testamentary capacity might be resolved by medical or psychiatric examinations of testators. It was agreed that further consideration of Linde's suggestion be deferred and that Riddlesbarger might contact Linde on the matter.

Section 9. Hearing when no will. Zollinger noted that section 9 of the first draft appeared to have no precisely similar counterpart in existing Oregon statutory law. He commented that section 9 referred to the petition of the personal representative, and that the petition would not necessarily be filed by the personal representative. Allison expressed the view that the apparent purpose of section 9 was to fill a gap in the procedure prescribed by existing statutory law.

Section 10. Necessity and amount of bond; bond notwithstanding will. Gilley suggested that "or special administrator" be inserted after "personal representative" in the first sentence of section 10 of the first draft. Allison noted that section 4 of the first draft specifically required a special administrator to file a bond. Riddlesbarger noted that section 21 of the first draft, dated April 27, 1967, on definition of terms defined "personal representative," and Gilley suggested, and Dickson agreed, that perhaps that definition should exclude special administrators.

In response to a question by Gilley, Lovett expressed the opinion that the banking law contained provisions pertaining to the necessity of bonds of trust companies acting as personal representatives and the reduction of bonds of personal representatives by deposits with banks and trust companies. [Note: See ORS 709.240 to 709.260.] Lundy noted that ORS 126.171, relating to the bond of a guardian, contained the phrase "except as otherwise provided by law" in order to recognize the existence of other provisions of law pertaining to bonds of guardians, including such provisions in the banking law. Carson suggested that such a phrase might be added to section 10 in order to resolve the matters of the provisions in the banking law and the provision on special administrators.

Gilley suggested, and it was agreed, that "and approved by the endoresement thereon of the Judge" be deleted from the first sentence of section 10.

Gilley commented that subsection (1) of section 10 should be revised to read: "The apparent value of the estate." Zollinger proposed that the wording of subsection (1) be: "The nature and apparent value of the assets of the estate."

Several members expressed the view that bond should not be required of a personal representative if the will waived that requirement. Gilley commented, and Dickson agreed, that such a waiver should not be conclusive, and that the court should be able to require bond notwithstanding the waiver in appropriate circumstances. [Note: Previous action by the Committees on the subject of waiver of bond of a personal representative by will is recorded in Minutes, Probate Advisory Committee, 3/18,19/66, pages 33 and 34, and Appendix; and Minutes, Probate Advisory Committee, 4/15,16/66, page 19. The action so recorded indicates that there should be some provision stating, in substance, that when a will declares that no bond is required of the personal representative, he may act without filing a bond; but notwithstanding waiver of the bond by will, the court may, at any time in its discretion, on its own motion or on petition of an interested person, require the personal representative to give bond, and the court shall require a nonresident executor to give bond. The first draft does not appear to contain such a provision.]

Section 11. Increasing, decreasing or requiring new bond. Gilley suggested that "approved and" be deleted from the second sentence of section 11 of the first draft.

Section 12. Letters testamentary or of administration. Gilley remarked that "acceptance of the appointment" should be substituted for "acceptance of the trust" in the first sentence of subsection (1) of section 12 of the first draft, and that "or is the petitioner for letters of administration" should be deleted from subsection (2).

In response to a question by Dickson, Zollinger noted that subsection (2) of section 12 was duplicated to some extent by the provisions of ORS 709.330 on the sale and transfer of assets and liabilities by a trust company and the effect thereof on fiduciary relations.

Section 12a. Forms of letters testamentary and of administration. Zollinger and Dickson noted that it was not contemplated that letters be issued to special administrators. Meyers commented that special administrators could act under authority of court orders.

No change was made in section 12a of the first draft.

Section 13. Publication of notice by personal representative. Dickson commented that, in view of the previous action by the committees on section 1 of the first draft, relating to venue, section 13 of the first draft should require publication of the personal representative's notice of appointment in counties in addition to the one in which the proceeding was pending. Zollinger suggested that publication be required in the county in which the decedent was domiciled, as stated in the petition for appointment of the personal representative, in addition to the county in which the proceeding was pending, if they were different counties. Allison remarked that publication might be required in the county in which the proceeding was pending and in such other counties as the court might prescribe. Dickson expressed the view that protection of creditors was not the only reason supporting the desirability of publication in more than one county. After further discussion, in the course of which several members expressed opposition to the requirement of publication in more than one county, Carson moved, and it was seconded, that no change be made in subsection (1) of section 13.

The requirement of paragraph (b) of subsection (2) of section 13 that the notice include the names and addresses of the personal representative and his attorneys was discussed at some length. Riddlesbarger and Gilley argued that those names and addresses need not be included in the notice, and that the only address that should be required was the one at

which claims were to be presented to the personal representative. Dickson and Carson agreed that the attorney of a personal representative need not be identified in the notice. Allison and Jaureguay expressed the view that the names and addresses of both the personal representative and his attorney was often useful information. Dickson commented that the inclusion of such information in the notice would not be prohibited, but would not be required. It apparently was agreed that paragraph (b) should be deleted, and that paragraph (d) should refer to presentation of claims to the personal representative at the address designated in the notice for such presentation.

Section 14. Notice to heirs, devisees and legatees. Carson indicated that he did not favor the requirements of subsection (1) of section 14 of the first draft, relating to mailing notice to heirs, devisees and legatees of a decedent. He commented that such requirements appeared contrary to the general aim of the committees to achieve simplification of probate procedure. Krause noted that existing law (i.e., ORS 115.220) required mailing of copies of a will admitted to probate to devisees and legatees named therein, and commented that one of the purposes of subsection (1) of section 14 was to justify elimination of mailing copies of wills.

Butler, Riddlesbarger and Biggs stated that they shared Carson's view on the undesirability of the requirements of subsection (1) of section 14. Riddlesbarger and Biggs commented that it was often very difficult to locate the heirs of a decedent, and that required mailing of notice to such heirs would impose a substantial burden on the personal representative. Biggs proposed that the mailed notice required by subsection (1) be limited to notice to devisees and legatees named in a will. Zollinger expressed the view that the surviving spouse and at least the adult lineal heirs of the testator not provided for by the will should be mailed notice. Braun and Carson commented that if the aim was to notify all persons interested, beneficiaries under prior wills might be as interested as heirs.

Dickson remarked that one purpose of mailed notice was to satisfy requirements of due process, and that, for example, if a surviving spouse or heir were not notified of the probate proceeding, his rights might not be foreclosed by the termination of the time period for contesting the will. Jaureguay commented that whatever might be the requirements of due process, it should be the policy of the state to afford some kind of notice to persons entitled to contest a will.

Braun moved, and it was seconded, that subsection (1) of section 14 be deleted. Motion carried.

Removal of personal representative. Gilley noted that the provision relating to removal of a personal representative, which appeared in the first draft as subsection (4) of section 14, should be a separate section.

Biggs observed that the removal proceeding under the section was to be initiated by petition, and expressed the view that the court should be able to initiate the proceeding on its own motion. Gilley suggested that "or upon its own motion" be inserted after "Upon the petition being filed" in the second sentence of the section. After discussion on whether issuance of a court order directing the personal representative to appear and show cause should be mandatory or discretionary with the court, it apparently was decided to retain "shall" in the second sentence and not substitute "may" therefor.

Section 15. Appointment of successor personal representative. Thalhoffer suggested that "is disqualified" be substituted for "ceases to qualify" in subsection (1) of section 15 of the first draft. Lundy pointed out that the terminology used in section 6 of the first draft was "is not qualified," rather than "is disqualified." Zollinger commented that the wording of subsection (1) of section 15 might be changed to "ceases to be qualified."

Section 16. Notice by new personal representative. Gilley suggested that "need not give notice" be substituted for "does not have to give notice" in the first sentence of section 16 of the first draft, and that "notice shall state" be substituted for "notice shall provide" in the third sentence.

The requirement of notice by a new personal representative was discussed at some length. Dickson asked if the time period for filing claims would begin again upon the publication of notice by the new personal representative, or if the period begun by publication of notice by the previous personal representative would still apply. Gilley pointed out that previous action by the committees at the March 1966 meeting answered this question by indicating that if appointment of the successor personal representative occurred before expiration of the four-month claim presentation period, the court should be authorized to extend the period for not more than four months after appointment of the successor and that the notice published by the successor should state the period of extension. [Note:

See Minutes, Probate Advisory Committee, 3/18,19/66, page 30.] In response to a question by Dickson, Zollinger commented that a reason for the notice by the new personal representative was to inform creditors of the change in personal representatives so that such creditors could present their claims to the proper personal representative. Gilley moved, and it was seconded, that the committees approve the substance of section 16, with the addition thereto of an appropriate provision reflecting the previous committee action at the March 1966 meeting on extension of the claim presentation time period. Motion carried.

Section 17. Proceedings when will found after administration granted. The matter of whether the circumstance described in section 17 of the first draft would call for notice by a new personal representative was discussed.

Dickson suggested that section 17 be relocated before sections 15 and 16 of the first draft.

Butler questioned the reference to letters testamentary in section 17, and remarked that if the will found and proven did not name an executor, the new letters would be letters of administration with the will annexed. Zollinger noted that the form of letters testamentary set forth in section 12a of the first draft contemplated use thereof in the case of an administrator with the will annexed.

Lundy pointed out that section 17 was based upon ORS 115.340, and that ORS 115.200 described the reverse situation in which, if a will was proven and letters issued thereon and the will was then set aside, declared void or inoperative, those letters would be revoked and letters of administration issued. He observed that the committees had previously approved a section similar to ORS 115.200, but that such section, for some reason, did not appear in the first draft. [Note: See Minutes, Probate Advisory Committee, 3/18,19/66, page 19; and Minutes, Probate Advisory Committee, 2/18,19/66, pages 10 and 11.]

Section 18. Designation of attorney to be filed. It apparently was agreed that "represent him" should be substituted for "assist him" in section 18 of the first draft.

Section 19. Duty of court to supervise. It was suggested that "and require" be substituted for "to insure" in section 19 of the first draft.

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Section 20. Contest of will. It was agreed that the period for contesting a will should be reduced from six months to four months.

Section 21. No change was made in section 21 of the first draft.

The meeting was adjourned at 4:55 p.m.



property by will is statutory. Perhaps the definition of the term "will" could include the thought.

Section 2. Execution of a will. A will shall be in writing and shall be executed (by the signatures of the testator and of at least two attesting witnesses as follows:) with the following formalities:

(1) The testator, in the presence of each of the witnesses shall:

- (a) Publish the will; and
- (b) Sign the will; or
- (c) Acknowledge the signature previously made on the will by him or by his proxy; or
- (d) (At the direction of the testator and in his presence have) Direct one of the witnesses or (another) some other person to sign thereon the name of the testator. Any (witness) person who so signs the name of the testator shall sign his own name (as a witness) to the will and write on the will that he signed the name of the testator at the direction of the testator.

(2) (The witnesses shall each sign the will in the presence of the testator.) At least two witnesses shall each:

- (a) Hear the testator publish the will; and
- (b) See the testator sign the will; or
- (c) Hear the testator acknowledge the signature on the will; or

(d) Observe acts which unmistakably indicate that the will has been signed by the testator or by his proxy; and

(e) Sign the will in the presence of the testator and at his request.

Comment:

1. The words "by the signatures of the testator and of at least two attesting witnesses as follows" have been deleted because they duplicate the subsequent provisions respecting signing.

2. Subparagraph (b) has been changed because if witnesses need not be in the presence of each other, the acts of the testator in the presence of the witnesses may be different.

3. The language of subparagraph (c) of the proposal is not clear as to whether the proxy is or may be a witness to the will of another person.

4. I recommend that publication be required despite the fact that the committees did not so provide. Although ORS 114.030 contains no language to support the requirement, the Supreme Court has recently held that a codicil was improperly executed because the witnesses did not know the nature of the document they were called upon to witness. See Erickson v. Davidson, 216 Or. 547, citing Richardson v. Orth, 40 Or. 252. The court made no mention of Loper v. Werts, 19 Or. 122; In re Skinners Will, 40 Or. 571; In re Estate of Neil, 111 Or. 282; In re Estate of Heaverne, 118 Or. 308; In re Estate of Shaff, 125 Or. 288, and In re Christofferson Estate, 183 Or. 75, in each of which it was held not to be necessary that the testator publish the will or that the witnesses have any idea as to the purport or contents of the instrument to which they subscribed their names. My proposal eliminates any uncertainty that might exist. A better reason, however, is found in the functioning of the attesting witnesses. An attesting witness is one who signs his name to an instrument for the purpose of proving and identifying it or who signs with the intention of being considered a witness to the act in question. The act in question may be publication of the will or its execution by the testator or both. Publication signifies the act of declaring or making known to the witness that the testator understands and intends that the instrument signed by him to

be his last will and testament. The purpose of publication is to make it manifest that the testator knows what he is executing and to secure him against fraud or imposition. The act should impress upon the witnesses the fact that since the document is a will they are expected to remember what occurred at its execution and be ready to vouch for its validity. If the requirement were to be that the witnesses attest only to the signing of the will by the testator, the foregoing purposes of publication would not be served. Moreover, the testator may have signed several documents on the same occasion or on other occasions during that day. In such event, unless the witnesses are aware of the nature of the document signed in their presence their testimony would be meaningless insofar as the execution of the will is concerned. Publication does not require that the contents of the will be revealed. The right of privacy, therefore, is not invaded.

Section 3. Witness as beneficiary. A will attested by an interested witness is not thereby invalidated. If an interested witness attests a will and the will is not attested also by two or more disinterested witnesses, the interested witness may take under the will only so much of the provision made for him therein as in the aggregate equals in value, on the date of death of the testator, the part of the estate of the testator that would have passed to him had the testator died intestate. A witness is interested only if the will gives to him some (a) personal and beneficial interest in the estate. (of the testator is bequeathed or devised to him by the will.)

Comment: The only changes have been made by rephrasing the wording of the section.

Wisconsin defines what is not to be construed as a personal or beneficial interest in the estate as follows:

"(a) A provision for the spouse of the witness;

"(b) a provision for employment of the witness as executor or trustee or in some other capacity after death of the testator and a provision for compensation at a rate or in an amount not greater than that usual for the services to be performed;

"(c) a provision which would have conferred no benefit on the witness if the testator had died immediately following execution of the will."

I have mixed feelings as to whether any of those requirements should be included in the Oregon law. Because those feelings are not strong either way, I have not proposed any change in the section.

Perhaps some ambiguity exists as to whether a proxy who signs the name of the testator to the will may be "interested." My reasoning is that unless he is also a "witness" he would not be "interested."

Section 4. Validity of a will. A will is lawfully executed if it is in writing, signed by the testator and otherwise executed in accordance with the law of:

(1) This state at the time of execution or at the time of death of the testator;

(2) The domicile of the testator at the time of execution or at the time of his death; or

(3) The place of execution at the time of execution.

Comment: No changes have been made.

Section 5. Testamentary additions to trusts. (1) A devise (or bequest) may be made by a will to the trustee or trustees of a trust, regardless of the existence, size or character of the corpus of the trust, if:

(a) The trust is established or will be established by the testator, or by the testator and some other person or

persons, or by some other person or persons;

(b) The trust is identified in the testator's will;

and

(c) The terms of the trust are set forth in a written instrument, other than a will, executed before or concurrently with the execution of the testator's will, or in the valid last will of a person who has predeceased the testator.

(2) The trust may be a funded or unfunded life insurance trust, although the trustor has reserved any or all of the rights of ownership of the insurance contracts.

(3) The devise (or bequest) shall not be invalid because the trust:

(a) Is amendable or revocable, or both; or

(b) Was amended after the execution of the testator's will or after the death of the testator.

(4) Unless the testator's will provides otherwise, the property so devised: (or bequeathed)

(a) Shall not be deemed to be held under a testamentary trust of the testator but shall become a part of the trust to which it is given; and

(b) Shall be administered and disposed of in accordance with the provisions of the instrument or will setting forth the terms of the trust, including any amendments thereto made before the death of the testator, regardless of whether made before or after the execution of the testator's

will so provides, including any amendments to the trust made after death of the testator.

(5) A revocation or termination of the trust before the death of the testator shall cause the devise (or bequest) to lapse.

(6) This section shall not be construed as providing an exclusive method for making devises (or bequests) to the trustee or trustees of a trust established otherwise than by the will of the testator making the devise.

Comments: (a) The words "or bequeath" and "or bequest" have been deleted because the definitions make the use of the words unnecessary. (b) Subsection 7 can be deleted and the words "or any devise" added following the word "wills" in the proposed section 21. (c) Subsections 8 and 9 of the proposal appear to be unnecessary.

Section 6. Manner of revocation or alteration exclusive. A will may be revoked or altered only as provided in sections 6 to 10 of this Act.

Comment: No changes recommended.

Section 7. Express revocation or alteration.

(1) A will may be revoked or altered by another will.

(2) A will may be revoked by being burned, torn, canceled, obliterated or destroyed, with the intent and purpose of the testator of revoking the will, by the testator or by another person at the direction of the testator and in the presence of the testator. Such injury or destruction by a person other than the testator at the direction and in the presence of the testator shall be proved by at least two witnesses.

Comment: No changes recommended.

Section 8. Revocation by marriage. A will is revoked by the marriage of the testator after the execution of the will, unless:

(1) The spouse of the testator does not survive the testator;

(2) Provision is made for the surviving spouse by a written antenuptial agreement or marriage settlement; or

(3) The will evidences the intent of the testator that the will not be revoked by the marriage.

Comment: No changes recommended.

Section 9. Revocation by divorce or annulment.

Unless a will evidences a different intent of the testator, the divorce or annulment of the marriage of the testator after the execution of the will revokes all provisions in the will in favor of the former spouse of the testator and any provision therein naming the former spouse as executor. (and the effect of the will is the same as though the former spouse did not survive the testator.)

Comment: The words "and the effect of the will is the same as though the former spouse did not survive the testator" have been deleted because they seem to be unnecessary.

Section 10. Revocation does not revive prior will.

If, after making a will, the testator makes a subsequent will, the revocation of the subsequent will does not revive the earlier will.

Comment: The word "does" is inserted in the title of the section.

No change is recommended, although consideration was given to preserving some of the provisions of ORS 114.120 respecting revival.

Section 11. Devise of life estate. A devise (or bequest) of property to any person for the term of the life of the person, and after his death, to his children or heirs, vests an estate or interest for life only in the devisee or legatee, and remainder in the children or heirs.

Comment: No change recommended.

Section 12. Devise passes all interest of testator. A devise (or bequest) of property passes all of the interest of the testator therein at the time of his death, unless the will evidences the intent of the testator to dispose of a lesser (estate or) interest.

Comment: The section adopted by the committees was as follows: "A devise of property shall pass the interest of the testator therein at his death unless the will discloses an intention to dispose of a lesser estate or interest." The changes made appear to be for housekeeping purposes only, except that further committee action deleted the words "estate or" from each of Sections 12, 13 and 14.

Section 13. Property acquired after making will. An estate or interest in property acquired by a testator after he makes his will passes as provided by the will, unless the will evidences the intent of the testator to dispose of a lesser (estate or) interest.

Comment: The words "estate or" were removed from the

section pursuant to the aforementioned action of the committees, the record of which appears on Page 11 of the minutes of the meeting held 12/17,18/65.

It would be pointed out that the proposal to delete sections 13 and 14 was approved by a bare majority of the Advisory Committee and carried the Bar Committee. I voted against the deletion and have not changed my position.

Section 14. Encumbrance or disposition of property after making will. An encumbrance or disposition of property by a testator after he makes his will shall not affect the operation of the will upon a remaining (estate or) interest therein which is subject to the disposal of the testator at the time of his death.

Comment: No changes are recommended.

Section 14 A. Bond or agreement to convey property devised as a revocation. An executory contract of sale made for a valuable consideration by a testator to convey any property devised in any will previously made, is not deemed a revocation of such previous devise, either in law or equity; but such property shall pass by the devise, subject to the same remedies on such agreement, for specific performance or otherwise, against devisees as might be had against the heirs of the testator or his next of kin, if the same had descended to them.

Comment: The committees approved the writer's proposal No. 12 in principle, but referred to Lundy the task of re-drafting the section with the aim of simplifying the wording but retaining the present meaning. See Page 6 of the minutes of the meeting held 12/17,18/65. I have attempted to perform that task.

Section 14 B. Non-ademption of specific gifts in certain cases.

(1) Scope of section. It is the intent of this section to abolish the common law doctrine of ademption by extinction in the situations governed by this section; this section is inapplicable if the intent that the gift fail under the particular circumstances appear in the will, or if the testator during his lifetime gives property to the specific beneficiary with the intent of satisfying the specific gift. Whenever the subject of the specific gift is property only part of which is destroyed, damaged, sold or condemned, the specific gift of any remaining interest in the property owned by the testator at the time of his death is not affected by this section; but this section applies to the part which would have been adeemed under the common law by the destruction, damage, sale or condemnation.

(2) Proceeds of insurance on property. If insured property which is the subject of a specific gift is destroyed or damaged, the specific beneficiary has the right to:

(a) Any insurance proceeds paid to the personal representative after death of the testator with the incidents of the specific gift; and

(b) A general pecuniary legacy equivalent to any insurance proceeds paid to the testator within one year of his death.

But the amount hereunder is reduced by any amount expended or incurred by the testator in restoration or repair of the property.

(3) Proceeds of sale. If property which is the subject of a specific gift is sold by the testator within two years of his death, the specific beneficiary has the right to:

(a) Any balance of the purchase price unpaid at the time of death (including any security interest in the property and interest accruing before death), if part of the estate, with the incidents of the specific gift; and

(b) A general pecuniary legacy equivalent to the amount of the purchase price paid to the testor within one year of his death.

Acceptance of a promissory note of the purchaser or a third party is not considered payment, but payment on the note is payment on the purchase price; and for purposes of this section property is considered sold as of the date when a valid contract of sale is made. Sale by an agent of the testator or by a trustee under a revocable living trust created by the testator, the principal of which is to be paid to the personal representative or estate of the testator on his death, is a sale by the testator for purposes of this section.

(4) Condemnation award. If property which is the subject of a specific gift is taken by condemnation prior to

the testator's death, the specific beneficiary has the right to:

(a) Any amount of the condemnation award unpaid at the time of death, with the incidents of the specific gift; and

(b) A general pecuniary legacy equivalent to the amount of an award paid to the testator within one year of his death.

In the event of an appeal in a condemnation proceedings, the award is for purposes of this section limited to the amount established on such appeal. Acceptance of an agreed price or a jurisdictional offer is a sale within the meaning of subsection (3) of this section.

(5) Sale by guardian or conservator of incompetent.

If property which is the subject of a specific gift is sold by a guardian or conservator of the testator or a condemnation award or insurance proceeds are paid to a guardian or conservator, the specific beneficiary has the right to a general pecuniary legacy equivalent to the proceeds of the sale or insurance proceeds (reduced by any amount expended or incurred in restoration or repaid of the property). This provision does not apply if testator subsequent to the sale or award or receipt of insurance proceeds is adjudicated competent and survives such adjudication for a period of one year; but in such event sale by a guardian or conservator within two

years of testator's death is a sale by the testator within the meaning of subsection (3) of this section.

(6) Securities. If securities are specifically willed to a beneficiary, and subsequent to execution of the will other securities in the same or another entity are distributed to the testator by reason of his ownership of the specifically bequeathed securities and as a result of a partial liquidation, stock dividend, stock split, merger, consolidation, reorganization, recapitalization, redemption, exchange, or any other similar transaction, and if such other securities are part of testator's estate at death, the specific gift is deemed to include such additional or substituted securities. "Securities" has the same meaning as in \_\_\_\_\_.

(7) Reduction of recovery by reason of expenses and taxes. Throughout this section the amount the specific beneficiary receives is reduced by any expenses of the sale or of collection of proceeds of insurance, sale, or condemnation award and by any amount by which the income tax of the decedent or his estate is increased by reason of items covered by this section. Expenses include legal fees paid or incurred.

Comment: The foregoing is copied verbatim from the proposed probate code of Wisconsin. It is recommended because it seems to treat the situations covered in a fair and equitable manner. No authority was found either in the statutes or the case law of Oregon. A justification for the section is found on Page 69 of the proposed probate code of Wisconsin.

Section 14 C. Renunciation of gift under will. Any

person to whom property is given by the terms of a will may renounce all of such property, or unless the will expressly provides otherwise any part of such property, by filing a signed declaration of such renunciation with the county court and serving a copy on the personal representative within 180 days from admission of the will to probate; but the court may extend the time for cause shown. No interest in the property or part thereof so renounced is deemed to have vested in such person; but the renounced property or part passes as if such person had predeceased the testator unless the will provides otherwise. However, a renunciation is invalid to the extent that the person renouncing has prior to filing the renunciation effectively assigned or contracted to assign the renounced property, if prior to entry of the final judgment, or earlier distribution by the personal representative in reliance on the renunciation, the assignee files with the county court a copy of the assignment or contract and serves a copy on the personal representative.

Comment: This section is copied verbatim from the proposed probate code of Wisconsin. It is recommended primarily to resolve the question, at least in Oregon, as to whether or not the renunciation would constitute a gift for gift tax purposes. It would, of course, settle the question as to the right of a devisee or legatee to renounce a provision made for his benefit.

Section 15. When estate passes to issue of devisee or legatee; anti-lapse. When property is devised (or bequeathed) to any person who is related by blood or adoption to the

testator and who dies before the testator leaving lineal descendants, the descendants take the property the devisee (or legatee) would have taken if he had survived the testator. If the descendants are all in the same degree of kinship to the predeceased devisee, (or legatee) they take equally, or if of unequal degree, they take by representation.

Comment: The only change was to delete the words "or legatee."

Section 16. Children born or adopted after execution of will (pretermitted children). (1) If a testator, during his lifetime or after his death, has a child born after the execution of his will or adopts a child, whether in this state or elsewhere, after that execution, and dies leaving the after-born or after-adopted child unprovided for by any settlement and neither provided for nor in any way mentioned in the will, a share of the estate of the testator disposed of by the will passes to the after-born or after-adopted child as provided in this section.

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

(a) No provision is made in the will for any such living child, an after-born or after-adopted child shall not take a share of the estate.

(b) Provision is made in the will for one or more of such living children, an after-born or after-adopted child shall take a share of the estate as follows:

(A) The share of the estate that the after-born or after-adopted child takes is limited to the part passing to the living children under the will.

(B) The after-born or after-adopted child shall take the share of the estate, as limited by subparagraph (A) of this paragraph, he would have taken had the testator included all after-born and after-adopted children with the living children for whom provision is made in the will, and had the testator given an equal part of the estate to each living, after-born and after-adopted child by the will.

(C) To the extent feasible, the interest of an after-born or after-adopted child in the estate shall be of the same character, whether equitable or legal, as the interest the testator gave to the living children by the will.

(3) If the testator has no child living when he executes his will, an after-born or after-adopted child shall take a share of the estate as though the testator had died intestate as to the estate.

(4) An after-born or after-adopted child may recover the share of the estate that passes to him as provided in this section either from the other children under paragraph (b) of subsection (2) of this section or from the testamentary beneficiaries under subsection (3) of this section, ratably, out of the shares of the estate passing to those persons under the will. In abating the interests of those beneficiaries,

the character of the testamentary plan adopted by the testator shall be preserved to the maximum extent possible.

Comment: No change was made in the section as adopted. It should be pointed out, however, that the matter of the remedy of the pretermitted child was not adopted. Instead, any further action in that regard was to await the report of a committee appointed to consider the matter of the jurisdiction of the probate court.

Section 17. Delivery of will by custodian; liability.

(1) A person having custody of a will, other than an executor named therein, shall deliver the will, within 30 days after the date of receiving information that the testator is dead, to a court having jurisdiction of the estate of the testator or to an executor named in the will.

(2) If it appears to a court having jurisdiction of the estate of a decedent that a person has custody of a will made by the decedent, the court may issue an order requiring that person to deliver the will to the court.

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

Comment: No changes recommended.

Section 18. Disposition of wills deposited with county clerk. The county clerk of each county shall make all reasonable effort to deliver each will deposited in his office as provided in ORS 114.410 before the effective date of this Act and on deposit in his office on that date to the testator or

person to whom the will is to be delivered after the death of the testator. Any such will not so delivered before January 1, 2010, may be destroyed by the county clerk.

Comment: No changes recommended.

Section 19. ORS 41.520 is amended to read:

41.520. Evidence to prove a will. Evidence of a last will and testament (, except when made pursuant to ORS 114.050, shall not be received, other than) shall be the written instrument itself, or secondary evidence of (its contents) the contents of the will, in the cases prescribed by law.

Comment: No changes made. The question is whether the section should be in the probate code or in the chapter on evidence. It should be in the latter or in a separate chapter on procedure in probate courts.

Section 21. Act not to affect wills made prior to Act. This Act does not apply to wills or any devise made prior to the effective date of this Act as provided by ORS chapter 114.

Comment: The only change is to include the words "or any devise."

Section 22. Repeal of existing statutes. ORS 114.010, 114.020, 114.030, 114.040, 114.050, 114.060, 114.070, 114.110, 114.120, 114.130, 114.140, 114.150, 114.210, 114.220, 114.230, 114.240, 114.250, 114.260, 114.270, 114.310, 114.320, 114.330, 114.340, 114.410, 114.420, 114.430, 114.440, 115.110, 115.130 and 115.990 are repealed.

Comment: No change recommended.

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, June 16 & 17, 1967)

Prepared by  
Mr. Allison

Proposed revised Oregon probate code.  
ELECTION OF WIDOW - DOWER, CURTESY  
2nd Draft  
June 12, 1967

This draft is proposal #6.

Section 1. ORS 113.050 is amended to read:

113.050. (1) The surviving spouse of a decedent [domiciled in this state at the time of death] shall have an election whether to take under the will of the decedent or to take by descent an undivided one-fourth interest in all the real property of which the decedent dies seised and, if the decedent was domiciled in this state at the time of death, to [have and] take upon distribution an undivided one-fourth interest in all the personal property of [which the decedent died possessed, which] the estate of the decedent. Such interest shall be in addition to, and not in lieu of, any other statutory right [of dower or curtesy or homestead].

(2) Such undivided one-fourth interest in real and personal property shall be subject to the following:

(a) A proportionate share of the debts of the decedent, the expenses of last illness and administration, the inheritance tax computed under subsection (1) of ORS 118.100, and, if

applicable, the inheritance tax of any other state.

(b) A proportionate share of the federal estate tax, if any, provided the total of all property passing to the surviving spouse of a type which qualifies for the marital deduction under the federal estate tax law exceeds the maximum marital deduction permitted under such law. [Said] The proportionate share shall be determined by first multiplying the total federal estate tax by the lesser of:

(A) The total of all such property so passing to the surviving spouse less the maximum marital deduction allowable; or

(B) The value of such undivided one-fourth interest; and then dividing the product thereof by a sum equal to the value of the taxable estate for federal estate tax purposes plus the exemption allowable under the federal estate tax law.

(c) Being sold for the best interest of the estate or for purpose of distribution.

Section 2. Dower and curtesy, including inchoate dower and curtesy, are abolished, but any right to or estate of dower or curtesy of the surviving spouse of any person who died before the effective date of this Act shall continue and be governed by the law in effect immediately before that date.

Section 3. ORS 5.040 is amended to read:

5.040. County courts having judicial functions shall

have exclusive jurisdiction, in the first instance, pertaining to a court of probate; that is, to:

- (1) Take proof of wills.
- (2) Grant and revoke letters testamentary, of administration, of guardianship and of conservatorship.
- (3) Direct and control the conduct, and settle the accounts of executors and administrators.
- (4) Direct the payment of debts and legacies, and the distribution of the estates of intestates.
- (5) Order the sale and disposal of the property of deceased persons.
- (6) Order the renting, sale or other disposal of the property of minors.
- (7) Appoint and remove guardians and conservators, direct and control their conduct and settle their accounts.
- [(8) Direct the admeasurement of dower.]

Section 4. ORS 91.020 is amended to read:

91.020. Tenancies are as follows: Tenancy at sufferance, tenancy at will, tenancy for years, tenancy from year to year, tenancy from month to month, [tenancy by curtesy,] tenancy by entirety and tenancy for life. The times and conditions of the holdings shall determine the nature and character of the tenancy.

Section 5. ORS 91.030 is amended to read:

91.030. A [tenancy by curtesy,] tenancy by entirety

and a tenancy for life shall be such as now fixed and defined by the laws of the State of Oregon.

Section 6. ORS 93.240 is amended to read:

93.240. (1) Subject to the provisions contained in this section, whenever two or more persons join as sellers in the execution of a contract of sale of real property, unless a contrary purpose is expressed in the contract, the right to receive payment of deferred instalments of the purchase price shall be owned by them in the same proportions, and with the same incidents, as title to the real property was vested in them immediately preceding the execution of the contract of sale.

[(2) If immediately preceding the execution of any such contract one or more of the sellers held no estate in the real property covered thereby other than an inchoate estate of or right to dower or curtesy, then, unless a contrary purpose is expressed in the contract, the joinder of such party or parties shall be deemed to have been for the purpose of barring dower or curtesy only and, except to the extent specifically prescribed therein, such person or persons shall have no interest in or right to any portion of the unpaid balance of the purchase price of said real property.]

[(3)] (2) If immediately prior to the execution of a contract of sale of real property title to any interest in

the property therein described was vested in the sellers or some of the sellers as tenants by the entirety or was otherwise subject to any right of survivorship, then, unless a contrary purpose is expressed in the contract, the right to receive payment of deferred instalments of the purchase price of [such] the property shall likewise be subject to like rights of survivorship.

[(4) This section, being declaratory of existing law, applies to contracts of sale of real property heretofore executed as well as to those hereafter executed.] (3) Nothing contained in this section shall be deemed to modify or amend the provisions of subsection (4) of ORS 118.010 relating to inheritance taxes payable by reason of succession by survivorship as provided by subsection [(3)] (2) of this section.

Section 7. ORS 94.330 is amended to read:

94.330. No transfer or mortgage of any estate or interest in registered land shall be registered until it is made to appear to the registrar that the land has not been sold for any tax or assessment upon which a deed has been given and the title is outstanding, or upon which a deed may thereafter be given[, and that the dower, right of dower, and estate of homestead, if any, have been released or extinguished or that the transfer or mortgage is intended to be subject thereto, in which case it shall be stated in the certificate of title ].

Section 8. ORS 105.050 is amended to read:

105.050. In an action [for the recovery of dower before admeasurement or] by a tenant in common of real property against a cotenant, the plaintiff shall show, in addition to the evidence of his right of possession, that the defendant either denied the plaintiff's right or did some act amounting to a denial.

Section 9. ORS 105.340 is amended to read:

105.340. In all cases of sales in partition when it appears that [a married woman has an inchoate right of dower in any of the property sold, or that] any person has a vested or contingent future right or estate therein, the court shall ascertain and settle the proportional value of the [inchoate] contingent or vested right or estate according to the principles of law applicable to annuities and survivorship, and shall direct such proportion of the proceeds of sale to be invested, secured or paid over in such manner as to protect the rights and interests of the parties.

Section 10. ORS 107.100 is amended to read:

107.100. (1) Whenever a marriage is declared void or dissolved, the court has power further to decree as follows:

(Paragraphs (a) to (g), inclusive, omitted here)

[(h) for the extinguishment and barring of dower and curtesy.]

(Remainder of ORS 107.100 omitted here)

Section 11. ORS 93.170, 105.065, 111.050, 113.010, 113.020, 113.030, 113.040, 113.080, 113.110, 113.120, 113.130, 113.140, 113.150, 113.160, 113.210, 113.220, 113.230, 113.240, 113.250, 113.260, 113.270, 113.280, 113.290, 113.410, 113.420, 113.430, 113.440, 113.450, 113.510, 113.520, 113.530, 113.540, 113.610, 113.620, 113.630, 113.640, 113.650, 113.660, 113.670, 113.680 and 113.690 are repealed.

Section 12. This Act takes effect on January 1, 1970.

References: Advisory Committee Minutes:  
6/19/65, pp. 5 and 6  
9/18/65, pp. 6 and 7

#### EDITORIAL COMMENTS

Subject: Proposed Revised Oregon Probate Code Provisions on Election of Widow and Abolition of Dower and Curtesy

I have found it necessary to rewrite the first draft on this subject, dated April 28, 1967, for the principal reason that the original of this draft was embodied in Senate Bill 315, introduced in the 1965 Legislative Session, as a Senate Judiciary Committee Bill, at the request of the Law Improvement Committee. Since this must be considered for understanding in legislative bill form, it had to be rewritten to show not only the additional language included in the proposed amendments, but also the deletions from the present sections.

This bill was presented to the Legislature to include, of necessity, not only the provisions for abolition of dower and curtesy, but also to include the amended provisions for intestate succession, which would give the surviving spouse a fee interest in real property in lieu of a present dower or curtesy interest.

There was also introduced in the Legislature a companion bill, Senate Bill 328, which also was recommended by this committee to the Law Improvement Committee and by it introduced in the Legislature. This bill attempted to set up provisions which would attempt to give some protection to a spouse where

a title was vested in the other spouse, akin to our present inchoate dower or curtesy interest. Although neither bill passed, it was the indication that the Senate Judiciary Committee was favorably disposed to the bill abolishing dower or curtesy, but was not interested in Senate Bill 328 to attempt to preserve inchoate interests prior to death.

I quote portions of the able comments made to the legislature in support of Senate Bill 315 as follows:

"The common law right of dower and curtesy has been modified or abolished in many states. In Oregon, a parallel right of the surviving spouse to take against the will of the decedent a one-fourth interest in his personalty has been created. This bill abandons the distinction between real and personal property, so far as concerns the rights of a surviving spouse and provides that, with respect to both, the surviving spouse may take a one-fourth interest.

"Under present Oregon Law, upon the death of the owner of a tract of timberland, his surviving spouse will be entitled to one-half of the earnings, but if the decedent owns all of the stock of a corporation, which owns the timberlands, the surviving spouse may claim one-fourth of the stock, absolutely. You will note, of course, that the right to the use of timberland has little value. The value of a dower or curtesy interest in lands bears no relation to the value of the lands but concerns only their productiveness and the life expectancy of the owner.

"Section 1 of the bill amends ORS 113.050 which now provides that a surviving spouse may elect against the will of a decedent to take an undivided one-fourth interest of the personal property of his estate. As amended, it provides that the surviving spouse may also elect to take by descent an undivided one-fourth interest in all the property of which the decedent dies seised and, with respect to real property, makes no distinction between resident and nonresident decedents.

"Section 2 of the bill abolishes dower and curtesy except with respect to the surviving spouse of a person who died prior to the effective date of the Act; it preserves rights and remedies with respect to vested estates of dower and curtesy.

"Section 3 of the bill amends ORS 5.040 relating

to jurisdiction of probate courts in the admeasurement of dower or curtesy. For this purpose, jurisdiction is limited to the interest of the surviving spouse of a person who died before the effective date of the Act.

"Section 4 of the bill deletes references to tenancies by curtesy in ORS 91.020 and section 5 makes a similar deletion in ORS 91.030.

"Section 6 amends ORS 105.340, relating to sales in partition, to delete reference to inchoate rights of dower.

"Section 10 repeals 41 sections of the Code relating to estates of dower and curtesy. Under sections 3 and 4 of the bill, these provisions will continue in effect with respect to the rights of dower and curtesy of the surviving spouses of land-owners who died before the effective date of the Act.

"The bill does not in any respect modify the law with respect to dower or curtesy consummate. Inchoate interests are mere expectancies or possibilities and legislation affecting or abolishing them does not impair any property right or the obligation of any contract. This is well established in other jurisdictions and it is the holding of our own Supreme Court in United States National Bank vs. Daniels (1947), 180 Or. 356, 177 p. (2d) 246.

"The Advisory Committee on Probate Law notes a trend toward the abolition of common law estates of dower and curtesy and considers that it is in keeping with the trend away from an agrarian economy. There is nothing radical about the change which this bill proposes. It simply makes a more appropriate provision for the benefit of the surviving spouse of a decedent than has heretofore been made under existing law."

The reference to the Advisory Committee minutes is certainly anything but helpful in considering the serious questions which I shall now introduce for discussion and decision by this meeting.

I note that in my copy of Bill No. 1, submitted to the Law Improvement Committee as revised January 14, 1965, I have in section 1 and in section 2 of the proposed draft, the words "one-fourth interest" have been corrected to read "one-half interest". Although I can find no language in the minutes which authorize this change, it is obvious why the change was made in my draft. The original bill, Senate

Bill 315, provided that the widow be given an undivided one-quarter interest in the real property in lieu of the dower interest. Of course, long subsequent to this time, the committee has changed this undivided one-quarter interest in the real property to an undivided one-half interest in the real property. Thus, if the widow is to take by descent, she would take an undivided one-half interest and not an undivided one-quarter interest as now provided in this bill.

It is my suggestion, however, that the undivided one-quarter interest in real and personal property as provided in the draft be retained. We are now providing, in effect, that the devolution of real property to the widow will correspond to the present devolution of personal property. Thus, it would seem appropriate that the present undivided one-quarter of the personal property, upon election against will, should be retained also as to both the real and personal property.

With respect to other changes in the present draft from the first draft submitted to you, I quote the following from Mr. Lundy's comments on the original rough draft of this proposal:

"There are at least two possible approaches to the treatment of existing statutory provisions that relate to dower and curtesy abolished by this draft. The first of these approaches is to delete all such provisions by repeal or amendment, relying on the 'saving' provision of section 4 to retain in force and effect such of those provisions as are applicable to vested interests. The second of these approaches is to delete by repeal or amendment only such of those provisions as are applicable to inchoate interests, retaining those provisions that pertain to vested interests or that otherwise would have some effect after the effective date of the proposed legislation. With the one exception of ORS 113.090 referred to above, this draft adopts the first of these approaches, which has the advantages of deleting statutory provisions which ultimately will become obsolete and of avoiding what in some cases may be the difficult problem of determining which statutory provisions will have some effect after the effective date of the proposed legislation."

Section 2 of the proposal reads in part as follows:  
"Any right to or estate of dower or curtesy of the surviving

spouse of any person who died before the effective date of this Act shall continue and be governed by the law in effect immediately before that date." In my opinion, to carry out the full intent of this language, the proposed bill should eliminate all reference to both inchoate and consummate dower and curtesy. This has indicated to me a change in section 3 of the first draft.

I have also included amendments to ORS 107.100 and 105.050, which were not included in the original proposal No. 6.

I have also eliminated section 9 of the proposed Act since this section is included in and amended by the draft of Clifford E. Zollinger on support of spouse and children.

I have eliminated the amendment of ORS 111.030, section 10 of this proposal, because that is repealed by the present draft on advancements.

I have eliminated section 11 because this provision would be repealed by the proposed section on wills.

One other comment is necessary. This bill does not repeal ORS 113.090, which provides that no action or suit shall be brought after 10 years after the death of a decedent to recover or reduce to possession curtesy or dower by the surviving spouse of such decedent. This limitation statute has been most useful to title companies in passing outstanding dower or curtesy interests where it can be established that the owner of the property has been dead 10 or more years. Since this is a limitation statute, it would be applicable to dower and curtesy rights for a period of ten years following the effective date of the Act. Although retaining this limitation statute in the code would not be consistent with the remainder of this bill, I suggested to Mr. Lundy that I could see no great harm in retaining this section for the notice of all concerned.

In Mr. Lundy's original comments on the proposed draft he called attention to the fact that the draft did not include amendments of a number of sections which, because of the substantial bulk they would add to the draft, were not included. Certain of these sections have been included in the present draft, but I call attention to the fact that, in addition to the above, amendments should be included to ORS 68.420, 94.105 and 105.330. The amendment of these sections, which would consist merely of the elimination of the

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references to dower and curtesy interests, would be included in any legislation submitted finally.

I have not included in the draft Mr. Lundy's able comments or others in the file, but this material will be included as part of the final draft.

STANTON W. ALLISON

# OBJECTIVES OF MICHIGAN PROBATE

## CODE REVISION

Adopted 1/21/67

### I.

TO SIMPLIFY THE PROCESS OF TESTAMENTARY SUCCESSION TO THE END OF REDUCING THE DIFFERENCES IN CERTAINTY, CONVENIENCE, PRIVACY AND DELAY THAT PRESENTLY EXIST BETWEEN DISPOSITIONS BY WILL, ON THE ONE HAND, AND TRANSFERS AT DEATH BY REVOCABLE TRUST, ON THE OTHER.

a. By simplifying the procedures relating to probate of wills, so that wills can be validated via an administrative process without notice, leaving questions that might be raised by contest or by request for a binding adjudication of validity, for decision in a separate proceeding. Such an approach would eliminate the delay involved in obtaining letters testamentary, reduce or eliminate the need for special administrators, and reduce the ability of persons who might oppose the will to impede and delay normal administration as a means of inducing settlement. It would tend to equalize the position of one who would attack a will, with that of one who might attack a revocable trust.

b. By providing that wills which are filed with the probate court incident to probate proceedings should be treated as private documents to be exhibited to those who can show probable interest, but not to the public.

c. By providing statutory duties, powers and protective devices to executors so that, where there are no limitations on his power by will and no other reason to resort to probate court for instructions or the resolution of controversies, the personal representative will have the option of settling and closing the estate without further recourse to probate court. At the same time, the rules should provide ample protection for interested parties by (1) requiring the personal representative to give certain notices and information to interested parties as a prerequisite to gaining the benefit of statutes of limitation; (2) providing a complete opportunity for any interested party to subject the personal representative to the authority of the probate court when any occasion demands it; (3) providing for the possibility that the court may order that a particular administration be accomplished under the continuing supervision of the probate court if some necessity for so doing is shown.

d. By eliminating the disparity that presently exists

between wills and will substitutes in respect to the elective share of spouses by (1) requiring an electing spouse to take economic benefits received from the decedent by will substitutes into account for purposes of determining what his or her protected share in the probate estate should be; (2) by extending the spouse's right of election to will-like transfers to third persons while making it clear that such transfers are valid except to the extent necessary to make up the share of the spouse; (3) providing for disinheritance of the spouse by consent by barring him or her from electing against a will to which he or she has given written approval during the decedent's lifetime.

e. By minimizing the continuing supervision by probate court of testamentary trusts and by empowering the probate court to handle litigation involving any kind of trust that persons properly might submit to a Michigan court, (i.e., including inter vivos family trusts, or other trust arrangements of a dispositive nature).

f. By aligning Michigan rules concerning interpretation of wills and its rules relating to ancillary administrations to uniform models so that the likelihood of conflicts of law problems in cases of decedents who have moved from state to state, or who own property in several states, may be reduced.

## II.

TO UPGRADE THE WORK AND IMAGE OF THE PROBATE COURT BY REDUCING OR ELIMINATING THE NECESSITY FOR A JUDGE'S INVOLVEMENT IN ROUTINE MATTERS RELATING TO ADMINISTRATION OF DECEDENTS' ESTATES, BY INCREASING THE POWER AND FINALITY WITH WHICH THE PROBATE JUDGE MAY DEAL WITH CONTESTED MATTERS, AND BY BROADENING THE SUBJECT MATTER JURISDICTION OF THE PROBATE COURT SO THAT IT PROPERLY MAY DEAL WITH ALL KINDS OF PROBLEMS INVOLVING FIDUCIARIES, WHO ARE, OR MAY BE, PROPERLY BEFORE A PROBATE COURT.

a. By eliminating the supervisory role of the probate court over most matters relating to estates; making controversies relating to estates more like other litigated matters in that the court will act in a judicial way in response to pleadings raising issues for decision, and process subjecting interested parties to the power of the court.

b. By separating routine administrative matters such as the non-contentious authentication and validation of wills, appointment of personal representatives in non-contested cases and the checking and receiving of reports required to be filed by personal representatives, from the responsibilities of probate judges by designating the position of probate registrar and permitting delegation of such matters to the registrar.

- c. By making adjudications in matters litigated before the probate judge final, subject only to appeal to the Court of appeals. Ideally, the probate court should be considered as co-equal with the circuit court. If it can be considered a part of the latter court, other things would fall in place. If it is to remain a separate court, then the jurisdiction of the circuit court over probate matters would need to be terminated.
- d. By giving the probate court jurisdiction, as now possessed by circuit courts, over inter vivos trusts.

### III.

TO UPDATE AND SIMPLIFY THE LAW OF INTESTATE SUCCESSION AND THE RULES RELATING TO THE SETTLEMENT OF SMALL ESTATES SO THAT THE IMPACT OF RULES OF PROPERTY SUCCESSION ON PERSONS OF MODEST MEANS WILL BE AS BENEVOLENT AS POSSIBLE.

- a. By increasing the amount of property which a surviving spouse and dependents may claim ahead of creditors and devisees to some fixed amount and by providing affidavit procedures and summary administration procedures so that estates of such size usually will not need to be administered.
- b. By providing that all intestate property pass to the surviving spouse up to a limit calculated to cover most modest estates. If the amount involved is over a set amount, the excess would be divided by the surviving spouse and descendants.
- c. By eliminating the distinction between real and personal property for purposes of intestate succession.
- d. By eliminating the possibility of inheritance by very remote relatives by providing for escheat where the decedent is not survived by any dependents, whether relatives or not, nor any relatives who are closer in relationship than descendants of great-grandparents. In other words, descendants of grandparents would be the outer limit on blood relatives who might inherit.
- e. By providing a period of survivorship, such as 30 days, as a condition to the right of any heir (save to exempt or family allowance property) to take property by intestate succession.
- f. By providing an optional system of independent administration for personal representatives of intestate persons so that such representatives will have the power to settle and close the estate of an intestate without the necessity of recourse to the probate court after receiving letters of

administration. Such a system would include appropriate safeguards which would assure any interested person of reasonable protection. This would provide the same flexibility of administration for intestate estates as is proposed for testate estates.

#### IV.

TO CORRECT VARIOUS INEQUITIES OF EXISTING PROBATE LAWS AND TO ELIMINATE VARIOUS PROVISIONS OF THE PRESENT CODE WHICH HAVE GENERATED CONSIDERABLE CRITICISM AND WHICH CAN BE ELIMINATED WITHOUT FUNDAMENTAL DAMAGE TO THE SECURITY OF THE SUCCESSION PROCESS OR THE INTERESTS OF THOSE INVOLVED IN ITS SMOOTH OPERATION.

a. By providing that any suitable person who consents to suit in Michigan courts may be a fiduciary of a Michigan probate estate.

b. By eliminating the appointment of appraisers by probate judges and making the selection of appraisers the sole responsibility of the personal representative.

c. By eliminating statutory fees for personal representatives and substituting a non-specific provision entitling personal representatives to reasonable compensation. This would permit the subject of fees for fiduciaries to be made the subject of court rule, if any schedule other than those settled by competitive pressures is desirable.

d. By eliminating the risk of personal liability of personal representatives for conduct which is reasonable. This would mean a change in the law concerning the personal liability of an executor or administrator for torts of his employees and in the rules making a fiduciary absolutely liable for a reasonable, but erroneous determination of the identity of the persons entitled to the estate .

e. By including comprehensive provisions dealing with the rights of adopted persons so as to remove questions relating to intestate succession and the interpretation of gifts and bequests to groups identified as "children," "issue," heirs" and "descendants."

f. By aligning to modern, uniform norms, the basic Michigan assumptions concerning such subjects as revival of revoked wills, proof of destroyed wills, implied exercise of powers of appointment, and ademption of specific gifts of corporate securities as affected by a change of ownership of such items between the date of execution of the will and the date of death.

V.

TO REVISE THE LAW OF GUARDIANSHIP TO MAKE IT MORE RESPONSIVE TO THE NEEDS OF THE TIMES AND TO REDUCE THE AMOUNT OF REQUIRED SUPERVISION OF THE AFFAIRS OF GUARDIANS AND OTHER CONSERVATORS BY THE PROBATE COURT.

a. By separating the subjects of guardians of the person of incompetents from the subject of care of property of persons who are disabled to the point of being unable properly to manage their property and business affairs. Such a separation would move the question of mental competency away from the question of ability to conserve or to manage property leaving the competency question as relevant only to situations where some restraint of personal liberty is appropriate.

b. By reducing the need for guardians or conservators for minors or their property by designating certain relations with whom a minor may be residing as having certain statutory rights in respect to authorizing medical treatment or other intrusions on the person or liberty of a minor, and in respect to small property interests of minors.

c. By giving property conservators appointed by the probate court the option and power to manage the affairs of the owner with minimum contact with the probate court.

Preliminary Remarks by Richard V. Wellman at Meeting  
of Probate Council and Probate Code Revision  
Committee, Michigan State Bar Association Building, Lansing

January 21, 1967.

The subject of probate reform is frequently associated with Dacey's book. This is unfortunate, for it obscures the fact that an American Bar Association subcommittee was moving toward probate reform as early as 1962, and that this Council took steps at least six months before Dacey's book first appeared, toward revision of Michigan's Probate Code.

To me, these moves by responsible agencies of the bar demonstrate two points: first, that lawyers are sensitive to legal technicalities that are upsetting to the public; and, second, that there are problems with probate law in terms of its impact on the practicing lawyer, and the way he would like to handle estates, that warrant serious study and revision. Whether bar groups could have expected much success with legislatures in respect to changes in this area without Dacey's help is problematical. But, with the amount of public attention that is presently focused on probate, we have a unique opportunity to move things toward a better way. I, for one, am awfully glad that we got a bit of a head start on the job.

From a purely professional viewpoint, the reasons why practicing lawyers are concerned with the present shape of our probate laws are not hard to find. Our probate code of 1939 was not very old when the marital deduction came into federal tax law in 1948 to give real impetus to the estate planning business. Since then, it has become increasingly true that the practicing lawyer has been pushed by good judgment and client demand, ever more deeply into the science of seeking out safe, efficient and simple devices for carrying out the tremendously diverse objectives of owners in respect to preserving and transmitting their savings. In the process, we have become keenly aware of the values that are flowing from generation to generation via insurance, pension and profit-sharing arrangements, joint tenancies, living trusts and other devices. This realization has sharpened our perception of the truly unique role that the will plays in estate planning, but it has also made us more aware of the embarrassing encumbrances that accompany use of the will as an estate planning tool. Many of us think of the will as the lawyer's specialty, and we hate to see it slip into the category of something no person of considerable means uses when he is completely well advised about its features and comparative shortcomings.

The problems that relate to the utility of wills are rooted in probate procedures. Turning to this area, we should see that we live with three inherited assumptions which, in combination, account for most of our difficulties. These are (1) the idea that a will has no validity until it is judicially authenticated after death; (2) that all personal and intangible property of a decedent vests, as a matter of title, in the person appointed by the probate court as the executor or administrator of the decedent's estate; and (3) an extension of the first two--that the probate court, being indispensable in the settling of a decedent's estate, is somehow responsible for supervising the process of collection and distribution of assets, and must stay involved in the process until the estate is judicially closed.

The product of these notions, especially the last one, is an inflexibility of procedures governing the settlement of estates that makes the administrative process more a hinderance than a helpful safeguard. For example, there is no essential difference in the procedures applicable to a well drawn will which governs a completely planned estate, and to an estate governed by a do-it-yourself job, or an intestacy. The same routines apply whether the successors of a particular estate are harmonious and cooperative, or at each other's throats. Probate procedures take no particular account of whether the assets of an estate are simple or complex, although the differences in the headaches that go with running a closely held business, and those attending ownership of a well selected portfolio of securities seem obvious from every other point of view.

Of course, inflexible rules become obsolete more quickly. For example, there probably was a day when it made sense to make the sale of land shortly after its owner's death a sticky piece of business. But, when that ancient point of view works to impede the free management of a portfolio of rapidly fluctuating securities, or to obstruct the sale of speculative land during a period following an owner's death we realize how far out of tune our rules have become.

But, inflexibility and outmoded assumptions are not the whole of the story. Another major drawback of present assumptions relates to fixing responsibility. The notion that the probate court supervises estates leads the public to blame the courts when things go sour in a particular estate, but we all know that today's courts, particularly those in populous areas, are in no position to serve as true supervisors of all that goes on in estate administration. They must react to pleadings and facts brought to their attention. Executors, on the other hand, are handcuffed by the need to get court orders on routine matters and are

thus rather effectively impeded from exercising responsibility which really should be theirs. Attorneys can and do help this curious situation, but here, too, we must realize that they work for the executor and must await his authorization. The result is a tragic form of the old shell game; you never know exactly which hat covers the blame when things go wrong.

The drafting subcommittee which you have appointed has given preliminary approval to a set of principles which we believe may help us achieve a new code and a new approach to some of these problems. The ideas set forth in these principles are in line with the present direction of the national effort to achieve a uniform probate code. Again, speaking in general terms, I would say that the principal feature of the new approach we are considering is flexibility. I can best emphasize this by saying that nothing presently being considered would force a particular probate court or probate lawyer to make drastic changes in the way estates are presently handled, provided present procedures seem preferable as applied to a given case when compared with alternatives. The changes involved are in the order of options. If they make sense, I would expect that they would begin to be used by careful lawyers in selected situations. This may not be the sort of dramatic change in law that will be exciting news for various ladies' sewing circles, but, in my judgment, it is the sort of change which will serve best to meet the needs of the public.

## LIVING TRUSTS: AVENUE FOR ABUSE?

Probate practices must  
meet 20th century need

by William J. Hickey  
Probate Judge, Norfolk County, Massachusetts

The twentieth century has posed a serious challenge to the nation's probate courts.

Where land and transfer of ownership was once a major asset of the probate system, realty today plays a minor part in most estates.

Probate practices, save for descent and purchase of realty, no longer serve for administering estates of bank accounts, securities, problems of mental capacity, investment practices and estate and inheritance taxes.

The family's financial future today is not a task for an amateur or a "do-it-yourself" man.

Nor can any pattern of multitudinous forms assure a plan's capacity for meeting the family's particular needs at lowest costs in expenses, taxes, and avoidance of potentially dangerous and troublesome mistakes.

Probate today is under attack throughout the nation. The national press has entered the fray: emotions and prejudices are heightened; facts are obscured.

The probate system--as it exists to day--is being attacked because of:

Lengthy delays in making funds available to heirs;

Political patronage;

Unreasonable expenses for court-appointed appraisers and guardians ad litem;

Publicity attending financial status of decedents and their beneficiaries.

### Basis in Fact

Judges and attorneys must recognize that these attacks may have a basis in fact.

We must rectify and modernize our probate courts.

There is an absence of uniformity in procedure and jurisdiction of probate courts throughout the nation. Consequently, I shall deal primarily, but not exclusively, with the Massachusetts probate court system--one of the oldest in the United States.

AVENUE FOR ABUSE?  
Hickey

Back in History

The Massachusetts Legislature, in 1784, established the state probate courts, providing for judges and registers of probate in each county and defining their powers.

In 1862--eight years later--these courts were made Courts of Record, and, in 1891, became courts of general and Superior jurisdiction.

On many occasions and at various times both the organization and personnel of these courts have been studied by prominent citizens.

In 1956, then Gov. Christian A. Herter (later Secretary of State under President Eisenhower) appointed the Herter Judicial Survey Commission, composed of an eminent cross-section, geographically and professionally of the community.

This Commission declared:

. . . most people in the Commonwealth, at one time or another, find themselves, or their relatives and friends involved in proceedings in the probate court. These courts enjoy an enviable reputation throughout the country for their organization and substantiveness and are up to date in their work. . . .

In Massachusetts the name "Probate" is an anomaly since the jurisdiction of the Courts encompass, not only probate matters, but also the human and financial problems of every segment of society.

A partial list of subjects within the sphere of authority of Massachusetts Probate Courts is: the probates of wills and granting of administration of estates; appointments of guardians and conservators; petitions for adoption of children and change of name; libels for divorce, or for affirming or annulling marriages; petitions of married women relative to their separate estates; petitions relative to the care, custody, education and maintenance of minors; and equity matters arising under trusts created by will or other written instruments.

Effective March 1, 1964, the Probate Courts were granted original and concurrent jurisdiction in equity with the Supreme Judicial and Superior Courts "of all cases and matters of equity cognizable under the general principles of equity jurisprudence and with reference thereto shall be Courts of general equity jurisdiction."

### Streamlined System

Changes in recent years resulted in streamlining the entire Massachusetts probate system. Here are a few of the changes:

1. Legislative statute for the appointment of a chief justice with authority to assign judges to alleviate the caseload throughout the Commonwealth.

2. Supreme Judicial Court rule requiring court-appointed appraisers and guardians to file a detailed statement of services rendered, disbursements, and charges may be published and are on file for public scrutiny.

3. Legislative statute authorizing testator to order that no guardians ad litem be appointed to represent minors or unborn persons.

4. No judge of probate nor any register, assistant register, or persons employed in any registry of probate shall be interested in, or benefited by, the fees of emoluments which may arise in any matter pending before any Probate Court.

Considering the Massachusetts changes and, after a study of probate nationally, I feel the following recommendations should greatly improve administration in all probate courts throughout the U. S. and improve the "image" of the probate system everywhere:

1. Abolish court appointed appraisers. Since the fiduciary must marshal the assets, he should be responsible for the establishment of valuations. The opinions of non-expert court appraisers is not given any weight by the State Inheritance or Federal Tax Bureaus. Therefore, their existence serves no useful purpose. (It should be noted that so-called court appointed appraisers are not required in the administering of an Inter Vivos Trust.)

2. Shorten the period of creditors to bring suit and thus allow estates to be probated more swiftly.

3. Extend the widow's allowance to include all dependents of the decedent and increase amounts available so as not to inconvenience those who relied upon the decedent for financial support.

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4. Require estate and inheritance tax returns to be filed and reviewed more quickly; authorize the fiduciary to make distribution six months after filing returns without personal liability for any additional assessment.

5. Require the fiduciary to make final distribution within 15 months from the date of death, or forfeit the right to payment of services and be subject to removal. This filing period to be extended only upon approval of the Court and upon affidavit for good cause.

6. Require attaching creditors to file an affidavit stating the exact nature of a claim and facts substantiating the amount of attachment.

7. Require all fees to fiduciaries and attorneys to be approved by the Probate Court prior to payment.

8. Make the financial status of all decedents and their wills and trusts private records, open only to heirs-at-law and other interested persons--comparable to the tax records of the Federal and State Governments.

9. Appoint rather than elect Justices and probate officials.

10. Expand a small estate statute, in those communities that have it, to include somewhat larger estates, broader in scope.

11. Require the trustees of inter vivos trusts to file accounts in the Probate Court upon the death of the donor.

### Living Trust Query

Living trusts are being created for other than tax purposes, in most larger estates, to avoid delay of probating, the expense of probate and the publication.

When an estate is probated there should be a judicial review of the fiduciaries' financial transactions, their fees and their general competency. Presently, the accounts of many fiduciaries, under inter vivos trusts, are being filed in court although there is no requirement to do so. In a judicial review, Probate Courts also have authority to determine the meaning of inter vivos trusts, the removal and appointment of trustees.

It should be considered whether, after the death of the donor of an inter vivos trust, the fiduciary be required to file an annual accounting.

This would give protection to the heirs and at the same time retain the unique tax advantages of the inter vivos trust, without additional charges.

#### Stricter Requirements

It is now more and more prevalent for older persons who are somewhat incapacitated to create joint accounts, or trustees accounts, or inter vivos trusts, for the purpose of allowing a confidant to manage the business affairs and pay the bills. In many cases there is no testamentary intent. Upon death, these funds are not reported and the question of mental capacity cannot be determined since there is no knowledge of any assets.

It is therefore suggested that, since these funds must be reported to the estate and inheritance tax authorities, such information be required by the Probate Courts so that some degree of supervision be exercised over the disposition of non-probate assets.

We must bring our Probate Courts in tune with the needs of the twentieth century. However, there is an immortal maxim that any plan created by the mind of man is no better than the mind or minds that administer the system.