

ADVISORY COMMITTEE
Probate Law Revision

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

Dates) 1:30 p.m., Friday, July 14, 1967
and: and
Times) 9:00 a.m., Saturday, July 15, 1967
Place: Suite 2201, Lloyd Center

(This Board Room is at the head of the
spiral stairway on the Central Plaza,
or take elevator to the medical section.)
Portland, Oregon

Suggested Agenda

1. Approval of minutes of May and June meetings.
2. Miscellaneous matters.
3. Probate courts and jurisdiction.
 - a. Report by Legislative Counsel on 1967 legislation.
 - b. Discussion to be led by (if present) Judge Thalhofer, Judge Warden, Mr. Copenhaver, Mr. Gooding and Mr. McKay.
4. Wills (draft by Riddlesbarger considered at June meeting).
 - a. Sections 14 and 14A (background report by Mr. Allison and Mr. Lundy).
 - b. Sections 14B and 14C (discussion to be led by Mr. Riddlesbarger).
5. Elective share of surviving spouse.

Consideration of section 1 of draft by Allison considered at June meeting and elective share provisions of proposed Wisconsin Probate Code (draft by Mr. Riddlesbarger, Mrs. Braun and Mr. Richardson, and discussion to be led by them).
6. Family support (discussion to be led by Mr. Zollinger).
7. Outline of chapters of proposed revised Oregon probate code (discussion to be led by Miss Lisbakken).
8. Title to property (discussion to be led by Mr. Frohnmayer).
9. Advancements (discussion to be led by Mr. Frohnmayer).
10. Conserving property of missing persons (ORS chapter 127) (report by Mrs. Braun and Mr. Gilley).
11. Next meeting.

Please note change of meeting place for July meeting.

ADVISORY COMMITTEE
Probate Law Revision

Thirty-eighth Meeting, July 14 and 15, 1967
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The thirty-eighth meeting of the advisory committee (a joint meeting with the Committee on Probate Law and Procedure, Oregon State Bar) was convened at 1:45 p.m., Friday, July 14, 1967, in Suite 2201, Lloyd Center, Portland, by Chairman Dickson.

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

The following members of the Bar committee were present: Bettis (arrived 3:30 p.m.), Gilley, Kraemer, Krause, McKay, Piazza and Thomas. Biggs, Braun, Copenhaver, Lovett, Meyers, Mosser, McKenna, Silven, Thalhofer, Pendergrass, Richardson and Warden were absent.

Also present was Robert W. Lundy, Legislative Counsel.

Approval of Minutes of May and June Meetings

The reading of the minutes of the two previous meetings (May 19 and 20; June 16 and 17, 1967) was dispensed with and the minutes were approved as submitted.

Probate Courts and Jurisdiction

Report by Lundy. Lundy distributed a copy of a report he had prepared dated July 12, 1967, on the subject of probate courts and jurisdiction. He explained that the report had been prepared in response to a request made at the June 1967 meeting concerning action taken by the 1967 regular session of the Oregon legislature on transfer of probate jurisdiction. He noted that probate jurisdiction had been transferred to the circuit court in the following four counties: Columbia and Tillamook from the county court; Linn and Umatilla from the district court. He indicated that in all four instances the transfers were made in conjunction with the addition of a circuit court judge.

Lundy also reported that the legislature had transferred juvenile jurisdiction to the circuit court in a number of counties, and, as a result of this action, there were only eight counties in Oregon where juvenile jurisdiction remained in the county court.

Lundy's report also set forth previous action by the committees relating to the subject of probate courts and jurisdiction and quoted excerpts from earlier minutes relating to the following four basic points previously decided:

(1) Vest original probate jurisdiction in all counties in the circuit courts only.

(2) Define probate jurisdiction in broad terms.

(3) Look to present methods of providing temporary circuit court judges to assist in handling the additional workload possibly resulting from transfer of probate jurisdiction.

(4) Authorize appointment of attorneys as probate commissioners to handle ex parte probate matters.

Report of subcommittee. McKay reported that he had met with Thalhofer and Copenhaver to discuss appointment of attorneys to act as probate commissioners to handle ex parte probate matters in counties in which there was no resident circuit court judge and no district court. The committees were of the opinion it would be more desirable to authorize the county clerks to sign ex parte matters than to appoint attorneys as probate commissioners and outlined the following reasons for the departure from the decision previously decided upon by the committees:

(1) The location of the county clerk was a matter of general knowledge, whereas the judge would have to be contacted in many cases to learn the name and address of the commissioner he had appointed.

(2) In several eastern Oregon counties there was just one attorney or firm and to appoint him might prohibit him or his firm from practicing in the probate court.

(3) The county clerk was the clerk of the court, and as such, was under the jurisdiction of the probate judge.

(4) The county clerk received a salary which would eliminate the need for such additional payment that would be necessary for probate commissioners.

McKay noted that the 1963 Iowa Probate Code, sections 22 and 23, adopted this approach and suggested that the draft be adopted to apply to the county clerk in the eight eastern Oregon counties which would be affected. Dickson urged that the provision be made permissive in all counties and pointed out that it would be both convenient to attorneys and time saving to the probate judge if the county clerk were permitted to handle ex parte orders.

The committees discussed the types of orders which the county clerk should be permitted to sign and agreed that he should not be permitted to determine or approve:

- (1) A matter contested in any way.
- (2) An order requiring appraisal of an estate.
- (3) The amount of support money.
- (4) The final account.
- (5) Heirship.
- (6) Attorney fees.

Determination of guardianship matters was discussed and it was agreed that the county clerk should be authorized to sign ex parte orders in guardianship matters as well as probate matters.

McKay commented that section 23 of the 1963 Iowa Probate Code allowed anyone who disagreed with any order to oppose it within six months. Riddlesbarger asked if ex parte probate orders by the clerk of court should be made permissive or mandatory. He suggested that some judges might refuse to relegate this responsibility to the clerk. McKay read section 23 of the 1963 Iowa Probate Code and the committees agreed that language would be appropriate.

McKay moved, seconded by Riddlesbarger, that a draft be prepared to provide for the transfer of all probate jurisdiction to the circuit court and to authorize and empower the county clerks in the respective counties to sign all but a few vital ex parte orders on a permissive basis. Motion carried. Dickson requested that the subcommittee, consisting of McKay, Thalsofer, Warden, Copenhaver and Gooding, prepare the draft, submit it to Allison prior to the September meeting, and the subject be placed on the September agenda as the first order of business.

Section 2. Execution of a Will. (Note: See Minutes, Advisory Committee, 6/16,17/67, Appendix A, page 2; and memorandum from Allison dated July 11, 1967.)

Allison called attention to his memorandum dated July 11, 1967, and requested reconsideration of the action taken at the June 1967 meeting requiring that the testator, in the presence of each of the witnesses, "declare that the instrument is his will." He was of the opinion that to add to the technical requirements for execution of a will would provide additional grounds for attacking a will of a competent testator. Allison recited the cases he had read on this subject and advocated rejection of the provision which, he, indicated, was contrary to the existing case law of Oregon prior to the Sloan decision in Erickson v. Davidson, 216 Or. 547. Allison moved, seconded by Thomas, that the committees adopt sections 237 and 238 of the proposed Uniform Probate Code.

Riddlesbarger called attention to his comments on section 2 of the wills draft (Note: See Minutes, Probate Advisory Committee, 6/16,17/67, Appendix A, page 3) and noted he had recommended that publication be required. He stated that a witness signed his name to an instrument for the purpose of identifying and proving it, and that if the witness did not attest to something, there was no good reason for the requirement that a will be witnessed. Krause expressed agreement with Riddlesbarger and commented that a witness should, as a minimum requirement, be aware that he was signing as a witness to a will. Frohnmayer observed that the execution of a will should be made as simple as possible and agreed with Allison that stumbling blocks should not be added which would defeat the intent of the testator. He also expressed the view that witnesses should not be required to sign in the presence of each other. Husband remarked that he favored having the two witnesses present at the same time. Jaureguy commented that while it was a good idea, the law should not require such a procedure. He said that he could not agree that a will should be denied probate because the witnesses did not sign in the presence of each other.

Gilley suggested providing that the will be admitted to probate in every instance unless there was testimony of an eye witness to the effect that the will was not published. Allison remarked that many wills, not drawn by lawyers, do not have an attestation clause.

Zollinger agreed with Riddlesbarger that unless a

witness attested a will, his signature was not very meaningful. He noted that in Iowa, where the law was the same as Oregon's present law, the requirement had been added that the testator publish his will and said that he would favor the requirement that the witness be aware of the fact that he was attesting a will.

After further discussion, Allison withdrew his motion and Zollinger moved, seconded by Riddlesbarger, that the action taken at the June 1967 meeting be reconsidered and that section 2, subsection (1), be amended to read:

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

"(a) Sign the will; or

"(b) Acknowledge the signature previously made on the will by him or by his proxy; or

"(c) Direct one of the witnesses or some other person to sign thereon the name of the testator. Any person who so signs the name of the testator shall sign his own name to the will and write on the will that he signed the name of the testator at the direction of the testator.

"(2) At least two witnesses shall each:

"(a) See the testator sign the will; or

"(b) Hear the testator acknowledge the signature on the will; or

"(c) Understanding that the instrument is the will of the testator, sign his name thereto in the presence of the testator and at his request."

Allison suggested that subparagraphs (b) and (c) of subsection (1) be transposed and was told this was a drafting matter to be left to his discretion.

Thomas expressed doubt that "understanding" was the proper term as used in subparagraph (c) above. Zollinger suggested "being aware" and Riddlesbarger called attention to the deleted language in subparagraph (d): "Observe acts which unmistakably indicate that the will has been signed by the testator . . ." Dickson directed that the exact terminology be left to the draftsmen. In reply to a question by Husband, the committee favored omitting the

provision that would require the witnesses to sign in the presence of each other. A vote was then taken on Zollinger's motion and the motion carried.

Section 14. Encumbrance or disposition of property after making will; and Section 14 A. Bond or agreement to convey property devised as a revocation. (Note: See Minutes, Probate Advisory Committee, 6/16,17/67, Appendix A, page 10; Lundy's report dated 7/13/67.)

Lundy distributed a report dated July 13, 1967, which he had prepared to answer questions raised at the June 1967 meeting on sections 14 and 14 A of Riddlesbarger's revised draft on wills. He explained that a question had arisen as to the derivation of section 14 and was of the opinion that it came from subsection (3), ORS 114.230. Section 14 A, he said, was derived from ORS 114.140. Concerning the status of ORS 114.150 Lundy noted that it covered a subject involved in what was called "Bill No. 7" in 1965. He called attention to the material following tab 19 in the blue notebooks which set forth the substance of Bill No. 7 plus the committees' action on certain sections in ORS chapter 116.

Allison indicated that section 377 of Jaureguy and Love made clear that section 14 A was necessary not only to indicate a change in the common law rule as to revocation, but also to provide that the person who received a specific devise of property would also receive the benefit of any contract on that property. Lundy expressed agreement that section 14 A was necessary and had been inadvertently omitted from the first draft. He added that section 14 A should probably follow section 10 of the draft rather than section 14 if the committees agreed with his conclusion that section 14 was not a revocation provision.

Riddlesbarger moved, seconded by Zollinger, that section 14 A be adopted and approved in principle, leaving to Legislative Counsel the task of drafting the section in proper language. The motion carried.

Riddlesbarger then moved, seconded by Zollinger, that section 14 be approved. The motion carried.

Section 14 B. Non-ademption of specific gifts in certain cases. Riddlesbarger explained that section 14 B was copied from the 1966 proposed Wisconsin Probate Code and expressed approval of the intent of this section and suggested that the action would clarify the concept of

ademption by extinction. Allison took the opposing view and recommended deletion of the section because it would apply only to specific gifts, and a court would have to determine whether the legacy was specific or demonstrative before the section would be applicable. Zollinger agreed with Riddlesbarger and cited an occasion in his own practice where the proposed section, had it been in effect, would have settled the case in what he deemed to be a fair and just manner. After further discussion, Riddlesbarger moved, seconded by Zollinger, that section 14 B be approved in principle. Motion carried. Dickson asked the committee members to study the section so that they would be in a position to discuss it at greater length the following morning.

Section 14 C. Renunciation of gift under will. Riddlesbarger explained that section 14 C was recommended primarily to resolve the question of whether or not a renunciation would constitute a gift for gift tax purposes. Dickson asked Lundy to call Carson after the meeting to alert him to this problem and indicated that the section would be discussed the following morning when Carson was present.

Elective Share of Surviving Spouse

Dickson read a letter written by Richardson to Riddlesbarger in which Richardson stated that neither he nor Braun would be able to attend the July meeting. In his letter Richardson outlined general agreement with the procedure in the 1966 proposed Wisconsin Probate Code for election against a will. Riddlesbarger requested that this subject be postponed and Dickson directed that it be placed on the August agenda as item number 1.

Riddlesbarger called attention to the report Riddlesbarger and Allison had prepared on the rights of a surviving spouse to elect against a will.

Family Support

(Note: See report by Zollinger dated June 5, 1967, entitled "Support of Spouse and Children.")

Zollinger called attention to a draft, tab 15, in the blue notebooks, dated January 25, 1967, prepared by Legislative Counsel which was derived from a draft by Gilley and Krause and approved by the committees. He favored the changes in the draft set forth in his report dated June 5, 1967.

Section 1. Occupancy of family abode by spouse and children. Zollinger noted that Legislative Counsel had raised the question of whether section 1 was limited to fee

simple estates or whether the purpose was to include leasehold estates. Zollinger was of the opinion the section should provide for leasehold property and this was added to his draft. In reply to a question by Dickson, Zollinger commented that he felt it appropriate to give an incompetent child the right to occupy the place of abode as provided in the section.

Frohnmayr suggested subsection (2), line 2, read "fire and other hazards" and the members agreed to this change. Frohnmayr suggested reviewing the terminology by changing "abode" to "family residence." Zollinger contended that "principal place of abode" was a more meaningful term and others agreed.

Section 2. Support of spouse and children; petition, answer and order. Allison called attention to the question by Legislative Counsel on page 5 of Zollinger's June 5 report which asked what persons were included in the notice to "interested parties." Allison indicated he would prefer not to require a formal citation and hearing procedure. Frohnmayr agreed that it was not necessary to issue a citation and was of the opinion that any kind of actual notice to the personal representative would be adequate. Gilley questioned the advisability of requiring appointment of a guardian ad litem for minor children to protect their interests, and, after discussion, indicated he would prefer to leave this matter to the discretion of the court. Frohnmayr said that he favored Gilley's suggestion and proposed that the personal representative receive notice and the citation be issued only to those persons whom the court determined should receive notice. His opinion was that no problem existed in this connection in the vast majority of cases, and he opposed further complicating the procedure in estates where no problem had been experienced.

After further discussion, Gilley moved that subparagraph (b) of subsection (1) read "Unless the court by order waives citation, citation to the personal representative . . . (no further change)."

Zollinger moved to amend Gilley's motion by revising subsection (1) to read:

"(a) (No change.)

"(b) Unless the petitioner is the personal representative, service of the petition and notice of hearing thereon.

"(c) Unless the court by order shall otherwise direct, citation to persons whose distributive share of the estate

may be diminished by the granting of the petition.

"(d) Hearing."

Husband seconded Zollinger's motion and the motion carried unanimously.

The meeting was recessed at 5:15 p.m.

The meeting was reconvened at 9:10 a.m., Saturday, July 15, 1967, by Vice Chairman Zollinger in Suite 2201, Lloyd Center, Portland.

The following members of the advisory committee were present: Dickson (arrived 9:40 a.m.), Zollinger, Allison, Carson, Frohnmayer, Husband, Jaureguy, Lisbakken and Riddlesbarger.

The following members of the Bar committee were present: Bettis (arrived 10 a.m.), Gilley, McKenna, Piazza and Thomas. Also present was Lundy.

Support of Spouse and Children (Continued)

Section 3. Nature of support; limitations; change by court. Zollinger pointed out that subsection (4) had been inserted because of a suggestion by Legislative Counsel that there should be an expression of the manner in which distributive shares were to be charged if at all, because of any support order at the time of final distribution.

Allison noted that Legislative Counsel had suggested use of the term "set apart" rather than "transfer of" in section 3. Jaureguy commented that "transfer" was ambiguous because it could mean transfer of possession or transfer of title. Zollinger suggested this could be corrected by inserting "title to" after "Transfer of" in subparagraphs (a) and (b) of subsection (1). Allison contended "set apart" was the better phraseology because it had been used in the code for many years. Zollinger asked for a show of hands on the use of the two terms and the majority of the committees favored "set apart."

After further discussion, Frohnmayer moved that the committees reconsider their decision. Zollinger again asked for a show of hands and the committees reversed their position and approved "Transfer of title to" in subparagraphs (a) and (b) of subsection (1).

Frohnmayer suggested substitution of "may" for "will"

in the first line of subsection (3) and Riddlesbarger proposed "is or may be" in place of "will." Frohnmayer indicated that under the wording of the draft, the court would actually have to make the determination as to the estate's insolvency and could then only allow one-half of the value of the estate. Jaureguy added that the support order was made before there was an accurate determination of the indebtedness of the estate.

Zollinger suggested the following language in subsection (3): "If it appears to the court that after such provision for support is made the estate will be insolvent, the provision for support . . . (no further change)." The committees agreed this language would be satisfactory.

In reply to a question by Riddlesbarger, Zollinger said that section 3 did not provide differentiation between payment for temporary or permanent support. Riddlesbarger was of the opinion that the court would have no guide to determine whether or not a previous award should be taken into account. Zollinger explained that the determination was discretionary in the court. Riddlesbarger questioned the clarity of the provision and suggested insertion of a requirement that the court take into consideration amounts previously paid in subsection (2). Gilley was of the opinion that subsection (4) of section 2 was self limiting and did not need revision.

Allison indicated that Dickson had previously stated his opinion that the provisions for support of spouse and children should be broad enough to serve as a substitute for a small estates Act. Dickson commented that adequate safeguards could be made for the protection of creditors while setting the remainder of the estate aside for the widow and children. Zollinger expressed disapproval of using this statute as a device to escape a small estates Act. He said that the provision by which the court could transfer title from the heirs to the widow for her support and the support of the children should be measured by their need and not by convenience in transferring title.

Zollinger moved, seconded by Gilley, that the committees approve the chapter on support of spouse and children with the amendments made during the course of the discussion. Motion carried.

Editorial comment. (Page 6.) Zollinger asked the committees to examine the editorial comment included in his report. Allison suggested deletion of "owned by him at his death" on line 9, page 7, and also noted that the words "or incompetent" should be deleted on line 6, page 7.

Allison referred to the sentence beginning on line 8, page 7, "Although section 1 applies only to the principal place of abode of the decedent, sections 2 and 3 permit the court to transfer to them or any of them another more suitable residence or to provide funds for the purchase or rental of other living quarters." After a discussion, Zollinger expressed the view that this provision belonged in the chapter on election of surviving spouse and other members agreed.

Wills

Section 14 C Renunciation of gift under will. Riddlesbarger apprised the committees of his research on the subject of renunciation. He was of the opinion that the committees should decide whether the new probate code should include a statute clarifying the right of a beneficiary to renounce a gift, and if the renunciation would constitute a gift for gift tax purposes.

Zollinger said that he saw no compelling reason to enact legislation on renunciation except where it affected tax liabilities. Zollinger was not convinced, that a renunciation should be a nontaxable transfer; however, if the committees decided it should be considered a taxable transfer, the provision should appear in the tax statutes. Zollinger remarked that a person should not be forced to accept responsibility attached to the ownership of property he received through descent. Riddlesbarger moved that section 14 C be deleted, because the section was already the law in Oregon. Frohnmayer favored including renunciation provisions in the law and suggested that the renunciation be required to take place within six months. Zollinger was of the opinion that renunciation was not an appropriate part of the chapter on wills and should be the subject of a special subcommittee report which would include renunciation of distributive shares as well as gifts in both testate and intestate estates. Dickson said that since the subject had tax implications, it would be referred to the subcommittee consisting of Carson, Lisbakken and Braun. Frohnmayer suggested the subcommittee consider a possible distinction between testamentary gifts and intestate succession in addition to the tax and time elements.

Section 14 B. Non-ademption of specific gifts in certain cases. Subsection (1). Scope of Section. Riddlesbarger pointed out that section 14 B had been taken verbatim from the 1966 proposed Wisconsin Probate Code and suggested the content of subsection (1) might more properly be included under "comments" than in the statute. He recommended adoption

of the balance of the section. Zollinger was of the opinion the section should be left intact in order to codify the law, repeal the common law and overrule the case law where appropriate. Allison asked if "specific gift" should be defined or the purposes of subsection (1) and Zollinger replied that the term had a clear meaning without further clarification. Zollinger moved, seconded by Riddlesbarger, that the substance of subsection (1) be approved. Motion carried.

Section 14 B, subsection (2). Proceeds of insurance on property. Both Krause and Piazza expressed disapproval of the provision permitting funds paid to the decedent one year prior to his death to be paid to the specific beneficiary. They said that such a provision could contravene the intent of the testator. Frohnmayer commented that the shorter the time period the more likely it would be that the money would still be in the estate. He suggested that a 30-day time period would leave no question at all that the money should go to the one to whom the property had been given under the terms of the will. Gilley commented that the proper criterion for determining the time period was to give the testator time to change his will. He moved, seconded by Krause, that subparagraph (b) of subsection (2) be revised from "one year" to "90 days." Motion failed.

After further discussion, Frohnmayer moved, and the motion was seconded, that subparagraph (b) of subsection (2) be amended to read ". . . paid to the testator within 180 days before his death." Motion carried. Riddlesbarger moved, seconded by Zollinger, that the substance of subsection (2) be approved as amended. Motion carried.

Section 14 B, subsection (3). Proceeds of sale. Krause suggested that "within two years of his death" be deleted in the first sentence of subsection (3). Zollinger so moved, the motion was seconded and carried.

Zollinger next moved that "180 days before" in subparagraph (b) be substituted for "one year of." He said he could see no reason for a distinction between the treatment accorded insurance proceeds and proceeds of a sale. The motion was seconded by Frohnmayer and carried.

Zollinger moved, seconded by Frohnmayer, the approval of subsection (3) as amended. Motion carried.

Allison commented that "and for purposes of this section property is considered sold as of the date when a valid contract of sale is made" could be eliminated in subparagraph (b).

Gilley moved, seconded by Krause, that the action of the committees approving subsection (3) be reconsidered. Motion carried. Gilley then moved, seconded by Krause, that subparagraph (b) be eliminated. Speaking in support of his motion Gilley stated, and Krause agreed, that proceeds of sale were inherently different than proceeds of insurance following a fire or casualty because a sale was a deliberate act of the testator and he probably did not intend that anything paid to him prior to his death would pass to the beneficiary. Zollinger disagreed, and noted that if he had intended a result different than that set forth in subparagraph (b), he would have expressed it by a testamentary act. Riddlesbarger pointed out that in this case his will said the property was to go to the beneficiary and the whole principle of the proposed code was that ademption by extinction would not operate in certain situations. Vote was then taken on Gilley's motion to delete subparagraph (b). Motion failed.

Section 14 B, subsection (4). Condemnation award.
Dickson noted that the 1967 session of the legislature made provisions for condemnation awards and had added an additional measure of damages for moving, relocation, etc., following condemnation of property. Zollinger asked if the proposed statute should include a limitation on the award for the condemned property as distinguished from an award for moving expenses. Frohnmayer recommended that no limitation be imposed.

Riddlesbarger questioned the meaning of "jurisdictional offer" in the last sentence of subsection (4). Lundy suggested it might be the statutory terminology used in the Wisconsin condemnation law. Carson said that it should be a "judicial" offer. Bettis proposed the term be revised to "settlement offer." Krause thought "acceptance of an agreed price" was sufficient. Allison objected to the phraseology which referred back to "subsection (3) of this section." After further discussion, Riddlesbarger moved, seconded by Krause, that subsection (4) be approved with the following revisions: Change "gift" to "devise" in line 2; delete "one year or" in subparagraph (b) and insert "180 days before"; leave to Legislative Counsel the task of clarifying "jurisdictional offer." Motion carried.

Lundy asked if it was the committee's intent that whatever compensation was received in a condemnation proceeding within six months before the death of the owner be subject to this section and received an affirmative reply.

Section 14 B, subsection (5). Sale by guardian or conservator of incompetent. Riddlesbarger moved, seconded by Frohnmayer, that subsection (5) be adopted with the following

amendments: Change "gift" to "devise" on line 2, correct the typographical error in line 8 by changing "repaid" to "repair;" on line 11 delete "one year; but" and insert "six months."; delete the rest of the subsection. Motion carried.

Section 14 B, subsection (6). Securities. Riddlesbarger pointed out that "securities" are defined in the Securities Act. Lundy asked if the Oregon definition was the same as the definition intended in the Wisconsin Act. Riddlesbarger moved, seconded by Zollinger, that subsection (6) be approved with the definition of "securities" to be inserted by Legislative Counsel, and with "gift" changed to "devise" in line 9. Motion carried.

Section 14 B, subsection (7). Reduction of recovery by reason of expenses and taxes. Riddlesbarger noted that previous sections had covered subjects similar to those included in subsection (7). He moved, seconded by Zollinger, that subsection (7) be approved with the understanding that Legislative Counsel would add provisions from other sections, if necessary, and make whatever housekeeping revisions he deemed advisable. Motion carried.

Section 14 A. Bond or agreement to convey property devised as a revocation. Riddlesbarger asked Legislative Counsel to review section 14 A in the light of the committee's decisions made at this meeting.

The committee recessed for lunch at 11:45 a.m. and reconvened at 1:30 p.m. with the following members of the advisory committee present: Dickson, Allison, Carson, Frohnmayer, Husband, Jaureguy, Lisbakken and Riddlesbarger. Members of the Bar committee present were: Bettis, Gilley, Krause, Piazza and Thomas (arrived 2:05 p.m.). Lundy was also present.

Arrangement of Proposed Revised Oregon Probate Code

Lisbakken reviewed the reports made by the various subcommittees outlining the arrangement of the material to be included in the proposed revised Oregon probate code and recommended adoption of the report dated May 12, 1966, prepared by Dickson, Lisbakken and Richardson. Dickson explained that this subcommittee had attempted to arrange the code in a logical order beginning with the definitions and flowing through the entire program of administration in the order an estate was processed through a probate court. Lundy explained some of the technical difficulties inherent in arranging this bulk of material and also called attention to the fact that the chapters on gift and inheritance taxes were located in the middle of the available chapter numbers dividing the code

at a somewhat illogical point. He further explained that the arrangement of the bill as passed by the legislature would be followed closely when incorporating it into ORS.

After further discussion, Riddlesbarger moved, seconded by Frohnmayer, that the concensus of the committee be that the outline dated May 12, 1966, be followed to the extent feasible. Motion carried.

Title to Property (Note: This is Appendix A to these minutes).

Frohnmayer distributed copies of a memorandum he and Piazza had prepared dated July 13, 1967, and read it to the committees. With respect to section 1 under "Title and Possession of Decedent's Property" Allison asked why "administrative expenses" had not been included with the claims for which the estate was liable. Frohnmayer replied that "claims" was defined to include administrative expenses as well as taxes. Allison pointed out that the section on claims of creditors would need a different definition of "claims." Frohnmayer commented that it should be noted that this particular section should not be included in the sections included under the broad claims definition. Dickson pointed out that since the committees had provided for support of incompetent children, they should also be added to the section. Frohnmayer agreed with Dickson.

Allison was of the opinion that one of the most useful provisions in the present code was the right to sell property for the benefit of the estate. He suggested this provision be kept in mind when provisions were drafted concerning property subject to sale for payment of expenses.

Frohnmayer called attention to subsection (3) on page 5 of his memorandum and read the draft prepared by Jack McMurchie under tab 16 in the blue notebook, "Allocation of Income." (See also Minutes, Probate Advisory Committee, 2/17,18/67, pages 1, 2 and 3, and Appendix A). Lundy noted that tab 15 was also part of the same subject.

After further discussion, Frohnmayer agreed to meet with McMurchie, Butler, Richardson, Zollinger and Allison prior to the September meeting to correlate the material on this subject and to determine the action of the committees with respect to the drafts which had been prepared. Dickson directed that this subject be placed on the September agenda as item #2.

Advancements (Note: This is Appendix B to these minutes).

Frohnmayer distributed a second draft on advancements dated July 5, 1967, which he and Piazza had prepared in

response to a request by the committees at the May 1967 meeting. Allison suggested section (1) b. be revised to "the heir states in writing" and Frohnmayer agreed. Jaureguy questioned when an advancee could state a gift was an advancement. Frohnmayer said that he did not consider the time factor to be of significance so long as there was a writing.

Frohnmayer said that Allison had written him suggesting that a definition of "advance" be included in this chapter, but that he and Piazza were of the opinion "advance" was defined in section 1. Allison proposed the following definition which he had copied from a California case: "Advancement: An irrevocable gift in praesenti of property to an heir by an ancestor to enable the donee to anticipate his inheritance to the extent of the gift." Frohnmayer was of the opinion the proposed definition was no improvement over section 1.

Frohnmayer suggested insertion of "or his issue" after "heir" in the second line of section 3. Allison pointed out that the heir was referred to as "advancee" earlier in the chapter, and the members agreed that "advancee" would be a better term than "heir." Carson pointed out that the chapter was not consistent in the use of "lineal descendant" and "issue." The committees agreed "issue" would be the better word to use throughout the new Oregon probate code. Allison noted that ORS 111.140 should be repealed and Frohnmayer concurred. After further discussion, the committees agreed to make the following revisions:

"(1) b. the heir states in writing . . .

"(2) If an advancee dies before the decedent leaving issue who inherit from the decedent . . . the issue of the advancee, whether or not the issue take by representation.

"(3) If the value of the advancement exceeds the share of the advancee, the advancee shall be excluded . . .

"(4) The advancement . . . when the advancee comes into its possession or enjoyment . . .

"(5) ORS 111.110, 111.120, 111.130, 111.140, 111.150 . . ."

Dickson commented that he was in agreement with the 1966 provisions of the Wisconsin Probate Code except for the provisions vesting title to property in the personal representative. He suggested Frohnmayer correspond with the draftsmen of the Wisconsin Code to determine their reasons for giving the personal representative title, possession and income derived from property of the estate. Frohnmayer agreed to do so and Dickson directed that the matter again be discussed

at the September meeting.

Conserving Property of Missing Persons

(Note: See report of May 30, 1967, by Mrs. Braun and Mr. Gilley entitled "Missing Persons - ORS chapter 127.")

Allsion asked if this draft was intended to replace ORS chapter 127 and received an affirmative reply from Gilley.

Section 1. Gilley explained that the definition of "missing person" in subsection (8) of section 1 was intended to cover two situations; i.e., (1) for a person whose whereabouts was unknown, and; (2) for a person who was known to be unable to return, for example in the case of a person who was a prisoner of war jailed in Mexico.

Frohnmyer called attention to the occasional situation where a person refused to manage his own affairs and his family might suffer by his lack of attention. He suggested that such a person be included in the definition of "missing persons." Others pointed out that ample remedies were available to families or creditors in situations of that kind. It was generally agreed that such a provision should not be included.

Thomas called attention to the phrase "whose whereabouts is unknown" and asked, "Unknown to whom?" Riddlesbarger pointed out that his status would be determined by allegation and by the efforts made to locate him. Lundy expressed the view that he would not be a missing person until the matter had been adjudicated and, like the allegations contained in a petition for incompetency, there would have to be proof of that fact. The committees decided that the court should make the determination and the definition should not be narrowed by adding "known to the petitioner."

Section 4. Gilley explained that the provision in subsection (e) of section 4 dealing with the Social Security Administration was inserted because that agency would forward mail but would not divulge forwarding addresses. In reply to a question by Allison, Gilley explained that it was his understanding that the committees had previously decided to require publication in every case with respect to a missing person. When the court required other persons to be served with a citation, he advised that the general publication sections would cover the manner in which they should be served. He suggested that the missing person should be served by publication in every case. Piazza suggested the missing person be served personally, and in addition, that he be mailed a citation at his last known address. He proposed

that the same provisions of service be followed as provided in the guardianship code for service of a summons and suggested the following wording for subsection (e):

"(e) If the proposed ward is a missing person, on the missing person and such other persons as the court may direct. In addition to service a copy of the citation shall be mailed to such missing person at his last known address and by registered mail with postage prepaid letter to be forwarded through the United States Social Security Administration to his last address available to that agency."

Gilley recommended that there be publication in all cases because publication might reach someone who should be aware of the appointment of a guardian for the missing person. A motion to require publication in all cases involving missing persons failed.

Section 6. Gilley called attention to subparagraph (e) of subsection (2). Allison suggested the same language be used to provide notice in the case of a sale as was used in section 4 for notice on appointment of a guardian. Piazza proposed the section read:

"(e) If the ward is a missing person, on the missing person and on such other persons as the court may direct." Gilley approved the revision.

Section 8. Gilley pointed out the amendment in section 8 and Piazza asked if the provision was in conflict with the ademption situation covered by the committee earlier in the day. Dickson said that it was in harmony with the ademption provisions. Gilley explained that the merits of the section had not been considered by the subcommittee. He also noted that the guardianship code was applicable in most instances to missing persons without further amendment.

Allison read ORS 127.060 to the committees and questioned whether this provision should also be included in the guardianship code inasmuch as ORS Chapter 127 would be repealed. Lundy suggested ORS 126.255 might answer the question asked by Allison.

The meeting was adjourned at 4:20 p.m.

August and September Meetings

The following matter was scheduled for the August 1967 meeting:

Transfer of probate jurisdiction and provision for county clerks to sign certain ex parte matters.

The following matters were scheduled for consideration at the September 1967 meeting:

1. Elective share of surviving spouse

Consideration of section 1 of draft by Allison considered at June meeting and elective share provisions of proposed Wisconsin Probate Code (draft by Mr. Riddlesbarger, Mrs. Braun and Mr. Richardson, and discussion to be led by them).

2. Title to property

Allocation of income. Discussion to be led by Frohnmayer.

3. Advancements

Discussion to be led by Frohnmayer.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, July 14 & 15, 1967)

Proposed revised Oregon probate code
Memorandum on Title to Property
1st Draft
July 13, 1967

Prepared by:

Otto J. Frohnmayer
A. E. Piazza

We have been requested to lead the discussion on "title to property" at the meeting of the committees to be held on July 14 and 15, 1967. The following are some observations and suggestions which might facilitate the discussions of the committees.

Where Should Title Be Vested In Real And Personal
Property During Probate?

(1) Present Oregon law. The writers have not researched this problem in Oregon, but off the top of their collective heads, one with and one without, we believe that there is a distinction in Oregon between title to real property and title to personal property as follows:

- a. Upon death title to real property instantly passes to the heirs in case of intestacy and in case of testacy to those who are willed the realty.
- b. Title to personal property vests in the personal representative during probate. See In re McLeod's Estate, 159 Or 687, 82 P.(2d) 884 (1938), and Wright v. Kroeger, 219 Or 103, 345 P.(2d) 809 (1959).

(2) Title to real and personal property should be treated alike. Since the committees have heretofore agreed that in descent and distribution the distinction between real and personal property should be abolished, we suggest that the same rule be applied to the problem of title to real and personal property.

(3) Basye's views. From the letter of Paul E. Basye, July 16, 1965, to Otto J. Frohnmayer, we give you the benefit of his views on the subject of title during administration:

"As to title during administration, I think the best thinking on the subject is expressed in Section 84 of the Model Probate Code, giving title to the heirs or devisees subject to possession by the personal representative. This was

taken from Section 25 of the Texas Probate Code and Section 300 of the California Probate Code. We just completed a long discussion of this problem and decided to embody this idea in the final draft. Under present English law adopted in 1925, title to both real and personal property passes to the personal representative. Our own Committee felt that this invited difficulties when no administration was necessary - a matter which does not arise under our proposed solution giving title immediately to the heirs or devisees, subject only to the right of possession by the executor or administrator, if and when appointed."

It may be observed that since 1925 in England title to both real and personal property passes to the personal representative.

(4) Suggested alternatives. This problem has been handled in varying ways:

- a. Iowa, §350 provides when a person dies, title to his property, real and personal, passes to the person to whom it is devised by his will or in the absence of such disposition to the person who succeeds to his estate. All of the property is subject to the possession of the personal representative and to the control of the court for the purposes of administration, sale or other disposition under the provisions of law. Such property, except homestead and other exempt property, is chargeable with the payment of debts and charges against the estate. It is explicitly provided that there is no priority between real and personal property except as provided in the code or by the will of the decedent.

§351 provides if there is no distributee of real estate present and competent to take possession or if there is a lease of the real estate or if the distributee present and competent consents thereto, the personal representative shall take possession of the real estate except for the homestead and other exempt property. It further provides the personal representative shall take possession of all personal property of decedent except the exempt property. The personal representative may maintain an action for the possession of real and personal property or to determine the title to any property of the decedent.

The comment to the last section states that the committee recommend to the legislature that the personal representative take possession of all property of the decedent which is said to be in

line with the comment on pages 133 and 134 of the Model Probate Code "It seems preferable that the personal representative should have not only the right but also the duty of possession of the entire estate until distributed or delivered over to the heir or devisee upon a showing that it is not needed for the purpose of administration." The comment goes on to say that the legislature did not concur in the recommendation of the committee.

§352 says that unless otherwise provided in the will the personal representative shall collect the income from the property, pay the taxes and fixed charges thereon and apply the balance of the income to general estate obligations. Also unless otherwise provided, any unexpended portion of the income shall become a part of the general assets of the estate.

The comment under this section says that it changes the law. Under the former Iowa law the personal representative was not ordinarily entitled to the rents accruing during probate and any rents he collected normally belonged to the heirs or devisees. After equating realty with personalty, the income from both real and personal properties was made available to pay general estate obligations in the absence of testamentary direction.

§353, 354 and 355 make provision for the surrender of possession to heirs and beneficiaries of personal and real property in certain situations upon application to the court.

- b. Washington §11.48.020 provides that the personal representative shall, after qualifying and giving bond, have the right to the immediate possession of all the real as well as the personal estate of the deceased and may receive the rents and profits of the real estate until the estate shall be settled or delivered over to the heirs or devisees and shall keep in tenantable repair all houses, buildings and fixtures thereon which are under his control.

§11.48.090 provides for actions for the recovery of any property or for possession thereof by and against the personal representative in all cases in which the same might have been maintained by and against the respective testator or intestate.

We have not researched the prior law of Washington with regard to the title to real and personal property.

- c. Wisconsin §857.01 provides that upon letters being

issued the personal representative has title to all property of the decedent. The comment under this section states that this section gives the personal representative title to both the real and personal property and is consistent with the policy of treating real and personal property in the same manner in all phases of probate procedure. Historically in Wisconsin a personal representative has had title to personal property but not to real property, while a trustee has had title to both real and personal property.

§857.03 provides that the personal representative shall collect and possess all the decedent's estate, collect all income and rents from decedent's estate; manage the estate and, when reasonable, maintain in force or purchase casualty and liability insurance, pay and discharge, out of such estate, all expenses of administration, taxes, charges, claims allowed by the court, or such payment on claims as directed by the court; and make distribution and do such other things as directed by the order of the court. There is no pertinent comment to this broad use of the income from the property of the estate.

(5) Uniform probate code (7/19/66).

§393 provides that the personal representative has a right to, and should take, possession of all of the decedent's money and tangible property, including the decedent's interest in any income producing interest in land or tangible personal property. The possession of other estates or interest in, or kinds of, real or personal property of the decedent should be taken by the personal representative where reasonably necessary to any proper purpose of administration, including preservation of the value for those entitled to it, sale, preparation for sale or other transaction. The request by a personal representative for the possession of the property of the decedent shall be conclusive evidence of his right thereto in an action for possession, but any devisee or heir who may show that he was damaged through the wrongful assumption of possession of real and tangible personal property of the decedent by a personal representative may collect therefor from the personal representative in an appropriate proceeding. The personal representative shall pay taxes on property possessed and collect rents and earnings earned by any property of the decedent until such assets are sold or distributed. He should keep the buildings and fixtures under his control in tenantable repair. He

may maintain an action for possession of the real property or to determine the title to the same.

It may be observed that the language of this code is equivocal and undoubtedly would be the source of considerable litigation.

Review of Action Previously Taken By the Committee

By memorandum dated 12/14/66 from Legislative Counsel proposal No. 1 is set forth:

TITLE AND POSSESSION OF DECEDENT'S PROPERTY

Sec. 1. When a person dies intestate, title to his real and personal property passes at his death to his heirs; if a decedent dies testate, title to his real and personal property passes at his death to those to whom it is given by his will. The title of the heirs or beneficiaries to the real and personal property of the deceased owner is subject to the rights of his surviving spouse and minor children and any claims for which the estate is liable. During administration, the personal representative shall be entitled to possession of the real and personal property and shall have power to sell, mortgage, lease or otherwise dispose of the same as provided in this title.

NOTE: ORS 116.105 and ORS 117.320 are to be repealed.

By an exchange of letters between DBF and CEZ dated 8/23/65 and 8/30/65, the following language was suggested by CEZ:

When a person dies intestate, title to his real and personal property passes at his death to his heirs; if a decedent leaves a will, title to his real and personal property passes at his death to those to whom it is given by his will. The title of the heirs or beneficiaries to the real and personal property of the deceased owner is subject to the rights of his surviving spouse and minor children and any claims for which the estate is liable. During administration, the executor or administrator shall be entitled to possession of such real and personal property and shall have power to sell, mortgage, lease or otherwise dispose of the same as provided in this title.

POWERS AND DUTIES OF PERSONAL REPRESENTATIVE (4/27/67) AS
DRAFTED BY HERBERT E. BUTLER, ESQ.

Section 1. Possession and control of property. (1) The

personal representative is entitled to possession and control of all property of the decedent and to the rents and profits therefrom. Upon completion of the administration of the estate or upon order of the court, the personal representative shall deliver the property to the persons entitled thereto.

(2) The personal representative shall keep property in his possession and control in repair and preserve it from decay.

(3) The rights of the personal representative as provided in this section, are subordinate to the right to possession and control by a third party who has a valid lease or bailment of the property.

References: Advisory Committee Minutes:
6/17,18/66, pp. 16 and 17; and Appendix
7/15,16/66, p. 2

Conclusions

(1) The committees should agree that the title to all property passes upon the death of the decedent to his heirs, if the decedent dies intestate, and to his beneficiaries, if he dies testate.

(2) This title is subject to being divested by the spouse and minor children as to exempt property and by the personal representative if the property is required for the payment of claims, expenses of administration, etc. In the latter situation the personal representative should be entitled to possession of the property and should have the power to sell, mortgage, lease or otherwise dispose of the same.

(3) The committees should determine whether the personal representative should be entitled to the income of the property during administration in all cases or only in the case that the property may be needed for payment of claims, expenses of administration, etc.

(4) It is suggested that the two subjects of title and possession be either combined in one section or in sections following consecutively in the new code.

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, July 14 & 15, 1967)

Proposed revised Oregon probate code
ADVANCEMENTS
2nd Draft
July 5, 1967

Prepared by:

Otto J. Frohnmayer
A. E. Piazza

This is a second draft, pursuant to the instruction of the committees at the meeting of May 20, 1967. The first draft is attached as Appendix A to the minutes of the Probate Advisory Committee meeting held on May 19 and 20, 1967.

Advancements In Intestate Estates

(1) When gift is an advance. If a decedent dies intestate as to his entire estate, a gift by the decedent during his lifetime to an heir is an advance against his intestate share, only if there is either

- a. a writing by the decedent clearly stating that the gift is an advance (whether or not such writing is contemporaneous with the gift) or
- b. the heir states by writing or in court that the gift was an advance.

(2) Death of advancee before decedent. If an advancee dies before the decedent leaving lineal descendants who inherit from the decedent, the amount of the advance shall be taken into account in computing the share or shares of the issue of the prospective heir to whom the gift was made, whether or not the issue take by representation.

(3) Effect of advancement on distribution. If the value of the advancement exceeds the share of the heir, the heir shall

be excluded from any further share of the estate but he shall not be required to refund any part of the advancement. If the value of the advancement is less than his share, he shall be entitled upon distribution of the estate to such additional amount as will give him his share of the estate of the decedent.

(4) Valuation. The advancement shall be valued as of the time when the advancee comes into possession or enjoyment or at the time of the death of the intestate whichever first occurs.

References: Advisory Committee Minutes:
5/19,20/67, pp. 11 and 12; and Appendix
9/18/65, p. 7; and Appendix
2/18,19/66, pp. 22 to 24; and Appendix

ORS 111.110 to 111.170

(5) Repeal of existing statutes. ORS 111.110, 111.120, 111.130, 111.150, 111.160 and 111.170 are repealed.

REVISED OFFICIAL COMMENTS TO COMMITTEE PROPOSAL ON ADVANCEMENTS

1. Comment to Section 1.

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

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

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

heirs prior to the death of the intestate.

(d) This section specifies that the doctrine of advancements applies only to intestacy and only to persons sharing in the estate of one who has died intestate as to his entire estate. This limitation would not, however, seem to affect the holding of Clark v. Clark, 125 Or. 333, 342, 267 P. 534, 537 (1928), that a will might direct that a previous gift be considered an advancement in the determination of the shares into which an estate is to be divided.

(e) This draft follows the approach of proposed Wisconsin probate code, section 852.11(1). The Iowa, section 224, Washington, section 11.04.041, and Model probate codes provide that the presumption of a gift is rebuttable. However, the Wisconsin code is in accord with the more limited application of the statute of frauds already existing in Oregon law, ORS 111.120. Since the Wisconsin code represents the latest thinking and since the present draft does not substantially change existing Oregon law, it would seem to be the preferred approach.

The early case of Seed v. Jennings, 47 Or. 464, 83 P. 872 (1905) is in conflict with both the old Oregon statute and this new provision. That case suggested the common law presumption that the voluntary conveyance of property by a parent to a child is presumed to be an advancement, unless it is proved to be a gift. This dictum was contrary to the statute in force at the time and would, in any event, be overruled by the proposed version, which reverses the presumption and makes it rebuttable only by evidence in writing.

2. Comment to Section 2.

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

3. Comment to Section 3.

This section is a substitute for ORS 111.140 and substantially reenacts that section.

4. Comment to Section 4.

This section adopts the first tentative draft of the revised part 2 of the Model-Uniform Probate Code (July 10, 1966), section 211(b). This approach is also that of the Washington, Iowa and Model probate codes. Section 4 changes present Oregon law (ORS 111.160), which provides for valuation by the donor or donee in any one of three different writings or its estimated value when granted. The former method presents the possibility of inconsistent valuations arising from each of the authorized writings. In 1 Jaureguy and Love, Oregon Probate Law and Practice, sections 41-46, this problem is noted.

legislation (i.e., Senate Bill 117, now chapter 533, Oregon Laws 1967) is indicated by [bracketing] those counties deleted and underscoring those counties added. Dates, in parentheses, following counties added are the effective dates of the probate jurisdiction transfers.

<u>County Court</u>	<u>District Court</u>	<u>Circuit Court</u>
Baker	Benton	Clackamas
[Columbia]	Clatsop	<u>Columbia (7/1/68)</u>
Crook	Coos	Douglas
Gilliam	Curry	Jackson
Grant	Deschutes	Josephine
Harney	Hood River	Klamath
Jefferson	Lincoln	Lake
Malheur	[Linn]	Lane
Morrow	[Umatilla]	<u>Linn (7/1/68)</u>
Sherman	Wasco	Marion
[Tillamook]	Washington	Multnomah
Union		Polk
Wallowa		<u>Tillamook (7/1/68)</u>
Wheeler		<u>Umatilla (7/1/67)</u>
		<u>Yamhill</u>

PREVIOUS ACTION BY COMMITTEES

It appears to me that previous action by the committees, as recorded in the minutes, relating to the subject of probate courts and jurisdiction thereof, calls for proposed legislation that will:

- (1) Vest original probate jurisdiction in all counties in the circuit courts only.
- (2) Define probate jurisdiction in broad terms.
- (3) Look to present methods of providing temporary circuit court judges to assist in handling the additional workload possibly resulting from transfer of probate jurisdiction to circuit courts presently not having such jurisdiction.
- (4) Authorize appointment (probably by circuit courts and probably only for counties in which there is no resident circuit court judge and no district court) of probate commissioners (Attorneys) to handle ex parte probate matters.

Present methods of providing temporary circuit court judges are:

- (1) Assignment of other circuit court judges or of district court judges by Supreme Court (ORS 3.081 to 3.096).
- (2) Authorization for district court judge to exercise

certain probate jurisdictions of judge of circuit court for same county where no circuit court judge able to conduct business of circuit court (ORS 3.101).

(3) Appointment of pro tem circuit court judges (attorneys) by Supreme Court (ORS 3.510 to 3.560) and authorization for pro tem circuit court judges (attorneys) by stipulation (ORS 3.570).

Taking into consideration 1967 legislation, there will be 11 counties with no mandatory resident circuit court judge, no district court and probate jurisdiction not in the circuit court. However, circuit court judges in fact reside in 3 of these 11 counties (i.e., Grant, Malheur and Union Counties). The 11 counties are: Crook*, Gilliam#, Grant#, Harney, Jefferson*, Malheur, Morrow, Sherman, Union, Wallowa and Wheeler#. (Notes: *A circuit court judge must be a resident of or have his principal office in Crook, Deschutes or Jefferson County. #A circuit court judge must be a resident of or have his principal office in Gilliam, Grant or Wheeler County. See subsection (4) of ORS 3.041, as amended by section 7, chapter 533, Oregon Laws 1967.)

At your January 1966 meeting, Judge Dickson appointed a subcommittee, consisting of Judge Thalhofer (chairman), Mr. Copenhaver, Miss Field, Mr. Gooding and Judge Warden, to study and report on probate jurisdiction. See Minutes, Probate Advisory Committee, 1/14,15/66, page 9. At the March 1966 meeting that subcommittee reported on its activities and progress. See Minutes, Probate Advisory Committee, 3/18,19/66, page 7. The following excerpts from the minutes of the March 1966 meeting are pertinent:

"Probate Courts and Jurisdiction

"Members of the subcommittee on probate courts and jurisdiction, appointed at the January meeting, reported on activities and progress of the subcommittee. Copenhaver noted that of the 36 counties in Oregon, county courts had probate jurisdiction in 14, district courts in 11 and circuit courts in 11; and that of the 14 county courts with probate jurisdiction, 12 were in eastern Oregon. He indicated that he did not believe the matter of transfer of probate jurisdiction from all county courts to circuit courts had been considered formally by the county judges' association, but that he was aware that many county judges were not opposed to such a transfer and some would favor it. He commented that much of the opposition to such a transfer was found among attorneys in multi-county judicial districts without a resident circuit court judge in each county, and that periodic unavailability of a circuit court judge to handle probate matters in each county of such judicial districts was a problem, particularly, for

example, in the 9th Judicial District (i.e., Harney and Malheur Counties).

"Warden reported that he had sent a questionnaire to all district court judges asking whether they favored transfer of all probate jurisdiction to the circuit court; that of 24 replies, 18 (including seven from judges with probate jurisdiction) were in favor of such transfer; and that of the six replies expressing opposition, four were from judges with probate jurisdiction. He noted that the Bar Committee on Judicial Administration also was studying the matter of centralizing probate jurisdiction in the circuit courts, and that District Judge Henry Kaye of Umatilla County, a member of that Bar committee, had sent a questionnaire to all district court judges with probate jurisdiction asking if they would be willing to handle probate matters on a pro tem circuit court judge basis if the jurisdiction was transferred to the circuit court. Warden indicated that Judge Kaye's survey disclosed that eight of the 11 district court judges were willing to handle probate matters on such a pro tem basis.

"Dickson commented that the probate caseload in some of the eastern Oregon counties in multi-county judicial districts did not appear to be heavy. He called attention to statistics as of the end of 1965 indicating that, for example, there were 150 estates pending in Malheur County, of which 69 were over three years old; 55 pending in Harney County, with 15 over three years old; 25 pending in Sherman County, with 8 over three years old; 57 pending in Grant County, with 27 over three years old; 16 pending in Wheeler County, with 7 over three years old; and 40 pending in Gilliam County, with 26 over three years old.

"Dickson remarked that a large majority of the county and district court judges with probate jurisdiction appeared to be in favor of transfer thereof to the circuit court. He suggested that district court judges could handle some probate matters on a pro tem circuit court judge basis in order to relieve some of the extra burden on regular circuit court judges. In response to a question by Allison, Warden agreed that assignment to other judicial districts was a significant factor in the periodic unavailability of circuit court judges in multi-county judicial districts in eastern Oregon. Allison expressed the view that such assignment might be less frequent if probate jurisdiction was transferred to those circuit courts.

"Warden suggested that utilization of attorneys as pro tem probate judges in county seats with no resident circuit court judge and no district court judge might afford a solution to the problem in multi-county judicial districts without resident circuit court judges in each county. Zollinger commented that such utilization of attorneys presupposed the availability and willingness of attorneys to undertake such service when most such attorneys had a probate practice, and suggested authorization for appointment of attorneys as probate commissioners to sign orders and handle other ex parte matters.

"Zollinger asked whether the committees favored a proposal to transfer all probate jurisdiction to the circuit courts, and if so, whether this proposal should be included in the principal proposed probate revision bill or in a separate bill. Dickson expressed the view that the proposal need not be in a separate bill, since the jurisdiction transfer matter appeared to be noncontroversial in a large majority of the counties that would be affected by the proposal. Riddlesbarger moved, and it was seconded, that the committees approve in principle the inclusion in the principal proposed probate revision bill of provision for transfer of all probate jurisdiction to the circuit courts, for district court judges to handle ex parte probate matters when circuit court judges were unavailable and for probate commissioners, who should be attorneys, to handle ex parte probate matters in counties having no district court. Motion carried unanimously.

"Husband asked whether appointment of probate commissioners should be made by the Supreme Court or the appropriate circuit court. There was general agreement that probate commissioners should be appointed by the circuit court judges.

"Dickson requested that the subcommittee on probate courts and jurisdiction establish and maintain contact with the Bar Committee on Judicial Administration for the purpose of exchanging information on proposals relating to probate courts and jurisdiction thereof. He also asked the subcommittee to keep in touch with Lundy in regard to the drafting of the proposal approved by the probate committees. In response to a question by Lundy, Warden indicated that the Judicial Council was not considering the matter of probate jurisdiction at the present time."

"Probate Courts and Jurisdiction

"Dickson asked Copenhaver and Warden to repeat their reports on probate courts and jurisdiction thereof, previously made at the Friday afternoon session of the meeting, for the benefit of members not present at that time, and they proceeded to do so. In response to a question by Husband, Warden indicated that the three district court judges with probate jurisdiction who had expressed reluctance to handle probate matters on a pro tem circuit court judge basis if the jurisdiction was transferred to the circuit court were Judge Hall of Curry County, Judge Hall of Lincoln County and Judge Jenkins of Washington County.

"Referring to the previous discussion on appointment of probate commissioners, Dickson suggested that there should be a commissioner in each county of the large eastern Oregon multi-county judicial districts.

"In response to a question by Lundy, Dickson and Thalhofer expressed the view that the transfer of all probate jurisdiction to circuit courts should include jurisdiction as to guardianship, adoption, change of name and commitment of the mentally ill and deficient."

In regard to the remedy available to pretermitted children, as well as to heirship determination, it appears to me that previous action by the committees, as recorded in the minutes, calls for treatment of these matters as aspects of proposed general provisions on remedies involved in probate. This treatment may be encompassed in the subject matter of the first draft, dated May 3, 1967, on powers of court in probate (following tab 2 in the blue notebook), or of the first draft, dated April 10, 1967, on accounting and distribution (following tab 23 in the blue notebook), or both. The following excerpts from the minutes of the March 1966 meeting are pertinent:

"Riddlesbarger noted that the subcommittee also recommended that there be no special provision on the remedy of pretermitted heirs, but that determination of pretermittance should be made and distribution of pretermitted heir shares accomplished in the probate proceeding as a part of the general procedure on settlement and distribution, and that the subject of all remedies involved in probate should be treated broadly. He commented that centralization of probate jurisdiction in the circuit courts, in accordance with

the proposal approved by the committees at the meeting the previous day, would facilitate implementation of this recommendation. He referred with approval to the broad statement of the jurisdiction of the probate court in section 10, 1963 Iowa Probate Code. He stated that the subcommittee's recommendation included repeal of the present specific Oregon statutes on determining heirship (i.e., ORS 117.510 to 117.560)."

"Riddlesbarger moved, seconded by Zollinger, that the committees reconsider their previous action on a proposed pretermitted heir statute and consider the plan embodied in the proposed New York statute. Motion carried. After further discussion, Zollinger moved, seconded by Warden, that the substance of the proposed New York statute, extending its application to after-adopted children and excluding the provision on remedy of pretermitted children, be approved. Motion carried unanimously.

"Heirship determination generally. Riddlesbarger moved, seconded by Mapp, that the present specific Oregon statutes on determining heirship (i.e., ORS 117.510 to 117.560) be repealed and that general provisions on remedies involved in probate, following the approach of the 1963 Iowa Probate Code (particularly sections 10 and 11 thereof), be approved. Motion carried. Dickson referred the matter of drafting implementation of the approved motion to the subcommittee on probate courts and jurisdiction. Riddlesbarger commented that in drafting such implementation consideration should be given to the role of the probate commissioners, authorization for whom the committees had approved at the meeting the previous day, in the matter of general remedies."

MEMORANDUM
July 11, 1967

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

From: Stanton W. Allison

Subject: Section 2, Riddlesbarger's Revised Draft on Wills

I am requesting reconsideration of the action of the June 1967 meeting in requiring that the testator, in the presence of each of the witnesses, shall "declare that the instrument is his will." I refer you to the Oregon section, ORS 114.030, a Washington section, 11. 12.020, and a Wisconsin section, 853.03, none of which contain a similar requirement.

The declaration requirement appears in section 279 of the Iowa Code, which provides "and declared by the testator to be his will." Section 47 of the model code states: "The testator shall signify to the attesting witnesses that the instrument is his will."

I am firmly persuaded that the committees should consider the language in the proposed uniform code in sections 237 and 238 as follows:

"Section 237. Execution. Except as hereinafter otherwise provided, every will shall be in writing and signed by the person making the same or by some other person in his presence and by his direction and shall be attested and subscribed in the presence of the person making the will by two witnesses.

"Section 238. Knowledge that instrument is will.

There is no requirement that the testator inform the witnesses that the instrument they are attesting is his will or that he or they know that it is a will. An instrument in the form of an inter vivos conveyance, contract or trust instrument is effective as a will to the extent that its terms manifest an intent which is testamentary, so long as it is executed in the manner herein prescribed."

The Bar committee comment on the section of the Iowa Probate Code reads as follows:

"An expansion of the present requirements of 633.7 (1962 Code) by adding the requirement 'declared by the testator to be his will' and the requirement of witnesses signing 'who signed as witnesses in the presence of the testator and in the presence of each other'. The extension of the statute conforms more nearly to the general practice in Iowa and changes the rule as set forth in the case of In re Estate of Bybee, 179 Iowa 1089, 160 N.W. 900, and the case of In re Estate of Hagemeyer, 244 Iowa 703, 58 N.W. 2d 593."

It is apparent that the Iowa Code has added this requirement which changes the rule existing under their court decisions.

Mr. Riddlesbarger, on page 3 of his proposed revision, has given a full explanation of his suggestion that this provision be inserted to comply with the case of Erickson v. Davidson, 216 Or. 547. I personally hesitate to change what I think is the present case law of Oregon on the basis of this decision. In Professor Basye's survey of decedents' estates in 39 Oregon Law Review 176, he has this to say about the Erickson v. Davidson decision:

"It has been held in Oregon that attestation was insufficient under the statute where the testatrix did not indicate to the witnesses what the paper was, or acknowledge that she had signed or attached her

name thereto, or that the writing was hers, or was intended to be executed by her, and where the paper was so folded that the witnesses could not see or know of its contents or of the presence on it of the name of the testatrix. Upon the authority of this case, the court in Erickson v. Davidson held the attestation of the codicil invalid. However, the opinion did not undertake to set out all of the facts surrounding the witnesses' attestation of the codicil. It is submitted that the rather cursory statement in the opinion that the witnesses did not know the nature of the document the execution of which they were called upon to witness should not be taken to mean that this fact alone would render an otherwise sufficient attestation invalid under the statute."

The case of Richardson v. Orth, 40 Or. 252, which is the only case cited in Judge Sloan's opinion, in my opinion is not a sound authority for Justice Sloan's opinion. In the Orth case, a testatrix had not signed the writing at the time the witnesses subscribed it. It was obvious, therefore, that the Orth will was not executed pursuant to the Oregon statute.

On the other hand, I cite the following cases which were not referred to or cited in Justice Sloan's opinion:

In In re Christofferson's Estate, 183 Or. 75, at page 82, the court stated: "It is not necessary that the witnesses should sign in the presence of each other, nor is it necessary that the testator should declare the instrument to be his last will. If the testator actually signs the will and the witnesses attest his signature at his request, it is sufficient even though the witnesses may not know the

the purport or contents of the instrument."

"The court states in In re Davis' Will, 172 Or. 354:
"It is not necessary that the witnesses should have known either the purport or the contents of the instrument." The court then proceeds to discuss a California decision as follows: "It is sufficient to say that that decision was based upon a specific requirement of the law of California (Probate Code, Section 50, subd. 3.) which provides that the testator, at the time of subscribing the instrument 'must declare to the attesting witnesses that it is his will.' This is not the law in Oregon," citing In re Estate of Neil, 111 Or. 282.

In the case of In re Estate of Verd Hill, 198 Or. 307, the court on page 327 stated: "It was not necessary that the witnesses have any knowledge concerning the contents of the will, nor was it necessary that the testator should declare the document to be his last will or that the witnesses have any idea of the purport or contents of the instrument to which they had so subscribed."

I again call attention to the fact that the Erickson decision did not cite any of the three last cases referred to above, in all of which the Oregon court specifically declared that it was not necessary that the testator should declare the document to be his last will. I heartily agree with Professor Basye's criticism of the Sloan decision, and

hesitate to inject into the new code a provision which is contrary to the existing case law of this state prior to the Sloan decision.

I personally feel it is unwise to add to the technical requirements for execution of a will. For this reason, I strongly urge careful consideration of the provisions of the proposed uniform code which would represent the most recent and considered statement of this problem. I fear that injecting a statutory requirement that the testator declare that the instrument is his will would constitute a technical requirement upon which wills of many competent testators might be attacked. Just for one example, suppose the attorney for the testator, in the testator's presence, asks the witnesses to sign the document he has prepared for the testator. This is obviously a very common practice where the attorney procures the attestation of the witnesses. It seems fairly obvious that in this case the testator has not "declared the instrument to be his will."

I therefore strongly urge careful reconsideration of the action at the July meeting of the two committees.

STANTON W. ALLISON

REPORT
July 13, 1967

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

From: Robert W. Lundy, Legislative Counsel

Subject: Sections 14 and 14 A, Riddlesbarger's
Revised Draft on Wills

At your June 1967 meeting a revised draft on the subject of wills, prepared and submitted by Mr. Riddlesbarger, was considered. In the course of the discussion of sections 14 and 14 A of that revised draft, it developed that certain background aspects of the two sections were unclear, and the matter was left to Mr. Allison and myself to investigate and report thereon at the July 1967 meeting. This is my report on the matter. I have not had the opportunity to consult with Mr. Allison in the preparation of this report.

SECTION 14

It is clear, I believe, that the source of section 14 of Mr. Riddlesbarger's revised draft is subsection (3) of ORS 114.230. This is demonstrated by the following comparison of ORS 114.230 with sections 12, 13 and 14 of Mr. Riddlesbarger's revised draft, in the form apparently approved by committee action at the June 1967 meeting:

ORS 114.230

(1) A devise of real property is deemed a devise of all the estate or interest of the testator therein subject to his disposal, unless it clearly appears from the will that he intended to devise a less estate or interest.

(2) Any estate or interest in real property acquired by anyone after the making of his or her will shall pass thereby, unless it clearly appears

Mr. Riddlesbarger's Draft

Section 12. A devise 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 interest.

Section 13. An interest in property acquired by a testator after he makes his will passes as provided in the will.

therefrom that such was not the intention of the testator.

(3) No conveyance or disposition of real property by anyone after the making of his or her will shall prevent or affect the operation of such will upon any estate or interest therein subject to the disposal of the testator at his or her death.

Section 14. 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 interest therein which is subject to the disposal of the testator at the time of his death.

References:

Minutes, 6/16,17/67, pp. 7, 8; and Appendix A, §§ 12-15, pp. 9, 10.
1st Draft, Wills, 1/30/67, §§ 12-14, pp. 7, 8.
Minutes, 12/17,18/65, pp.9-11; and Appendix A, § 16, pp. 8, 9.

A question was raised at the June meeting as to the relationship of section 14 of Mr. Riddlesbarger's revised draft to the substance of ORS 114.150, which reads:

"A charge or encumbrance upon any real or personal estate, for the purpose of securing the payment of money or the performance of any covenant or agreement, is not deemed a revocation of any will previously executed relating to the same estate. The devises and legacies therein contained shall pass and take effect subject to such charge or encumbrance."

As demonstrated above, the source of section 14 is subsection (3) of ORS 114.230, and not ORS 114.150. It appears, however, that ORS 114.230 and 114.150, as well as ORS 114.140 (the source of section 14 A, to be discussed later in this report), are related in the sense that their purpose is repeal of certain doctrines. The following passages excerpted from Laurenguy & Love, Oregon Probate Law and Practice are pertinent on this point.

"The English Wills Act, 32 Henry VIII, was construed by the English courts to permit a devise of only real property owned at the time of the execution of the will. From 1844 until 1849 the Oregon law of wills (under the provisional government) was governed

by a similar statute. It was also held, probably as a corollary to this rule, that if subsequent to executing his will the testator altered the nature of the estate or interest held by him, this was itself deemed a revocation of the devise.

"It is believed that these anomalous doctrines should no longer trouble Oregon lawyers; but occasionally remnants of them appear to be bothersome so they should be mentioned. Besides, Oregon statutes to be discussed presently, whose primary purpose was the repeal of the above doctrines, [citing ORS 114.140, 114.150 and 114.230] seem as will be shown, to have also accomplished other important results." 1 Jaureguy & Love, Oregon Probate Law and Practice § 377 (1958).

A comment on the status of ORS 114.150 in the context of the proposed revised Oregon probate code appears to be in order, and I must admit that this status, so far as I am able to determine, is less than crystal clear. In the draft on wills submitted by Mr. Riddlesbarger and considered at the November 1965 meeting (see Minutes, 12/17,18/65, Appendix A), section 13 thereof appears to be a replacement for ORS 114.150. See Minutes, 11/19,20/65, pp. 7, 8; and section 13 of the Rewritten Draft that appears as an appendix to those minutes. ORS 116.140 to 116.160, and their status in the context of the proposed revised Oregon probate code, are involved in the matter. See Minutes, 6/17,18/66, pp. 21, 22. The first draft, dated April 20, 1967, on discharge of encumbrances, which appears in the blue notebook following tab 19, purports to deal with the matter, and this draft will be considered by the committees in due course.

Jaureguy & Love, Oregon Probate Law and Practice, comments on ORS 114.150 as follows:

"Immediately following the section of the statute just discussed is a section which provides that a charge or encumbrance upon property devised by a will executed prior to the encumbrance shall not be deemed a revocation of the devise but that 'the devisees and legacies therein contained shall pass and take effect subject to such charge or encumbrance'.

"The Missouri Supreme Court in construing its identical statute has assumed that at common law the placing of a mortgage or other encumbrance upon devised real property resulted in a revocation of the devise; and has held that the effect of the statute is not merely to abrogate this common law rule, but to deprive the devisee of the right which he had at

common law to have the land exonerated from the mortgage by having it paid with property not specifically devised or bequeathed.

"But the Oregon Supreme Court in the Nawrocki case [In re Estate of Nawrocki, (1954) 200 Or. 660, 268 P. (2d) 363], in a carefully reasoned opinion by Justice Brand, has held to the contrary. The Missouri court, the opinion says, was in error in holding that at common law an encumbrance upon devised property revokes the devise. It accordingly follows that 'the statute here in question is not an abrogation of any common law rule, but a codification thereof', and 'It is hardly logical to say that the enactment of a statute which merely states a common law rule has the effect of abrogating another common law doctrine, where both rules were compatible at common law.' The court accordingly held that the devisee was entitled to exoneration of the mortgage debt from the residue of the estate.

"The above decision seems inconsistent with a general statement in an earlier case, Howe v. Kern [(1912) 63 Or. 487, 125 P. 834, 128 P. 818], to the effect that 'the debts of the estate secured by mortgage must first be satisfied out of the mortgaged property.' However, in that case while the property had been specifically devised, it is not clear whether the will was executed prior or subsequent to the execution of the mortgage, and it may have been a purchase money mortgage, in which case the above quoted statement clearly applies."

SECTION 14 A

As Mr. Riddlesbarger correctly pointed out at the June 1967 meeting, section 14 A of his revised draft is based upon ORS 114.140, which was approved in substance at the December 1965 meeting. See Minutes, 12/17,18/65, p. 6; and Appendix A, § 12, p. 5. He also correctly noted that the section did not appear in the first draft, dated January 30, 1967, on wills, which is found in the blue notebook following tab 10. The omission of the section from the first draft apparently was inadvertent; I have discovered a draft of the section in Mr. Sorte's working papers.

ORS 114.140 reads:

"A bond, covenant or agreement made for a valuable consideration by a testator to convey any property devised or bequeathed in any will previously made, is not deemed a revocation of such previous devise or bequest, either

in law or equity; but such property shall pass by the devise or bequest, subject to the same remedies on such bond, covenant or agreement, for the specific performance or otherwise, against devisees or legatees as might be had by law against the heirs of the testator or his next of kin, if the same had descended to them."

Section 14 A of Mr. Riddlesbarger's revised draft reads:

"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."

The draft discovered in Mr. Sorte's working papers reads substantially as follows:

"If a person makes a will and thereafter enters into an enforceable agreement to convey or transfer property devised by the will, the agreement does not revoke any part of the will. The property passes as provided in the will, but the person contracting with the testator under the agreement has the same remedies against the devisee of the property as he would have had against the heirs of the testator if the property had descended to them under the laws of intestate succession."

I conclude by suggesting that section 14 A, since it pertains to revocation, should be located following section 10 of Mr. Riddlesbarger's revised draft. ORS 114.140 is comparably located.

REPORT
June 5, 1967

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

From: Clifford E. Zollinger

Subject: Support of Spouse and Children

One of the matters scheduled for consideration at the June 16 and 17, 1967, meeting of the committees is support of spouse and children. This report consists of a draft of proposed legislation on the subject, and comment on the draft.

PROVISIONS FOR SUPPORT OF SPOUSE AND CHILDREN

Section 1. Occupancy of family abode by spouse and children. The spouse and any minor or incompetent child of a decedent may continue to occupy the principal place of abode of the decedent until one year after his death or, if his estate therein be an estate of leasehold or an estate for the lifetime of another, until one year after his death or the earlier termination of his estate. During that occupancy:

(1) The occupants shall not commit or permit waste to the abode; nor shall they cause or permit mechanic's or materialmen's or other liens to attach thereto.

(2) The occupants shall keep the abode insured against fire or other hazards within the extended coverage provided by fire policies. In the event of loss or damage from such hazards, to the extent of the proceeds of such insurance, they will restore the abode to its former condition.

(3) The occupants shall pay taxes and improvement liens on the abode as payment thereof becomes due.

(4) The abode is exempt from execution to the extent it was exempt when the decedent was living.

Section 2. Support of spouse and children; petition, answer and order. (1) The court by order shall make necessary and reasonable provision from the estate of a decedent for the support of the spouse and any minor or incompetent child of the decedent upon:

(a) Petition therefor by the spouse or the guardian of the estate of any minor or incompetent child;

(b) Citation to the personal representative and persons whose distributive share of the estate may be diminished by the granting of the petition.

(c) Hearing on the petition.

(2) The petition for support shall include a description of any property available for the support of the spouse and children other than property of the estate and an estimate of the expenses anticipated for their support. If the petitioner is the personal representative, the petition shall also include, so far as known, a statement of the nature and estimated value of the property of the estate and of the nature and estimated amount of claims against the estate, taxes and expenses of administration.

(3) If the personal representative is not the petitioner, he shall answer the petition for support. The answer

shall include, so far as known, a statement of the nature and estimated value of the property of the estate and of the nature and estimated amount of claims against the estate, taxes and expenses of administration.

(4) Temporary support, pending hearing upon such petition, may be allowed by order of the court in such amount and of such nature as the court shall deem reasonably necessary for the welfare of the surviving spouse and any minor or incompetent child of the decedent.

Section 3. Nature of support; limitations; change by court. (1) Provision for support ordered by the court as provided in Section 2 of this Act may consist of any one or more of the following:

(a) Transfer of real property.

(b) Transfer of personal property.

(c) Periodic payment of moneys during administration of the estate, but for not more than two years after the date of death of the decedent.

(2) The court, in determining provision for support, shall take into consideration property available therefor other than property of the estate.

(3) If it appears to the court that the estate will be insolvent, provision for support ordered by the court shall not exceed one-half of the estimated value of the property of the estate and any periodic payment of moneys so ordered

shall be for not more than one year after the date of death of the decedent.

(4) Provision for support ordered by the court has priority over claims against the estate and other expenses of administration. Upon final distribution of the remaining assets of the estate, it shall not be charged against any distributive share of the person receiving such support, but it shall be treated as an expense of administration.

(5) Provision for support ordered by the court may be modified or terminated by the court by further order.

Section 4. ORS 23.260 is amended to read:

23.260. Exemption inapplicable to mechanics' and purchase-money liens and mortgages. ORS 23.240 to 23.270 (, 116.590 and 116.595) do not apply to mechanics' liens for work, labor or material done or furnished exclusively for the improvement of the property claimed as a homestead, and to purchase money liens and mortgages lawfully executed.

Section 5. ORS 107.280 is amended to read:

107.280. Decreeing disposition of property. Whenever a decree of permanent or unlimited separation from bed and board has been granted, the party at whose prayer such decree was granted shall be awarded in individual right such undivided or several interest in any right, interest or estate in real or personal property owned by the other or owned by them as tenants by the entirety at the time of such decree, as may be just and proper in all circumstances, in addition to the

decree of maintenance. The court may, in making such award, decree that (dower and curtesy, as well as homestead rights under ORS 166.010 and the election provided in ORS 113.050,) the rights of the surviving spouse as provided in ORS are extinguished and barred.

Section 6. Repeal of existing statutes. ORS 113.070, 116.005, 116.010, 116.015, 116.020, 116.025, 116.590 and 116.595 are repealed.

References: Advisory Committee Minutes
6/19/65 p. 5
4/15,16/66 pp. 9 to 14; and Appendix
8/19,20/66 pp. 7 to 13; and Appendix

Report by Gilley and Krause, 5/14/66 "Support of Surviving Spouse and Minor Children; Homestead"

Report by Mapp, 5/20/66 "Support of Surviving Spouse and Minor Children; Exemptions (Homestead), and Family Allowances"

Report by Allison, 4/15,16/66 Appendix

ORS 113.070, 116.005 to 116.125, 116.590, 116.595, 111.030, 107.280, 23.260

Comment: What are the consequences if the surviving spouse commits or permits waste, does not pay taxes or insure the property? Should this section specify that the insurance shall be a standard homeowner's policy?

In section 1 is "abode owned by the decedent that they occupied on the date of death" limited to outright ownership? Would the word "owned" cover a long term lease or a contract for deed?

In section 2 (1)(b) who is included in the citation issued to "interested parties"? Would it be better to either allow the order without notice or provide that notice shall be given to the persons ordered to be notified by the court?

Is section 3 meant to limit the order of the court to the three subparagraphs of that section? Are there other things the court might order for support?

Is support charged against the distributive share at the time of final distribution? This should be provided for, either affirmatively or negatively.

The terminology "transfer of" in section 3 is somewhat inconsistent with the theory that title vests upon death in the person entitled to it. Would the terminology of ORS "set apart" be better?

EDITORIAL COMMENT

The propriety of the provisions of this chapter by which rights to support are somewhat enlarged and the court is granted broader discretion than under existing law should be considered with other provisions in Chapter _____ by which the share of the surviving spouse in real property of an intestate decedent is increased and Chapter _____ by which dower and curtesy are abolished and the right of the surviving spouse to take against the decedent's will is enlarged.

Section 1 replaces ORS 113.070 granting to the widow of a decedent the right to remain in his dwelling house one year after his death without liability for rent. The present law represents an extension of the widow's common law right of quarantine, as a prelude or temporary substitute for the assignment of dower. 1 Jaureguy & Love Oregon Probate Practice, Sec. 181.

Section 1 extends the right of occupancy to a surviving husband and it defines the duties of the occupant to the heir or devisee.

Section 1(4) preserves for the occupant exemptions from execution, continuing, only to that extent, the exemption

presently contained in ORS 116.590 and 116.595 for the benefit of the heir or devisee.

The provisions of ORS 113.070 for "reasonable sustenance out of the estate for one year" for the widow and the provisions of ORS 116.005 to 116.015 for the support of the decedent's surviving spouse and any minor or incompetent child are more adequately covered by Sections 2 and 3 of this chapter. Although Section 1 applies only to the principal place of abode of the decedent owned by him at his death, Sections 2 and 3 permit the court to transfer to them or any of them another more suitable residence or to provide funds for the purchase or rental of other living quarters. The present limitation to exempt property is abandoned.

ORS 116.005 now permits provision for the support of the widow and minor children pending the filing of the inventory, without regard to solvency of the estate; but further support may not be ordered pursuant to ORS 116.015 unless it appears probable that the estate is sufficient to satisfy debts and liabilities of the deceased and pay expenses of administration in addition to the payment of support. Sections 2 and 3 permit support even from an insolvent estate, not exceeding one-half of the estimated value of the property of the estate and continuing for not more than one year after the date of the decedent's death. Provision for such support has priority over claims and other expenses of administration.

Provisions for support extend to either spouse and for the benefit of incompetent as well as minor children.

Provisions for support, unless modified by the court, may continue for two years after the death of a decedent if his estate is solvent.

The amount of the support to be provided from the decedent's estate is discretionary. The court may take into account other resources, as well as other income of the surviving spouse. This is contrary to the present law, as construed in Booth v. First National Bank (1960) 220 Or. 534, 349 P. 2d 840. It also abandons the requirement of ORS 116.015 that no allowance for support shall be made unless it appears that the exempt property is insufficient for the support of the widow and minor children.

Sections 4 and 5 are housekeeping amendments of other statutes containing references to sections which are repealed and superseded.

Section 6 repeals all statutes relating to the support of the family of the decedent and the descent or devise of exempt property.

April 15, 1966

TENTATIVE OUTLINE
Proposed Revised Oregon Probate Code

<u>Present ORS title 12</u> <u>(Estates of Decedents)</u>		<u>Proposed ORS title 12</u> <u>(Estates of Decedents)</u>	
Chapter 111	Descent and Distribution	Chapter 111	General Provisions
Chapter 112	Uniform Simultaneous Death Act	Chapter 112	Intestate Succession
Chapter 113	Dower and Curtesy; Election Against Will	Chapter 113	Wills
Chapter 114	Wills	Chapter 114	Commencing Estate Proceedings; Personal Representatives
Chapter 115	Initiation of Probate or Administration	Chapter 115	Administration of Estates Generally
Chapter 116	Administration of Estates	Chapter 116	Claims, Distribution, Accounting & Closure
Chapter 117	Settlement and Distribution	Chapter 117	Estates of Persons Presumed Dead; Small Estates
Chapter 118	Inheritance Tax	Chapter 118	Inheritance Tax
Chapter 119	Gift Tax	Chapter 119	Gift Tax
Chapter 120	Escheat; Estates of Persons Presumed to be Dead	Chapter 120	Escheat
Chapter 121	Actions and Suits Affecting Decedents' Estates and Administration	Chapter 121	Actions and Suits Affecting Estates
Chapters 122 to 125	[Reserved for expansion]	Chapters 122 to 125	[Reserved for expansion]

REPORT
May 12, 1966

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

From: Judge William L. Dickson, Patricia A. Lisbakken
and Campbell Richardson

Subject: Outline of Proposed Revised Probate Code

At the April meeting of the Advisory and Bar Committees, the matter of the outline of, or arrangement of provisions to be included in, the proposed revised Oregon probate code was discussed. Three subcommittees were appointed and each assigned the task of preparing a suggested outline. The following outline was prepared by Subcommittee #3, consisting of Judge Dickson, Miss Lisbakken and Mr. Richardson, and is submitted for your consideration.

TENTATIVE OUTLINE
Proposed Revised Oregon Probate Code

Chapter 111 General Provisions

Definitions
Jurisdiction of Probate Courts
Pleadings and Mode of Procedure
Process
Manner of Service of Citation
Notices
Contempt
Penalties
Validating Acts

Chapter 112 Devolution of Property (Testate and Intestate)

Intestate Succession
Wills
Advancements
Effect of Adoption and Illegitimacy
Felonious Deaths
Escheat
Uniform Simultaneous Death Act
Residue of Dower and Curtesy
Cross reference to Inheritance Rights of Nonresident
Aliens; Estates of Persons Presumed Dead

Chapter 113 Proceedings Prior to Administration; Personal
Representatives; Initiation of Administration;
Estates of Persons Presumed Dead

Proceedings Prior to Administration
Incorporation of ORS 97.110 to 97.230
(Disposition of Human Bodies)
Delivery of Body for Scientific or
Medical Purposes (ORS 116.115)
Funeral Charges (ORS 117.150)
Special Administrator
Personal Representatives
Initiation of Administration
Estates of Persons Presumed Dead
Cross reference to Reopening Estates;
Notices; etc.

Chapter 114 Administration of Estates Generally

Support of Spouse and Minor Children
Homestead
Election Against Will
Powers and Duties of Personal Representative
Discovery of Assets
Inventory and Appraisal
Sale and Lease of Property
Borrowing
Continuing Business
Application of Revised Uniform Principal and Income Act
Interim Accountings
Partial Distributions

Chapter 115 Creditors' Claims and Rights; Actions and
Suits Affecting Decedent's Estate

Filing Claims Against Estate
Determination of Contested Claims
Actions (ORS 121.020 to 121.100)
Suits (ORS 121.210 to 121.370)

Chapter 116 Determination of Rights; Estates
and Beneficiaries

Determination of Heirship
Will Contests
Inheritance Rights of Nonresident Aliens

Chapter 117 Settlement and Distribution; Reopening Estates

Right of Retainer
Final Account
Distribution to Legatees, Devisees and Heirs
(ORS 117.310 to 117.390)
Reopening Estates

Chapter 118 Inheritance Tax

Chapter 119 Gift Tax

Chapter 120 Small Estates

Chapter 121 to 125 [Reserved for Expansion]

REPORT

December 5, 1966

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

From: Thomas W. Mapp

Subject: Proposed Outline, Revised Oregon Probate Code.

(One of the matters scheduled for consideration at the December meeting is the proposed outline of the Probate Code. Three committees working independently are to have submitted drafts by the December meeting.)

Chapter III General Provisions

Definitions

Jurisdiction of Probate Court

Petitions and Method of Procedure

Notice

Manner of Service

Proof of Service

Waiver of Notice

Appearance

Jury Trial

Modification of Judgments

Appeal Procedure

Disposition of Human Bodies (ORS 97.110 - 230)

Delivery of Body for Scientific or Medical Purposes (ORS 116.115)

Funeral Charges (ORS 117.150)

Chapter 112 Devolution of Property (testate and Intestate)

Intestate Succession

Advancement

Wills

Election against Will

Pretermitted Issue

Effect of Adoption and Illegitimacy

Felonious Deaths

Escheat

Uniform Simultaneous Death Act

Inheritance Rights of Nonresident Aliens

Chapter 113 Initiation of Administration

Venue

Special Administrator

Probate of Will

Will Contests

Appointment of Personal Representative

Bond of Personal Representative

Chapter 114 Administration of Estates

Support of Spouse and Children
Powers and Duties of Personal Representatives (Generally)
Resignation or Removal of Personal Representatives
Inventory and Appraisal
Collection and Management of Estates
Sale, Mortgage and Lease of Property
Claims
Accounting
Distribution and Discharge
 Partial Distribution
 Final Distribution
 Determination of Heirship
Reopening Administration

Chapter 115 Summary Procedures

Small Estates Act
Independent Administration

Chapter 116 Ancillary Procedures

Uniform Probate of Foreign Wills Act
Uniform Ancillary Administration of Estates Act

Chapter 117 Liability of Beneficiaries of Estate
for Decedent's Debts

(ORS 121.230 - 370)
See Article 12 of 1966 Revised New York Code
(Substantive).

Chapter 118 Inheritance Tax

Chapter 119 Gift Tax

Chapters 120 - 125 (Reserved for Expansion)

REPORT

December 14, 1966

To: Advisory Committee on Probate Law Revision
and
Bar Committee on Probate Law and Procedure

From: R. Thomas Gooding, Duncan L. McKay and Judge
Joseph J. Thalhofer

Subject: Proposed Outline, Revised Oregon Probate Code

Chapter 111 GENERAL PROVISIONS

Definitions

Jurisdiction and powers

Proceedings, pleadings and process

Persons feloniously causing death of another

Inheritance by nonresident aliens

Uniform Simultaneous Death Act (ORS chapter 112)

Penalties

Validating Acts

Chapter 112 INTTESTATE SUCCESSION (mostly from ORS chapter 111)

Intestate succession

Advancements

Effect of adoption and illegitimacy

Abolition of dower and curtesy

Chapter 113 WILLS (mostly from ORS chapter 114)

Execution

Revocation

Rules of construction

Election against will

Effect of particular legacies and devises

Testamentary additions to trusts

Pretermitted children

Witnesses as beneficiaries

Chapter 114 INITIATION OF ESTATE PROCEEDINGS

Commencing estate proceedings (ORS 115.110 et seq)

Qualification and removal of personal representatives
(ORS 115.410 et seq)

Powers and duties of personal representatives generally
(ORS 116.105 et seq)

Chapter 115 ADMINISTRATION OF ESTATES GENERALLY
(mostly from ORS chapter 116)

Support of surviving spouse and minor children

Discovery of assets

Inventory and appraisal

Processing claims against the estate

Chapter 115 - continued

Payment of claims against the estate (ORS 117,110-180)
Sale or lease of property
Ancillary proceedings

Chapter 116 ACCOUNTING, SETTLEMENT AND DISTRIBUTION
(ORS chapter 117)

Periodic accounting
Partial distributions
Determination of heirship
Final account
Distribution to legatees, devisees and heirs
Reopening estates

Chapter 117 SUMMARY PROCEEDINGS

Small estates
Independent administration

Chapter 118 INHERITANCE TAX

Chapter 119 GIFT TAX

Chapter 120 ESCHEAT: ESTATES OF PERSONS PRESUMED TO BE DEAD

Chapter 121 ACTIONS AND SUITS AFFECTING ESTATES

Chapters 122 - 125

(Reserved for expansion)

(6) "Spendthrift" includes any person who, by excessive drinking, idleness, gaming or debauchery of any kind, spends, wastes or lessens his estate so as to expose or likely to expose himself or his family to want or suffering, or to cause any public authority or agency to be charged for any expense of the support of himself or his family.

(7) "Ward" means any person for whom a guardian has been appointed.

(8) "Missing person" means any person whose whereabouts is unknown and whose absence is unexplained or who is known to be unable to return to his usual place of abode and is unable to manage his affairs during his absence.

Section 2. ORS 126.106 is amended to read:

126.106. Any court having probate jurisdiction may appoint:

(1) Guardians of the person, guardians of the estate, or both, for resident incompetents or resident minors.

(2) Guardians of the person or guardians of the person and estate for incompetents or minors who, although not residents of this state, are physically present in this state and whose welfare requires such appointment.

(3) Guardians of the estate for resident spendthrifts.

(4) Guardians of the estate for nonresident incompetents, nonresident minors or nonresident spendthrifts who have property within this state.

(5) Guardians of the estate for missing persons
who have property within this state.

Section 3. ORS 126.126 is amended to read:

126.126. Any person may file with the clerk of the court a petition for the appointment of a guardian. The petition shall include the following information, so far as known by the petitioner:

(1) The name, age, residence and post-office address of the proposed ward.

(2) Whether the proposed ward is an incompetent, minor or spendthrift or missing person, and whether he is a resident or nonresident of this state.

(3) Whether the appointment of a guardian of the person, guardian of the estate, or both, is sought.

(4) The name, residence and post-office address of the proposed guardian, and that the proposed guardian is qualified to serve as guardian.

(5) A general description and the probable value of the property of the proposed ward and any income to which he is entitled. If any moneys are paid or payable to the proposed ward by the United States through the Veterans Administration, the petition shall so state.

(6) The name and address of any person or institution having the care, custody or control of a proposed ward who is an incompetent or minor.

(7) The reasons why the appointment of a guardian

is sought, the relationship, if any, of the petitioner to the proposed ward and the interest, if any, of the petitioner in the appointment.

Section 4. ORS 126.131 is amended to read:

126.131. (1) Except as otherwise provided in ORS 126.136, 126.141 and 126.146, the court, upon the filing of a petition under ORS 126.126, shall order the issuance of a citation requiring the persons or institutions referred to in subsection (2) of this section to appear and show cause why a guardian should not be appointed for the proposed ward.

(2) Citation issued under subsection (1) of this section shall be served:

(a) If the proposed ward is an incompetent, on any person or an officer of any institution having the care, custody or control of the incompetent, and on the incompetent.

(b) If the proposed ward is a minor, on any person or an officer of any institution having the care, custody or control of the minor, and if the minor is 14 years of age or older, on the minor.

(c) If the proposed ward is a spendthrift, on the spendthrift.

(d) If the proposed ward is receiving moneys paid or payable by the United States through the Veterans

Administration, on a representative of the Veterans Administration.

(e) If the proposed ward is a missing person, on the missing person by mail at his last-known address by registered mail with postage-prepaid letter to be forwarded through the United States Social Security Administration to his last address available to that agency, by publication thereof and upon such other persons as the court may direct.

Section 5. ORS 126.411 is amended to read:

126.411. A guardian of the estate may file in the guardianship proceeding a petition for the sale, mortgage or lease of any property of the ward. The petition shall include the following information, so far as known by the petitioner:

(1) The name, age, residence and post-office address of the ward.

(2) Whether the ward is an incompetent, minor or spendthrift or missing person.

(3) The name and address of any person or institution having the care, custody or control of a ward who is an incompetent or minor.

(4) A general description and the probable value of all the property of the ward that has come to the possession or knowledge of the guardian and not theretofore disposed of, and of all the property to which the

ward may be entitled upon any distribution of any estate or of any trust.

(5) The income being received from the property to be sold, mortgaged, or leased, from all other property of the ward and from all other sources, and the application of such income.

(6) Such other information concerning the guardianship estate and the condition of the ward as is necessary to enable the court to be fully informed.

(7) The purpose of the proposed sale, mortgage or lease, a general description of the requirements for such purpose and the aggregate amount needed therefor.

(8) A specific description of the property to be sold, mortgaged or leased.

Section 6. ORS 126.426 is amended to read:

126.426. (1) Except as otherwise provided in ORS 126.431 and 126.471, the court, upon the filing of a petition under ORS 126.411 for the sale or mortgage of real property, or the lease of real property for a term exceeding five years, shall order the issuance of a citation requiring the persons or institutions referred to in subsection (2) of this section to appear and show cause why an order for the sale, mortgage or lease should not be made.

(2) Citation issued under subsection (1) of this section shall be served:

(a) If the ward is an incompetent, on any person or an officer of any institution having the care, custody or control of the incompetent, and on the incompetent.

(b) If the ward is a minor, on any person or an officer of any institution having the care, custody or control of the minor, and if the minor is 14 years of age or older, on the minor.

(c) If the ward is an incompetent or minor in the care, custody or control of any institution, on any person paying or liable for the care and maintenance of the incompetent or minor at the institution.

(d) If the ward is a spendthrift, on the spendthrift.

(e) If the ward is a missing person, to each person who would be an heir at law of the ward if he were dead.

Section 7. ORS 126.476 is amended to read:

126.476. (1) A guardian of the estate, with prior approval of the court by order, may accept an offer to exchange real or personal property, or both, of the ward for real or personal property, or both, of another, or to effect a voluntary partition of real or personal property, or both, in which the ward owns an undivided interest, where it appears from the petition therefor and the court determines that such exchange or partition is in the best interests of the ward.

(2) A guardian of the estate, with prior approval of the court by order, may accept an offer for the purchase or surrender of the interest or estate of the ward

in real or personal property, or both, where it appears from the petition therefor and the court determines that:

(a) The interest or estate of the ward in such property is contingent or dubious;

(b) The interest or estate of the ward in such property is a servitude upon the property of the offeror;

(c) The interest or estate of the ward in such property is an undivided interest in property in which the offeror owns or is offering to purchase another or the other undivided interest or interests; or

(d) For any other reason, there is no market for the interest or estate of the ward in such property except by such sale or surrender to the offeror.

(3) A guardian of the estate may file in the guardianship proceeding a petition for authority to accept an offer under subsection (1) or (2) of this section. The petition shall include the following information, so far as known by the petitioner:

(a) The name, age, residence and post-office address of the ward.

(b) Whether the ward is an incompetent, minor [or], spendthrift, or missing person.

(c) The name and address of any person or institution having the care, custody or control of a ward who is an incompetent or minor.

(d) The name and address of the offeror.

(e) A specific description of the property, interest or estate to be exchanged, partitioned, sold or surrendered, and the price or property to be received therefor.

(f) Such other information as the petitioner may consider necessary to enable the court to be fully informed in respect of the subject matter.

(4) If the property, interest or estate to be exchanged, partitioned, sold or surrendered consists solely of personal property or an interest or estate therein, the provisions of ORS 126.416 shall apply, except that no return of his proceedings need be made and filed by the guardian.

(5) If the property, interest or estate to be exchanged, partitioned, sold or surrendered consists in whole or in part of real property or an interest or estate therein, the provisions of ORS 126.426 and 126.431 and subsection (1) of ORS 126.471 shall apply, except that no return of his proceedings need be made and filed by the guardian.

(6) Upon the entry of an order of the court authorizing acceptance of an offer under subsection (1) or (2) of this section, the guardian may execute such instruments as are appropriate to effect such exchange, partition, sale or surrender. If the guardian executes a conveyance of real property or an interest or estate

therein, the provisions of ORS 126.461 and 126.466 and subsections (3) and (4) of ORS 126.471 shall apply.

(7) Except as otherwise provided in this section, the provisions of ORS 126.406 to 126.471 do not apply to exchanges, partitions, sales or surrenders under this section.

Section 8. ORS 126.495 is amended to read:

126.495. In case of the sale or other transfer by a guardian of the estate of any real or personal property specifically devised or bequeathed by the ward, who was competent to make a will at the time he executed the will but was not competent to make a will at the time of the sale or transfer and never regained such competency or if the ward was a missing person subsequently found to be dead who did not make a valid will subsequent to the sale or transfer, so that the devised or bequeathed property is not contained in the estate of the ward at the time of his death, the devisee or legatee may at his option take the value of the property at the time of the death of the ward with the incidents of a general devise or bequest, or the proceeds of such sale or other transfer with the incidents of a specific devise or bequest.