

ADVISORY COMMITTEE
Probate Law Revision

Fourth Meeting

Date: Saturday, July 13, 1964

Time: 9 a.m.

Place: Judge Dickson's courtroom
244 Multnomah County Courthouse

Suggested Agenda

1. Approval of minutes of June 13 meeting of advisory committee.
2. Report on publicity and miscellaneous matters (Lundy).
3. Report on 1964 proposals of Bar Committee on Probate Law and Procedure (Allison).
4. Report on dower and curtesy -- progress and problems (Lundy).
5. Guardianship and conservatorship.
 - a. Proposed legislation (Rough Draft, 7/13/64) (Lundy).
 - b. Service of citation on appointment of guardian (Comment & Suggestion No. 12) (Butler).
 - c. Factors considered by court in appointing guardian (Comment & Suggestion No. 15) (Butler).
 - d. Filing name and address of guardian (Comment & Suggestion No. 20) (Butler).
6. Next meeting of advisory committee.

ADVISORY COMMITTEE
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Fourth Meeting, July 18, 1964

Minutes

The fourth meeting of the advisory committee was convened at 9:05 a.m., Saturday, July 18, 1964, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland. The following members were present: Zollinger, Allison, Butler, Carson, Jaureguy and Riddlesbarger. Dickson, Frohnmayer and Gooding were absent. Also present were William E. Love, a member of the Law Improvement Committee, and Robert W. Lundy, Chief Deputy Legislative Counsel.

Vice Chairman Zollinger presided in the absence of Chairman Dickson.

Before the meeting was convened, Lundy distributed to the members present copies of the 1942 annual report of the Bar Committee on Probate Law and Procedure, containing a draft of proposed legislation embodying a revised code of probate procedure, and a supplement consisting of a table comparing sections of the 1942 proposed code of probate procedure and the statute sections presently compiled in Oregon Revised Statutes.

1. Minutes of Last Meeting. Allison moved, seconded by Butler, that reading of the minutes of the last meeting (June 13, 1964) be dispensed with and that they be approved as submitted. Motion carried.

2. Report on Publicity and Miscellaneous Matters. Lundy reported that news releases on the last meeting had been prepared and sent to the Oregon State Bar Bulletin, to newspapers published in the cities where committee members reside and to representatives of wire services headquartered in the State Capitol. He indicated that he had started and would continue the practice of sending such news releases to the members of the Law Improvement Committee, with the thought in mind that such news releases might constitute progress reports by the advisory committee to the Law Improvement Committee. He also indicated that he had reported orally on the progress of the probate law revision project to the Law Improvement Committee at its meeting on July 10, 1964, and that members of the Law Improvement Committee had expressed interest in the content of the advisory committee's immediate program and in when the immediate program would be ready for consideration by the Law Improvement Committee.

Lundy noted that no comments and suggestions on problem areas in Oregon's probate and related law had been received since the last meeting. Riddlesbarger remarked that he had been asked by a representative of the Internal Revenue Service

about suggestions sent by that representative to his superior for forwarding to the committee, and that he (Riddlesbarger) had responded that to his knowledge these suggestions had not been brought to the attention of the committee. Lundy pointed out that the only suggestions he had received from IRS personnel were embodied in Comment & Suggestion No. 29, a memorandum from H. E. Green, Group Supervisor, IRS, forwarded by Arthur G. Erickson, District Director of Internal Revenue.

Riddlesbarger stated that he recently had occasion to discuss briefly the probate law revision project with two members of the faculty of the University of Oregon School of Law (Frank R. Lacy and Hans A. Linde); that they had referred to a European practice that apparently permits a testator, during his lifetime, to have his will probated in a court proceeding, and had agreed to furnish Riddlesbarger with more information on this matter, but thus far had not done so. At Riddlesbarger's request, Lundy agreed to note the matter for follow-up investigation and possible future consideration by the committee.

Riddlesbarger outlined a situation in which the widow of a decedent had filed a claim against the estate of the decedent, to which a daughter of the decedent (an heir) wished to object. He indicated that the executor of the will of the decedent had contended that the daughter was not a proper person under the law to object to the claim. He suggested, and Zollinger agreed, that the matter of who might object or appear in opposition to claims against estates of decedents was one the committee should consider at some appropriate time in the future.

Lundy reported that he had sent more background materials on administration of small estates of decedents, including a recently enacted New York statute and supporting research report on settlement of small estates without administration, to Denny Z. Zikes, who had agreed to undertake research for the committee in the area of summary proceedings for administration of small estates. [Note: See Minutes, Probate Advisory Committee Meeting, 6/13/64, page 2.]

3. Report on 1964 Proposals of Bar Committee on Probate Law and Procedure. Allison referred to and briefly summarized the content of the 1964 annual report of the Bar Committee on Probate Law and Procedure, of which he was chairman. He pointed out that the report recommended that the proposals therein for changes in the probate law, if approved by the Bar at its annual meeting next fall, be submitted to the advisory committee and the Law Improvement Committee for their consideration and action. [Note: See Minutes, Probate Advisory Committee Meeting, 5/16/64, page 2.] Allison indicated that copies of the Bar committee's report, when available, would be distributed to members of the advisory committee and the Law Improvement Committee.

a. Objection to confirmation of sale of real property by personal representative. Allison explained the Bar committee's proposed legislation amending ORS 116.805 to permit any interested person to file objection to confirmation of the sale of real property by an executor or administrator, pointing out that this proposed legislation was similar to Senate Bill 188 (1963), which failed to pass. Zollinger asked whether there might not be some difficulty in determining who was an "interested" person, and commented that this matter was considered in the course of revision of the guardianship and conservatorship statutes in 1960-1961 and a decision made to permit any "person," rather than any "interested person," to object to confirmation of the sale of real property by a guardian. [Note: See ORS 126.451.] Zollinger suggested, and Allison agreed, that at the appropriate time some consideration should be given to conforming ORS 116.805 to ORS 126.451.

b. Revocation of will by subsequent marriage, divorce or annulment of marriage of testator. Allison explained the Bar committee's proposed legislation relating to revocation of the will of a testator by his subsequent marriage, divorce or annulment of his marriage [Note: See ORS 114.130], pointing out that this proposed legislation was similar to Senate Bill 197 (1963), which failed to pass.

c. Guardian's access to ward's safe deposit box. Allison explained the Bar committee's proposed legislation to require the presence of a representative of the State Treasurer's office at the time of the first opening of a ward's safe deposit box by the guardian. [Note: See Minutes, Probate Advisory Committee Meeting, 5/16/64, page 8; Appendix B, pages 2 to 4.] Zollinger suggested that one advantage that might be derived from the proposed legislation would be an opportunity for the court to reconsider the amount of a guardian's bond in the light of the contents of the safe deposit box. He asked whether the representative of the State Treasurer's office should not be required to file in the guardianship proceeding an inventory of the contents of the safe deposit box within a specified period of time. Allison pointed out that the proposed legislation would require such an inventory within 10 days after the opening of the safe deposit box. Zollinger suggested, and Allison indicated he was inclined to agree, that the guardian's access to the safe deposit box should be denied or restricted until such an inventory had been filed and the court reconsidered the amount of the guardian's bond.

d. Waiver of appraisal of estates of decedents. Allison explained the Bar committee's proposed legislation amending ORS 116.420 to permit the court to waive the appointment of appraisers to appraise property of a decedent in certain specified circumstances, pointing out that this proposed legislation was similar to Senate Bill 185 (1963), which failed to pass.

e. Sale of property of decedent under power in will. Allison explained the Bar committee's proposed legislation relating to sale or disposition of property of a decedent under a provision made in the will of the decedent [Note: See ORS 116.825], pointing out that this proposed legislation differed somewhat from Senate Bill 198 (1963), which failed to pass.

f. Payment of mortgages or other encumbrances on property of decedent. Allison explained the Bar committee's proposed legislation relating to the obligation of a personal representative to pay mortgages or other encumbrances on property of a decedent. He indicated that Jaureguy had drafted the proposed legislation. [Note: See ORS 116.140.] In answer to a question by Zollinger, Jaureguy indicated that it was not the intention of the proposed legislation to preclude a person having a secured claim against a decedent from submitting a claim against the estate based on the obligation of the decedent and having the claim allowed and paid, rather than relying solely on the security for the obligation. Jaureguy expressed the view, with which Zollinger agreed, that the proposed legislation should be revised to clarify this matter.

Riddlesbarger suggested that a related matter was that of apportionment of Federal estate tax liability among the distributive shares of an estate of a decedent, and that this matter was one the committee should consider at some appropriate time in the future. [Note: See Comment & Suggestion No. 29.]

g. Reopening of estate of decedent for further administration. Allison explained the Bar committee's proposed legislation relating to reopening the estate of a decedent for further administration after it had been closed. He pointed out that a principal drawback of the present law on this subject was that it was too limited with respect to the grounds for reopening an estate.

4. Report on Dower and Curtesy. Lundy reported that he had prepared and sent to Allison a rough draft of proposed legislation changing the dower and curtesy interest of a surviving spouse to a fee estate in an undivided one-fourth of the real property owned by the deceased spouse at the time of his death [Note: See Minutes, Probate Advisory Committee Meeting, 6/13/64, page 5], and another rough draft of proposed legislation designed to protect this inheritance interest of a spouse in real property in the name of the other spouse alone by means of a filed declaration [Note: See Minutes, Probate Advisory Committee Meeting, 6/13/64, page 7]. Allison summarized the principal features of the two rough drafts and his proposals for changes therein. He indicated that he would send his proposals for changes to Lundy.

Allison pointed out that the rough draft changing dower and curtesy expressly abolished dower and curtesy, including the inchoate interest, but saved interests already vested; and gave a surviving spouse, in lieu of dower or curtesy, a first priority right to an undivided one-fourth interest in real property of which the deceased spouse died possessed if the decedent died intestate and left children or other lineal descendants (by amending ORS 111.020), and a right to elect against the will of the deceased spouse and to take an undivided one-fourth interest in real property of which the decedent died possessed (by amending ORS 113.050). He indicated that the rough draft also amended ORS 113.060 by adding a new provision relating to waiver of the right to elect against the will, and commented that his initial reaction was that such a provision was not necessary. Carson expressed the view that a specific statutory provision on waiver might serve a useful purpose; that waiver of the right to elect against a will would permit an estate plan to be made with more certainty that the plan would be carried out, and that a specific statutory provision on waiver might facilitate this.

Allison indicated that his proposals for changes in the rough draft protecting a spouse's inheritance rights included a description of the rights to be protected as "inchoate" inheritance rights; a specification that the effect of a conveyance or mortgage of real property not joined in by both spouses after the filing of a declaration of inheritance rights with respect to such property was failure of the conveyance or mortgage to affect the inheritance rights (i.e., the grantee or mortgagee would take subject to the inheritance rights, if exercised), rather than invalidity of the conveyance or mortgage; and a requirement that the declaration describe the particular real property to which it was applicable, rather than be applicable to all real property situated in the county. Jaureguy questioned, and Allison defended, the appropriateness of describing the rights to be protected as "inchoate" inheritance rights. Zollinger expressed approval of the requirement that the declaration describe the particular real property to which it was applicable.

Riddlesbarger indicated that he had received a letter from Gooding asking him to serve with Gooding on a subcommittee having some sort of function with respect to the proposed legislation relating to changing dower and curtesy, and requested clarification of this matter. Lundy responded that at the last meeting Dickson had asked Gooding to prepare and present objections to the rough drafts on this subject and offer alternative suggestions as to how to handle the matters involved, and had suggested that Gooding ask Riddlesbarger to join with him in presenting opposing and alternative views. [Note: See Minutes, Probate Advisory Committee Meeting, 6/13/64, page 8.]

5. Guardianship and Conservatorship.

a. Proposed legislation (Rough Draft, 7/18/64).

[Note: Before the meeting, copies of a rough draft of proposed legislation on guardianship and conservatorship (dated July 18, 1964) prepared by Lundy pursuant to and based upon action by the committee at the May 16 and June 13, 1964, meetings had been distributed to members.] Zollinger suggested, and the committee agreed, that each section of the rough draft be read at length by Lundy, and that all provisions of each section be subjected to a careful and detailed examination.

(1) Investment by guardians. Lundy pointed out that section 1 of the rough draft amended ORS 126.250 (relating to investment by guardians) by rearranging the list of investments in subsection (1) thereof a guardian of the estate might make without prior court approval and by placing each category of investment in a separate paragraph, and by deleting subsection (3) thereof (containing specific provisions for investment by guardians of the estate for wards receiving federal veterans benefits). He then proceeded to read ORS 126.250, as amended, at length.

Carson question whether the clause "and the issuer of which has not defaulted in the payment of either principal or interest of any general obligation bond within five years next preceding the date of the investment" in paragraph (c) of subsection (1) of ORS 126.250, as amended, should apply to obligations of the state. Lundy commented that this was a matter he had considered bringing to the attention of the committee; that prior to 1963 it appeared to be clear that the quoted clause applied to obligations of all the specified issuers (i.e., United States, State of Oregon and counties, cities, port districts and school districts of Oregon), but that insertion of the common trust fund clause by amendment in 1963 tended to create some doubt that the quoted clause applied to obligations of the United States. Zollinger suggested, and the committee agreed, that the quoted clause should apply only to obligations of counties, cities, port districts and school districts; that obligations of the state should be placed in a separate paragraph; and that obligations of the state and local governmental units should be "general" obligations, thus requiring prior court approval for investment in revenue bonds.

Lundy asked whether the wording of paragraph (a) of subsection (1) of ORS 126.250, as amended (i.e., "time or other deposits of cash"), constituted a sufficient description of a category of investment which might be made without prior court approval; whether some specification of the financial institutions with which the deposits are made should be added. Jaureguay questioned whether deposits with a bank of cash of a ward by his guardian should be regarded as investments. Zollinger expressed the view that such deposits should not be

regarded as investments, but rather as an aspect of the general duty of a guardian of the estate to protect and preserve the estate of the ward and an obligation of the guardian to be performed whether or not he had prior court approval. Carson and Zollinger suggested, and the committee agreed, that paragraph (a) of subsection (1) of ORS 126.250, as amended, should be deleted.

Lundy pointed out that "time or other deposits of cash" appeared in the common trust fund category of investment in subsection (1) of ORS 126.250, and asked whether, in view of the committee's decision to delete the quoted words as a separate category of investment, the quoted words should be added to the common trust fund category described in paragraph (d) of subsection (1) of ORS 126.250, as amended. Zollinger suggested, and the committee agreed, that the common trust fund category of investment should be described as being composed of "cash" (not using "time or other deposits of") or obligations in which a guardian of the estate may invest without prior court approval or both.

In answer to a question by Butler, Zollinger indicated that representatives of the Veterans Administration had not objected to deletion of subsection (3) of ORS 126.250.

(2) Accounting by guardians. Lundy pointed out that section 2 of the rough draft amended ORS 126.336 (relating to accounting by guardians) by specifying with more particularity therein the persons who were to receive copies of final and other accounts made and filed by a guardian of the estate and the procedure for giving copies of accounts other than final accounts. He then proceeded to read ORS 126.336, as amended, at length.

Lundy commented that ORS 126.336, as amended, was quite lengthy, and suggested that the section might be divided into two or more sections. Zollinger agreed, suggesting that subsections (1) to (3) might constitute a separate section, subsections (4) and (5) a second separate section and subsection (6) a third separate section.

Zollinger suggested that "next previous account" in paragraph (b) of subsection (2) of ORS 126.336, as amended, be changed to "last previous account." Lundy commented that "next previous" might be standard terminology used in the guardianship statutes, and indicated that he would check into the matter.

Lundy referred to paragraph (a) of subsection (4) of ORS 126.336, as amended, and asked whether he should solicit the views of the present Secretary of the Board of Control on the matter of receiving copies of accounts of guardians of the estate for wards committed or admitted to, and not discharged

from, state mental institutions. The committee indicated that Lundy should not do so at this time.

Carson suggested, and the committee agreed, that the wording of paragraph (d) of subsection (4) of ORS 126.336, as amended, should be changed in two particulars, as follows:
"* * * if there [is] are no such spouse and no such children,
* * * if there [is] are no such spouse, no such children and no such parents, * * *."

The committee discussed subsection (4) of ORS 126.336, as amended (relating to the distribution of copies of guardians' accounts other than final accounts), at considerable length. Butler expressed the view, with which Allison indicated agreement, that subsection (4) imposed a substantial burden on guardians; that in some instances it would be necessary for guardians, in complying with subsection (4), to prepare and distribute many copies of each of their accounts; that subsection (4) would tend to cause an increase in the expense of administering estates of wards; and that the present statutory provision on distribution of accounts other than final accounts was adequate. Love commented, and some members apparently agreed, that, while recognizing that some burden would be imposed on guardians by subsection (4), it appeared to be desirable that as many interested persons as possible receive the information contained in accounts of guardians, and that there appeared to be ways available to reduce the expense of preparing and distributing multiple copies of such accounts.

Butler suggested, and Riddlesbarger agreed, that the burden imposed on a guardian by subsection (4) might be reduced somewhat if the guardian mailed or delivered copies of his accounts to the persons specified "so far as known by the guardian." Jaureguy commented that a provision might be added to subsection (4) to the effect that a guardian had complied therewith by mailing or delivering copies of his accounts to the last-known addresses of the persons specified. Zollinger suggested, and the committee apparently agreed, that a provision be added to subsection (4) to the effect that if a guardian was unable, after diligent efforts, to ascertain the name or address of any person entitled to receive a copy of an account, and filed in the guardianship proceeding, with the account, a certificate to such effect, he would be considered to have complied with subsection (4) as to such person.

Jaureguy referred to that part of subsection (4) requiring a guardian to file with each account "proof satisfactory to the court" that copies of the account had been mailed or delivered as provided in the subsection, and suggested that instead of "proof satisfactory to the court" the guardian be required to file an "affidavit," "certificate" or "signed statement" of compliance with the subsection. Zollinger pointed out that his draft considered at the last meeting required the filing with each account of "the certificate of the guardian or his

attorney" that copies of the account had been mailed or delivered as provided in subsection (4), and that "proof satisfactory to the court" had been substituted in order to avoid specifying the exact nature of evidence of compliance with the subsection. [Note: See Minutes, Probate Advisory Committee Meeting, 6/13/64, page 12; Appendix C, pages 2 and 3.] He suggested, and the committee apparently agreed, that there be filed with each account "the certificate of the guardian or his attorney or other proof satisfactory to the court" of compliance with subsection (4).

The committee discussed in detail and at considerable length the matters of which persons should receive copies of accounts of guardians under subsection (4) of ORS 126.336, as amended, which persons should receive notices of the filing of accounts and which persons should receive neither copies nor notices of filing unless they requested them. In summary, this discussion and the committee action based thereon were as follows:

(a) Superintendent of state institution; Board of Control. Riddlesbarger expressed the view, in which Butler concurred, that if a ward had been committed or admitted to, and not discharged from, a state mental institution, both the superintendent of the institution and the Secretary of the Board of Control should receive copies of accounts of the guardian. Zollinger suggested that although the Secretary of the Board of Control certainly should receive copies of accounts, perhaps the superintendent of the institution should receive only notices of the filing of accounts. The committee apparently agreed that the Secretary of the Board of Control should receive copies of accounts, and that the superintendent of the institution should receive notices of filing.

(b) Guardian of person. Allison commented, and Butler and Riddlesbarger agreed, that if there was a guardian of the person for a ward other than the guardian of the estate, the guardian of the person should receive copies of accounts of the guardian of the estate. Zollinger suggested that it might be sufficient if the guardian of the person received only notices of the filing of the accounts. The committee apparently agreed that the guardian of the person should receive copies of accounts.

(c) Ward not minor or incompetent. Butler, Riddlesbarger and Zollinger expressed the view, and the committee apparently agreed, that a ward not a minor or an incompetent should receive copies of accounts of the guardian.

(d) Minor or incompetent ward. Love suggested, and Zollinger agreed, that many minor wards 16 years of age or older, for example, were probably capable of understanding the accounts of their guardians, and that there were circumstances in which the information contained in such accounts

would be useful to such wards. Butler commented that minor wards should not receive either copies of accounts or notices of the filing thereof; that there were circumstances in which it would be harmful for minor wards to receive copies of accounts. He gave as an example the possible temptation to a minor ward to marry and thus terminate the guardianship and gain control of the estate. Riddlesbarger remarked that he could visualize situations in which minor wards should be reminded of their estates and the administration thereof by their guardians. Allison indicated that he favored some minor wards receiving notices of the filing of accounts over receiving copies of accounts. A majority of the committee apparently agreed that some minor wards should receive copies of accounts.

The committee then discussed the minimum age of minor wards who should receive copies of accounts. Minimum ages of 14, 16 and 18 were considered. Zollinger pointed out that other guardianship statutes referred to minor wards 14 years of age or older [Note: See, for example, ORS 126.131 (citation in proceeding for appointment of guardian for minor), 126.136 (appointment of parent as guardian for minor without citation) and 126.166 (request by minor for appointment of particular guardian)], but expressed the view that a minimum age of 14 appropriate for purposes of these other statutes was not necessarily appropriate for the purpose of a minor ward receiving copies of accounts of the guardian. Carson suggested, and a majority of the committee apparently agreed, that the minimum age of a minor ward for receipt of accounts should be 14; that consistency with other guardianship statutes in this respect was desirable.

Zollinger suggested that it might be desirable for incompetent wards to receive copies of accounts of their guardians; that if an incompetent ward was able to understand the accounts his receipt of copies thereof might serve a useful purpose in some instances, and in any event would not be harmful. Butler expressed the view, and the committee apparently agreed, that incompetent wards should not receive copies of accounts or notices of the filing thereof.

(e) Spouse of incompetent ward. Butler indicated he did not object to the spouse of an incompetent ward receiving copies of accounts of the guardian. Riddlesbarger remarked that he would prefer that the spouse receive notices of the filing of accounts. A majority of the committee apparently agreed that the spouse should receive copies of accounts, and that the spouse need not be a resident of this state.

(f) Children of incompetent ward. Love suggested that the children of an incompetent ward should receive copies of accounts of the guardian, and whether or not such children were residents of this state. Butler, Jaureguy, Riddlesbarger and Zollinger indicated their preference, and a majority of the

committee apparently agreed, that the children, wherever residing, receive notices of the filing of accounts.

(g) Parents of minor or incompetent wards. Zollinger commented that it might be sufficient for the parents of a minor or incompetent ward to receive notices of the filing of accounts of the guardian. Butler, Carson and Jaureguy expressed the view, and a majority of the committee apparently agreed, that the parents should receive copies of accounts. A majority of the committee also apparently agreed that the parents need not be residents of this state.

(h) Brothers and sisters of minor or incompetent ward. Butler indicated that his preference was that brothers and sisters of a minor or incompetent ward should not receive either copies of accounts of the guardian or notices of the filing thereof, and Carson remarked that this was his preference also. Riddlesbarger suggested that copies of accounts or notices of the filing thereof might be mailed or delivered to one of the brothers or sisters, rather than to all of them. Allison, Butler, Love and Zollinger indicated they would not object to brothers and sisters receiving notices of the filing of accounts. Butler, Jaureguy and Zollinger suggested, and a majority of the committee apparently agreed, that copies of accounts, notices of the filing thereof or both should be sent to brothers and sisters, wherever residing, who had requested such copies or notices, but that neither copies nor notices should be mailed or delivered to brothers and sisters without such request.

(i) Notices of filing of accounts. Butler suggested that notices of the filing of accounts, in lieu of mailing or delivering copies of accounts to certain persons specified in subsection (4) of ORS 126.336, as amended, might be published or mailed or delivered to such persons. Carson commented that publishing notices perhaps would be as burdensome on guardians as mailing or delivering copies of accounts. Zollinger suggested, and the committee agreed, that the notices of the filing of accounts mailed or delivered to certain persons indicate that such persons might, on written request to the guardian, receive from him copies of accounts. In response to a question by Riddlesbarger, Jaureguy commented that the requests for copies of accounts should go to the guardian, and not the court or the clerk thereof, since such request in any event would have to be forwarded to the guardian.

The committee discussed the matter of when copies of accounts and notices of the filing thereof should be mailed or delivered to the specified persons. Jaureguy suggested, and Zollinger agreed, that the mailing or delivering of such copies and notices need not occur before the filing of the accounts in the guardianship proceedings, and that perhaps it might be specified that such mailing or delivering occur within

10 days after such filing. Riddlesbarger commented that there should be some proof of the mailing or delivering filed with the accounts, but that such proof should extend only to automatic mailings or deliverings, and not to mailings or deliverings dependent upon the receipt of requests therefor. He suggested that a guardian's responsibility to file such proof should end when the guardian has mailed or delivered the copies of accounts or notices of the filing thereof as required of the guardian at the time of the filing of the accounts. Riddlesbarger asked if there should be some time period established within which requests for copies of accounts or notices of the filing thereof should be made. Jaureguay suggested that such requests should be received before the filing of the accounts.

The committee turned to consideration of subsection (5) of ORS 126.336, as amended (relating to final accounts of guardians). Riddlesbarger and Zollinger pointed out that subsection (5) required personal service of copies of final accounts of guardians on the persons specified in subsection (4), and that in considering this aspect of subsection (5) the committee should keep in mind its discussion and tentative revision of subsection (4). Zollinger commented that the persons to be personally served with copies of final accounts should be limited to those entitled to receive copies of accounts under subsection (4) automatically or by reason of having requested them and those having requested copies of final accounts.

Zollinger remarked that personal service of copies of final accounts of guardians on persons outside the state might involve some problems, and asked whether some provision should be made for service by mail on such persons and a period of time after such service and before hearings on the final accounts. Lundy asked about the meaning of "served personally"; whether the quoted words contemplated service and return as in the case of a summons in a civil action. Zollinger expressed the view that the manner of service of copies of final accounts should be similar to that of service of summons in civil actions, including mailing and publication, although mailing to persons outside the state should be sufficient and publication not required.

Allison questioned the need for separate and different provisions for accounts other than final accounts (i.e., subsection (4)) and final accounts (i.e., subsection (5)). Lundy pointed out that two principal distinctions between the two categories of account were recognized in the two subsections; that is, a distinction as to the manner in which copies of accounts were distributed and the provision for objections to final accounts but not to other accounts. Zollinger commented that there was no occasion for objections to accounts other than final accounts since the right to make such objections was reserved until the final accounts were filed [Note: See subsection (6) of ORS 126.336], and interested persons

were not bound by court settlement of accounts other than final accounts.

Allison expressed the view that whether objections were allowed or not should not be a ground for distinction between the manner of distributing copies of accounts of guardians. He asked why there should be personal service of copies of final accounts, pointing out that there was published service, but not personal service, in many decedents' estates proceedings. Zollinger commented that some decedents' estates proceedings were proceedings in rem and not adversary in nature, and that this circumstance justified the view that a court might make a determination in such proceedings without the usual requirements met in adversary proceedings. He expressed the opinion that proceedings involving settlement of final accounts of guardians were not proceedings in rem; that such proceedings should be adversary in nature, with interested persons served and afforded opportunity to object and be heard on their objections; that service in such proceedings was as important as in civil actions. Allison commented that mailed service on nonresidents in civil actions was difficult because of lack of knowledge of the whereabouts of such persons, but this difficulty did not exist to the same extent in proceedings involving settlement of final accounts of guardians.

In response to a question by Butler, Zollinger indicated his belief that if a ward, for example, was personally served with a copy of the final account of the guardian and failed to object thereto, the ward would be foreclosed from later raising objections based on purported irregularities in the final account. Butler suggested that it was not desirable that a guardian should be released from liability for fraudulent acts, for example, by reason of the settlement of the final account, and not similarly released by reason of the settlement of other accounts. Riddlesbarger suggested that a guardian might be so released from liability except for fraud or inexcusable neglect. Jaureguy called attention to the statute [Note: See ORS 18.160] allowing one year for relief from action by a court under certain circumstances. He expressed the opinion that this statute applied to settlement of final accounts of guardians, but allowed that the committee might wish to make a similar specific provision applicable to such settlement.

Zollinger commented that the responsibility of a guardian should be terminated at some point, and indicated that he favored settlement of the final account as that termination point; that he did not object to the one year provision referred to by Jaureguy, but did not favor permitting a person to raise objections after that time. Allison remarked that it had been his understanding that a proceeding involving settlement of a guardian's final account and discharge of the guardian was not

an adversary proceeding in the same sense as a civil action; that if fraud on the part of a guardian, for example, were discovered within one year, an interested person had a right to object and to have his objection heard and determined by the court.

Riddlesbarger suggested that before the committee made any decisions with respect to revision of subsections (5) and (6) of ORS 126.336, it should have more information on the effect of settlement of a guardian's final account and the discharge of the guardian, the liability of the guardian thereafter and related matters. He expressed his willingness to do some research on these matters and report his findings to the committee. The committee agreed that Riddlesbarger should do this.

Lundy was requested to prepare a revised draft of subsection (4) of ORS 126.336, embodying, in so far as possible, the revisions apparently agreed upon by the committee at this meeting. He was instructed to postpone preparation of a revised draft of subsection (5).

b. Service of citation on appointment of guardian.

Butler referred to his report on Comment & Suggestion No. 12. [Note: This report is reproduced in the Appendix to these minutes.] He pointed out that, under subsection (3) of ORS 126.146, service of citation in a proceeding for the appointment of a guardian was not necessary on a "person" who had signed the petition, had signed a written waiver of service of citation or made a general appearance, and that "person" apparently meant those on whom subsection (2) of ORS 126.131 required service of citation, including a proposed ward, whether an incompetent, a minor 14 years of age or older or a spendthrift. Butler indicated that Comment & Suggestion No. 12 objected to the interpretation of "person" as including a proposed ward who was an incompetent. He expressed the opinions that the matter was not one of serious consequence and that the application of subsection (3) of ORS 126.146 to proposed wards was not harmful. He recommended, and the committee agreed, that no change be made in subsection (3) of ORS 126.146.

c. Factors considered by court in appointing guardian.

Butler referred to his report on Comment & Suggestion No. 15. [Note: This report is reproduced in the Appendix to these minutes.] He pointed out that ORS 126.166 listed several non-exclusive factors which a court might take into consideration in appointing a guardian, and that Comment & Suggestion No. 15 suggested the addition to this list of any request for the appointment as guardian for an incompetent by the incompetent orally in open court. Butler recommended, and the committee agreed, that the suggested addition to the list of factors in ORS 126.166 should not be made.

Riddlesbarger asked whether it was the policy of the committee to communicate with persons who send in comments and suggestions and report committee action thereon, and expressed the opinion, with which Jaureguy agreed, that perhaps this should be done. Lundy indicated that the policy previously established by the committee was not to do this. [Note: See Minutes, Probate Advisory Committee Meeting, 5/16/64, pages 7 and 8.] He commented that the committee might wish to send to such persons copies of proposed legislation in final form recommended by the committee and perhaps copies of any final reports applicable to such proposed legislation. Zollinger expressed approval of the approach suggested by Lundy, and the committee apparently agreed.

d. Filing name and address of guardian. Butler referred to his report on Comment & Suggestion No. 20. [Note: This report is reproduced in the Appendix to these minutes.] He pointed out that, under ORS 126.181, a guardian was required, before entering upon his duties, to file in the guardianship proceeding his name and address, and that Comment & Suggestion No. 20 objected to this requirement on the ground that the petition for the appointment of a guardian contained this information [Note: See ORS 126.126]. Butler recommended that the requirement be retained, and outlined his reasons therefor. Lundy commented that in a preliminary draft of proposed legislation prepared in the course of the 1960-1961 revision of the guardianship and conservatorship statutes the requirement that a guardian file his name and address was to be applicable "if such information is not contained in the petition for the appointment of a guardian," but that the quoted wording was subsequently deleted. The committee agreed that the requirement should be retained, and no change made in ORS 126.181.

6. Next Meeting of Advisory Committee. The next meeting of the advisory committee was scheduled for Saturday, August 22, at 9 a.m., in Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The committee agreed that the principal matter for consideration at the next meeting should be the two rough drafts of proposed legislation relating to changing dower and curtesy and protecting a spouse's inheritance rights. Allison and Lundy were requested to complete the preparation of the rough drafts as soon as possible, in order that copies thereof might be distributed to members before the next meeting. [Note: The decision of the committee to consider the rough drafts relating to dower and curtesy at the meeting scheduled for August 22 superseded the previous decision of the committee to consider them at a meeting to be held in September. See Minutes, Probate Advisory Committee Meeting, 6/13/64, page 8.]

The meeting was adjourned at 1 p.m.

APPENDIX

(Minutes, Probate Advisory Committee Meeting, July 18, 1964)

Subcommittee on Guardianship and Conservatorship

Report to Advisory Committee

June 13, 1964

[Note: Prior to the May 16, 1964, meeting of the Advisory Committee, Mr. Carson, as chairman of the Subcommittee on Guardianship and Conservatorship, assigned to Mr. Butler, for his consideration and recommendation, certain of the comments and suggestions pertaining to guardianship and conservatorship reproduced in the "Comments & Suggestions Received" section of the Advisory Committee notebook. Because of unexpected illness, Mr. Butler was unable to undertake the assignment before the May 16, 1964, meeting. See Minutes, Probate Advisory Committee Meeting, 5/16/64, page 12; Appendix B, page 14. However, Mr. Butler thereafter prepared reports on Comment & Suggestion Nos. 12, 15 and 20, and submitted them to the Advisory Committee, through Mr. Zollinger, at the June 13, 1964, meeting. See Minutes, Probate Advisory Committee Meeting, 6/13/64, page 16. Mr. Butler's reports are set forth below.]

Comment & Suggestion No. 12

Subject: Guardianship; appointment of guardian; service of citation.

Source: Judge Edwin L. Jenkins, District Court, Washington County.

Commentator: Mr. Butler.

("126.146(3) has been misunderstood in that the 'person' referred to includes the incompetent which contention I have flatly rejected.")

Subsection (3) of ORS 126.146 specifies that service of the citation issued under ORS 126.131 is not necessary on a "person" who has signed the petition, has signed a written waiver of service of citation or makes a general appearance. Apparently, it has been contended in Judge Jenkins' courtroom that as used in ORS 126.146(3) the word "person" refers among others to the proposed ward. He expresses a refusal to accept that view.

The same question arises as to subsection (3) of ORS 126.431.

Mr. Robert W. Lundy, Chief Deputy Legislative Counsel, advises that he has attempted to trace the history of subsection (3) of ORS 126.146 in the deliberations of the 1960-61 advisory committee but has been unable to find therein anything defining the committee's view as to the identity of those who were referred to by the cited subsection as "person."

To some extent, I am sympathetic with Judge Jenkins' view that as used in ORS 126.146(3) the word "person" should not be interpreted to include a proposed ward. However, I question whether that interpretation can be supported by a strict reading of that subsection in light of the provisions of ORS 126.131 which defines the persons or institutions on whom citation is to be served. Those defined include proposed wards who are incompetent, minors and spendthrifts.

Although the question is an interesting one, I have doubt as to whether it is one of serious consequence. For example, is there reason to suppose that any harm will occur simply because necessity for service of citation on a proposed ward is waived when that person being a spendthrift has signed the petition or has made a general appearance.

If the advisory committee disagrees with this view, perhaps Legislative Counsel should be asked to draft amendments to subsections (3) of both ORS 126.146 and ORS 126.431 specifying that as to the proposed ward, service of citation shall be required in every case.

Comment & Suggestion No. 15

Subject: Guardianship; appointment of guardian; factors considered.

Source: Judge George R. Duncan, Circuit Court, Marion County.

Commentator: Mr. Butler.

("RE: ORS 126.166. It is suggested that there be added to subsection (1), a provision that the appointing judge may take into consideration any request made orally by the incompetent in open court.")

It is my understanding that Sec. 203 of the Model Probate Code was used as a guide by the 1960-61 advisory committee in drafting the provisions of ORS 126.166. The committee took the view that the question of who is to be appointed guardian should be solely within the discretion of the court, but that a nonexclusive list of factors to be considered by the court should be included in the statute in order to assist and

fortify the court's exercise of that discretion. The point that the list of factors appearing in the statute is nonexclusive seems self-evident in that the court is instructed to appoint the qualified person most suitable who is willing to serve, having due regard, "among other factors," to those enumerated.

I suggest that there is nothing to prevent the appointing judge from taking into consideration a request made orally by the incompetent in open court and that in appropriate cases he would feel free to do so.

It is recommended that no action be taken toward revision of the cited Code provision.

Comment & Suggestion No. 20

Subject: Guardianship; filing name and address of guardian.

Source: Samuel M. Bowe, Attorney, Grants Pass.

Commentator: Mr. Butler.

("Sec. 126.126 ORS provides for the contents of a petition for the appointment of a guardian. Sec. 126.181 provides for the filing in the guardianship proceeding of the name, residence and post office address of the guardian. This is entirely superfluous and unnecessary as all the information is contained in the petition. Sec. 126.181 should provide only for such filing in the event of change of residence.")

Mr. Lundy (Chief Deputy Legislative Counsel) advises me that, according to his recollection, the 1960-61 advisory committee decided that the portion of ORS 126.181 requiring a guardian, before entering upon his duties, to file his name, residence and post office address should be included in the Code additional to a similar requirement of ORS 126.126(4) to cover the unusual situation in which a guardian other than the person identified in the petition is appointed.

I can think of two other reasons justifying continuation of ORS 126.181 in effect, namely:

(1) The name, residence and post office address of the proposed guardian as it appears in the petition for appointment may be expected to be accurate "so far as known by the petitioner." ORS 126.181 has the effect of requiring confirmation or correction of that information.

(2) ORS 126.181 performs the added function of requiring the guardian promptly to file every change in his name, residence or post office address.