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June 9, 1965

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

From: William M. Keller, Secretary
Committee on Probate Law & Procedure
215 American Bank Building
Portland, Oregon 97205

MEETING NOTICE

Date: Saturday, June 19, 1965

Time: 9 A. M.

Place: Judge Dickson's Courtroom
244 Multnomah County Courthouse
Portland, Oregon

- AGENDA:**
1. Report on success of legislation proposed.
 2. Progress reports on legislation being considered.

Please indicate, by signing and returning the extra colored copy of this notice in the enclosed return envelope, whether or not you will be able to attend the meeting.

WMK:sb

enclosures

ADVISORY COMMITTEE
Probate Law Revision

June 19, 1965

Minutes

Meeting convened at 9:00 A.M., Saturday, June 19, 1965, in Judge Dickson's courtroom, Portland. All members present except Zollinger and Butler. Committee on Probate Law & Procedure present, except McKay, Schnitzer, Gilley and Tassock. Dickson noted although Schnitzer is unable to attend meetings at present, he continues to be hard-working committee member. Also present were William E. Love, of Law Improvement Committee, and David Frohnmayer.

1. GENERAL

Dickson advised 50% of bills presented by Committee to legislature passed.

Dickson reported on luncheon meeting on June 17, 1965 attended by himself and Zollinger, with Messrs. Love and Stoll, representing parent committee, which requested revision of probate code ready by August, 1966 for presentation to it. Law Improvement Committee would then review it early in September, present it to the Bar. This Committee could make corrections early in November, still have time to meet with legislature in November and have bills ready to introduce when session opens. Suggested separate bills for controversial subjects, e.g., small estates act, dower and curtesy. Other work should probably be in one bill. Dickson advised work schedule would require Lundy, or one of similar capability, and stenographic help. Dickson noted new Washington code was recently made available to Lundy. It was determined rather than ask for special allowance for research materials, Committee will try to obtain materials through Lundy's office. Further advised that Committee intends to meet the third Saturday in each month, and has agreed to work for more than half a day. Liaison between Committee and parent was discussed; Love suggested occasionally a member of his committee might sit in on meetings. Expense of attending meetings was discussed. Dickson suggested sufficient funds might be made available to pay travel expense of out-of-town members. Love and Stoll

suggested: approach to legislature could be improved, that bills might better be referred to Legislative Counsel Committee rather than to a law committee; presentation to local bar associations of work product, inviting their help and cooperation; and a public relations program. Discussion with regard to mass production and distribution prior to presentation to legislature determined unnecessary and useless expense.

Love reported the Law Improvement Committee had met June 18, 1965; that it is an offshoot of the Legislative Counsel Committee and thus has a certain amount of that committee's budget at its disposal. Decided that probate law revision is most important project it now has. Resources will be available, including staff time, to run from September, 1965 to September, 1966. Sam Haley is now working on revision of code to incorporate this session's laws. Lundy is interested in working with Advisory Committee, but he is at direction of Legislative Counsel Committee, which might assign another to the project. Budgeted 13 man-months--about 6% of budget available. Will provide stenographic minutes, publication costs--whatever appears necessary. Further reported Advisory Committee increased to ten, Lisbakken appointed a member. May expand it further to make member of Law Improvement Committee also a member. Suggested one or two members of Law Improvement Committee should be members of legislature.

Dickson reported he had contacted Bar to request continuance of members of Probate Law & Procedure Committee, that decision would not be made until September.

2. FROHNMAYER-RIDDLESGARGER SUBCOMMITTEE

Frohnmayr pointed out basic problem--whether to cut and patch present code, or to perform an overall revision. Noted American Bar Association is working on a new Uniform Probate Code. Reported April, 1965 issue of Trusts and Estates contains article on ABA movement for a new code, that it is important both for procedure and substantive law. Public is becoming aware of cumbersome provisions of present probate law. One of reasons for inter vivos trusts is to get away from probate. Elements article suggested necessary to consider in revision: (1) Unduly restrictive authority of personal representative. Too much supervision of court. Reason for restrictions--to protect from dishonest fiduciary; but assumption should be that he will be honest. Powers of the fiduciary should be substantially the same as of owner of property. (2) Appraisers--no longer any particular reason for having them. Present system is a matter of political patronage, and a waste of money. Taxing authorities do not rely on these appraisals. (3) Abolition

of distinction between real and personal property, and question of where title would vest. Recognition that problem will be treated differently in different states, but forward-looking people are thinking of abolition of distinction. (4) Notice-- requirement for publication. Many notices unnecessary--e.g., for sale of real property. (5) Less public disclosure of what property is in probate. Should not be open to public as to size of estate and the assets included. (6) Small estates-- necessity for summary proceedings. (7) Independant administration--non-intervention wills, such as they now have in Idaho and Washington. (8) Guardians, court-appointed--should have more authority. (9) Probate court should be a court of general jurisdiction.

Paul E. Bayse is head of ABA committee on revision of Model Probate Code. Work has been in progress for over a year, draft of legislation not expected for at least another year. Presentation to the Committee on Uniform State Laws is anticipated one year from this summer.

Mention made of provisions of Iowa 1963 probate code, and Washington code which was passed in 1965--eliminates expense of administration, provides for small estates, but probably not as helpful to this Committee as Iowa code because Washington is community property state.

Frohmayer suggested if a mere patching is done of present code it will be pretty far behind the times; that it should instead be a forward-looking code. Committee should decide now whether to abolish dower and curtesy; otherwise two codes would be required--one with and one without.

Riddlesbarger concerned with definitions of terms, and best method of dealing with legislature. Judiciary Committee said time too short to adequately consider Small Estates Act, so the legislation was tabled.

Consideration given to Riddlesbarger suggestion that Committee follow pattern established by educational group-- two phases: (1) Housekeeping bill--e.g., clean up references to "his and her", "executor, executrix, administrator, administratrix," make existing code a more readable document and eliminate contradictions, without substantial substantive change. Then, (2) in separate bill, as a separate project, prepare legislation to effect the modern trend of thought.

Discussion followed as to whether better to have sweeping revision of present code, or to present two bills. Allison pointed out one cannot determine in advance what is controversial and what is not. Recommended complete revision, based on present code rather than complete new code. Jaureguy

pointed out present code has been construed for many years; if a brand new code is adopted benefit of these years of construction is lost. However, if new code were adopted it should be a uniform code. Carson believed uniform code is too far in the future to provide any real help; that it would be better to try to improve existing code.

Love stated his Committee hoped for something more than a mere topographical revision and elimination of ambiguities, etc., that it would prefer substantive changes in the law, but within the framework of the existing code.

Riddlesbarger requested definition of terms--whether "new code" means merely a rearrangement. Dickson stated a new code would embrace a number of new concepts, including radical changes in the necessity for probate, abolition of the distinction between real and personal property. Frohnmayer included power of probate court--stated there is no reason why probate court should not have power to determine title to real property. Dickson mentioned case where trustee is also executor--that there is no reason why assets should not be distributed to him without the intervention of an equity court.

Frohnmayer moved Committee undertake to make an extensive revision and reorganization of the existing code, to incorporate desirable provisions of the Iowa, Washington, perhaps South Carolina, codes, possibly Uniform Code, including a revision of the format of the code, to provide a modern, up-to-date code. Keller noted motion would not preclude building on the present foundation. Motion seconded by Jaureguy, upon being put to vote carried unanimously.

Frohnmayer distributed copies of "Proposed New Draft of S.B. 315 (ORS 111.020)" and of "Proposed Re-Draft for ORS 111.030." Introduced his son, David, who has completed his first year of law school at University of California--Boalt Hall, and who helped research.

Riddlesbarger requested assignment of definitions. Carson and Lundy appointed to provide definitions.

Frohnmayer noted ORS 111.010 contains definitions and rules of construction--that similar definitions appear throughout the entire probate code. Suggested one section early in Code give definitions and use of terms. Suggested elimination of terms "executor, administrator," that "personal representative" be used throughout.

ORS 111.020--used S.B. 315, which was revision of this section, thus code should do away with dower and curtesy. Proposed New Draft read. Questioned use of "seised" ("When any person dies seised"); "not having lawfully devised the same," (What about intestate?); situation where there is a will valid as to some things, but invalid as to the disposition of real property--perhaps could include in definitions "intestate" to include partial intestacy; "shall descend"--whether or not to stay with Oregon law that upon death of intestate title immediately descends to the heirs, subject to being divested for payment of debts--modern approach is to vest title in personal representative so he may deal with it the same as with personal property; "subject to his debts"--does this mean those only which are unsatisfied out of the personal property?

Carson noted under present sections real property may be sold before personal property.

Frohnmayr stated if distinction is retained between real and personal property, then widow receives 1/4 real property and 1/2 personal property, and issue becomes important. This would give validity to theory of abolishing distinction. Frohnmayr suggested possibility of giving 1/3 of both real and personal property to widow, net after debts and claims are paid; otherwise, if one type of property is sold rather than the other, one might thereby deprive the widow of just share.

Riddlesbarger questioned who would bear expenses--believed in the final settlement everyone should bear a proportionate share of the expenses.

Dickson suggested adoption of the doctrine of apportionment.

Swift suggested rather than doing away with distinction between real and personal property, merely to provide widow's share of each is the same. Keller noted present trend would indicate one-half would be reasonable share, as in community property states. Richardson noted intent when will is made is usually that widow will get bulk of the property. Favors one-half, but would prefer widow share proportionately burden of debts and taxes.

On poll of Committee members, determined surviving spouse to receive one-half real and personal property.

Discussion followed as to rights of surviving spouse and minor children. Allison noted confusion which results from "homestead"--when it is discussed in probate code it becomes confused with property exempt from execution on sale after judgment; thus, in considering the rights of the widow, word "homestead" should be eliminated. Also suggested setting aside of property to spouse should be by court hearing. Allison Committee to consider rights of spouse and minor children in Chapter 113.

ORS 111.040. David Frohnmayer noted present ORS 111.040 defines degree of kindred, stated Oregon uses civil law. Suggested this present section be incorporated in a definition section, and there define kinship. Would add "by counting upward from the intestate to the nearest common ancestor" as was done in the Model Probate Code of 1946. If this suggestion followed, there would be very escheat. Model Probate Code decided to limit, however, to maternal grandmother, theory being one might prefer that property should go to State of Oregon rather than to an extremely distant relative.

Frohnmayer noted many escheats result merely from lack of diligence; therefore, consideration should be given to whether it is better to give property to a distant relative in Timbuktu rather than to have the estate remain in Oregon.

Riddlesbarger questioned whether in-laws should every appear in the chain--noting that often daughters- and sons-in-law took care of elderly parents, that many older people refuse to make a will.

Riddlesbarger and Frohnmayer Subcommittee to consider this matter of in-laws and make recommendation to Committee.

Proposed New Draft SB 315 - (4) "Shall descend to the father and mother . . . as tenants by the entirety," In reply to query as to whether this is in keeping with the concept, it was noted this had previously been adopted as the policy of this Committee. (5) Whether to spell out specifically whether to take by right of representation if one or the other of the brothers and sisters is still alive. Dickson suggested it would be better to follow Supreme Court cases and opinions of Attorney General on this matter, spelling it out in statute.

(6) Oregon has collateral kindred rule, should list general rule, list exceptions. (b) Oregon version of ancestral property doctrine. Allison suggested (b) should be an exception to (4), not to (6); that this is very useful to title insurance people, obviates necessity of administration of the deceased minor child's estate. Upon death of the child his share lapses, not subject to claims.

Discussion as to whether there is relation back to original inheritance. Allison pointed out in answer to query as to whether a sale by a guardian during infancy would be invalid, that it is property owned at death, thus infant at death would not own property previously sold.

Upon vote, motion carried to eliminate (6)(b).

(6) "in equal degree"--Carson suggested insertion of words "per capita."

(7) Merely adds "surviving spouse," attempting to make provisions consistent as to real and personal property. Presently, even though there is surviving spouse, there could be an escheat to the state.

Discussion of terms "lineal descendant" and "issue." Carson noted terms not identical, that "lineal descendant" is a more precise term and should be used in preference to "issue." Richardson mentioned Oregon Supreme Court case on terms, noted Oregon defines differently from some other states where "issue" means children.

Jaureguy noted if one leaves two children, one of them survives him and has one child, the other has six, his one child will take equally with the other six, but if both children die, all grandchildren will take equally. Jaureguy would prefer right of representation regardless of whether one child is living or not. Carson noted right of representation applies in (5) to brothers and sisters, but in (6) next of kin take per capita.

Upon vote, determined right of representation to apply in (1), (5) and (6).

Next meeting - August 13 and 14, 1965, to commence at 9:00 A.M. at the Rogue Valley Country Club, Medford. To continue report of Frohnmayer-Riddlesbarger subcommittee.

Meeting adjourned at 12:45 P.M.