

ADVISORY COMMITTEE
Probate Law Revision
Thirty-ninth Meeting

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

Dates) 1:30 p.m., Friday, August 18, 1967
and : and
Times) 9:00 a.m., Saturday, August 19, 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.)

Suggested Agenda

1. Approval of minutes of July meeting.
2. Miscellaneous matters.
3. Report by Professor Mapp on the Boulder, Colorado meeting.
4. Inventory and Appraisement (Discussion to be led by Mr. Carson and Mr. Butler)
5. Powers and duties of Personal Representative (Discussion to be led by Mr. Butler)
6. 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).

7. Renunciation of gift under will and renunciation of intestate succession. (Sec. 14C of Riddlesbarger draft of Wills). (Report by special committee of Mr. Carson, Mrs. Braun and Miss Lisbakken).

ADVISORY COMMITTEE
Probate Law Revision

Thirty-ninth Meeting, August 18 and 19, 1967
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The thirty-ninth meeting of the advisory committee (a joint meeting with the Committee on Probate Law and Procedure, Oregon State Bar) was convened at 1:30 p.m., Friday, August 18, 1967, in Suite 2201, Lloyd Center, Portland, by Chairman Dickson.

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

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

Also present was James Sorte from the staff of Legislative Counsel.

Approval of July minutes

Zollinger requested that the following correction be made in the July minutes, page 5, subsection (2):

"(2) At least two witnesses shall each sign his name thereto in the presence of the testator and at his request:

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

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

"(c) Understand that the instrument is the will of the testator."

With the above correction, the minutes were approved as submitted.

Miscellaneous Matters

Sorte advised the committee that he had been requested by Mr. Lundy, Legislative Counsel, to inform the committees that the Oregon State Bar Committee on Taxation and the Oregon Association of Certified Public Accountants were undertaking a study of the inheritance tax laws, and that there was the further possibility that the Legislative Interim Committee on Taxation would also study the subject. He suggested that the

probate committees might wish to confer with the appropriate individuals. Dickson asked Sorte to convey this information to Carson, Lisbakken and Braun, the probate taxation sub-committee.

Report by Mapp on Uniform Probate Code

Mapp distributed his report dated August 14, 1967, entitled "Report on Summer 1967 Draft of Uniform Probate Code." He advised that the report did not cover the entire Uniform Probate Code and, as the committees discussed specific areas at future meetings, he would explain the policy decisions of the draftsmen of the Uniform Probate Code concerning the particular area. The Uniform Probate Code, he said, contains a basic approach to probate administration substantially different from other codes he had seen, and his report was designed to present the basic concepts and not necessarily follow the order in which the sections appeared in the Uniform Probate Code.

Mapp advised that the reporters working on the Uniform Probate Code had decided they would not provide a separate series of sections for independent administration, but would incorporate provisions for independent administration into the code. He characterized the code as a railroad track, one track representing independent administration and the other supervised administration. An estate could begin on the independent administration track, cross over to the supervised administration track at any number of places during the course of administration and, if desired, switch back to the independent track. The personal representative could administer the estate completely independently if he wanted to do so, but at many points, if he wanted adjudication or protection from the court, it was available to him.

Mapp went through his report section by section and explained it in detail. Riddlesbarger inquired if any state had a probate code similar to the Uniform Probate Code and was told by Frohnmayer that the Texas probate code was similar and had been in effect four or five years.

Frohnmayer asked if there was feeling among the reporters working on the uniform code that formal probate should be further simplified in order to do away with most of the requirements for going into court for authority to perform routine acts. Mapp replied that most of the reporters believed that, as in England and in Texas today, very few personal representatives would go into court, but the provisions to provide access to the court were retained for the benefit of anyone who wanted to use them.

Frohnmayr said many believed, as he did, that probate could be much simplified by providing for an informal administration to be followed by a formal and final discharge that would be meaningful and would not leave the matter unsettled for a three-year period as did the Uniform Probate Code. Zollinger agreed with Frohnmayr and expressed the view that if some of the authority for supervision were vested in the county clerk, the code would be more satisfactory to the legal profession.

Allison pointed out that the committees had agreed to abolish notice to interested parties in an ex parte proceeding although notice was to be given on the final account. He urged that provisions be retained for a voluntary alternative procedure for probate in solemn form with notice to interested persons. Zollinger favored that if, in a proceeding for the probate of a will in solemn form, it was alleged that there was a justiciable controversy, access to court should be permitted. In the absence of such an allegation, he believed it should not be permitted because it would cause unnecessary trouble. He said that what Allison was attempting to accomplish was to obtain an early adjudication without waiting for a contest and if that were accepted, some basis for a controversy should be alleged.

Riddlesbarger suggested a detailed comparison be drafted in order to enable comparison of the Uniform Probate Code with the provisions approved by the probate committees. Mapp volunteered to prepare such a comparison with the understanding that no time limit would be placed on the project. Dickson noted that Allison was making use of the Uniform Probate Code in drafting various code sections and suggested that when all policy decisions had been made, a committee could be assigned to compare the two codes.

Inventory and Appraisement

(Note: See tab 17, "Inventory and Appraisement" prepared by Legislative Counsel dated April 8, 1967.)

Section 1. Inventory and appraisement, when and how made. Butler read section 1 and Mapp read section 3-406 of the Uniform Probate Code. Frohnmayr expressed approval of the Uniform Probate Code section, one reason being that he disapproved of disclosing the amount of an estate to the general public. He noted that the code should contain a provision that final accounts could be abbreviated accounts where no one was interested other than a surviving spouse. Butler suggested there should be exceptions to such a provision. In the case of minors, he

said, providing them with copies of the inventory would not be sufficient protection. Riddlesbarger moved, seconded by Butler, that section 1 be approved as submitted.

Gilley moved, seconded by Frohnmayer, that the motion be amended to substitute for section 1 the substance of section 3.406 of the Uniform Probate Code providing for an alternative between filing the inventory and sending a copy of the inventory to interested parties. The section would then read:

"Within 60 days after his appointment a personal representative shall prepare an inventory of property owned by the decedent at the time of his death, listing it with reasonable detail, and indicating, as to each item, its fair market value as of the date of the decedent's death, and the type and amount of any encumbrances that may exist with reference to any item.

"The personal representative shall send a copy of the inventory to all persons interested in the estate except creditors, or he may file the original of the inventory with the court and furnish a copy to any interested person who requests it."

Dickson ruled Gilley's motion out of order since it could not be construed as an amendment to the original motion. Vote was taken on Riddlesbarger's motion to adopt section 1. Motion carried.

Riddlesbarger moved, seconded by McKenna, that "as of the date of death" be added to section 1. Motion carried. Dickson asked Allison to insert the phrase in the proper place.

Section 2. Extension of time. Butler read section 2 and noted that "a" in line 5 should be changed to "the." Dickson suggested that the entire section be eliminated except "The court may extend the time for filing the inventory for such period as the court determines necessary." Butler so moved, seconded by Gooding. Motion carried.

Section 3. Property discovered after inventory filed. Butler read section 3 and moved it be approved. After a brief discussion, the motion was seconded and carried.

Section 4. No appraisalment required except for tax purposes. Butler read section 4 and indicated that Legislative Counsel had varied the wording slightly from what the committees had previously agreed upon and suggested the following wording originally approved be retained: "Unless the court

requires appraisement for inheritance tax purposes or for the purpose of administration or distribution."

Frohnmayr read the following from the Uniform Probate Code: "The personal representative may employ a qualified and disinterested appraiser to assist him in ascertaining the fair market value of any asset the value of which may be subject to reasonable doubt." He urged that the personal representative be empowered to hire an appraiser. Butler pointed out that section 4 dealt with the situation where the court was requiring appraisement of some or all of the assets of an estate and the personal representative might be reluctant to hire an appraiser. Gooding suggested the section read "The personal representative may, but is not required, to have property in an estate appraised . . ." Frohnmayr expressed approval of the Uniform Probate Code phrase "qualified and disinterested appraiser." Gilley noted that the second sentence would need to be changed if that wording were adopted and Butler said that sentence also contained a departure from the language originally intended by the committees. The approved wording, he said, was "The court may direct that all or any part of the property be appraised . . ." Dickson noted that the intention was to put the burden on the personal representative. He suggested the section read "The personal representative may, but is not required to, have property in an estate appraised. Different appraisers may be appointed to appraise different parts of the property." Frohnmayr moved, seconded by Braun, that section 3-407 of the uniform code be adopted with the addition of the following sentence to take care of the question raised by Butler with respect to the reluctant personal representative: "The court may, in its discretion, direct that all or any part of the property be appraised."

Riddlesbarger moved, seconded by Butler, to amend the motion by adding to the above sentence "by one or more appraisers appointed by the court." Frohnmayr and Braun accepted the amendment.

Butler suggested deletion of the sentence beginning "The names and addresses of any appraisers . . ." Frohnmayr and Braun accepted this further amendment to the motion and Frohnmayr read section 4 as proposed by the motion:

"Section 4. The personal representative may employ a qualified and disinterested appraiser to assist him in the appraisal of any asset the value of which may be subject to reasonable doubt. Different persons may be employed to appraise different kinds of assets included in the estate. The court may, in its discretion, direct that all or any part of the property be appraised by one or more appraisers appointed by the court."

Motion carried.

Section 5. Appraisal to be at true cash value at date of death. Butler moved, seconded by Riddlesbarger, the adoption of section 5 in the following form:

"Section 5. Property for which appraisement is made shall be appraised at its true cash value as of the date of death of the decedent. Each appraisement shall be in writing and shall be subscribed by the appraiser or appraisers making it."

Motion carried.

Section 6. Fees of appraisers. Frohnmayer expressed disapproval of section 6 and was of the opinion the personal representative should be permitted to pay a reasonable fee without first going to court for authority to do so. He said he would not object to the fee being ultimately approved by the court but thought "allowed by the court" could mean he had to obtain authority before the fee could be paid. Dickson agreed with Frohnmayer and was of the opinion that attorney fees should be handled in the same manner.

The meeting was recessed at 5:30 p.m. and was reconvened at 9:00 a.m. the following morning, August 19, 1967, by Chairman Dickson in Suite 2201, Lloyd Center, Portland, with the following members of the advisory committee present: Dickson, Zollinger, Allison, Butler, Frohnmayer, Husband, Jaureguy, Lisbakken, Mapp and Riddlesbarger.

Members of the Bar committee present were: Bettis, Briggs, Braun, Gilley, Kraemer, Krause, McKay, McKenna and Richardson. Sorte was also present.

Uniform Probate Code and 1967 Wisconsin Bill

A count of the number of Uniform Probate Codes available to the committees was taken. The following members had a copy: Allison, McKay, Mapp, Zollinger. He directed that the remaining four copies be given to Frohnmayer, Riddlesbarger and two to Sorte, one to remain in the office of Legislative Counsel and the other to be placed in the law library in Salem.

Following the discussion of the draft on powers and duties of personal representatives, Dickson suggested the Uniform Probate Code be reproduced in sufficient quantity to furnish a copy to each member. Mapp called attention to the 1967 Wisconsin bill which, he said, was substantially different from the 1966 proposed Wisconsin Probate Code. Zollinger suggested copies of the Wisconsin bill would also be helpful to committee members. Dickson proposed that the members study these two

proposals and that a discussion of their provisions be held at the September meeting. Riddlesbarger was of the opinion the codes would be of greater value if the discussion were based on the views of the person responsible for the various subjects assigned to him, and Zollinger concurred that the codes would be helpful to members in discussing the areas for which they were responsible to lead discussion.

Husband moved, seconded by Allison, that copies of the Uniform Probate Code be obtained and provided to all members of both committees who did not already have them. Motion carried. Mapp agreed to attempt to obtain copies, and, if he was unable to do so, Dickson requested Sorte to be responsible for the reproduction of sufficient copies.

Husband moved, seconded by Zollinger, that a sufficient quantity of the 1967 Wisconsin probate bill be procured to furnish to all members of both committees. Motion carried. Dickson assigned Husband and Sorte the responsibility for obtaining copies or preparing reproductions.

Inventory and Appraisement (Continued)

Section 6. Fees of appraisers. Frohnmayer recapitulated the previous day's discussion of section 6 and reiterated his position that the personal representative should be given authority to pay an appraiser what he considered to be a reasonable fee without prior court approval. He noted that in any case the personal representative would be required to justify the fee at the hearing of the final account. Mapp indicated this subject had been discussed in Boulder, Colorado, and the concensus of opinion was that the payment of fees fell into the category of a private transaction and the court should not be involved in setting the fee unless someone tried to litigate it.

Butler objected to "shall be paid" and suggested "shall be entitled to be paid" would be preferable. He then moved, seconded by Krause, that section 6 be amended to read:

"Section 6. Each appraiser shall be entitled to be paid from the estate a reasonable fee and necessary expenses."

Motion carried.

Section 7. Naming of personal representative does not discharge claim against him. Butler moved, seconded by Jaureguy, that section 7 be adopted. Frohnmayer questioned the necessity of including section 7 and Richardson commented that the common law was to the contrary and it was included to

abrogate the common law. Zollinger noted that since "executor" had been changed to "personal representative," the purpose of the section was even more obscure. Allison volunteered to research this point. Vote was then taken on Butler's motion which carried with the understanding that the section would be reconsidered when Allison had explored the subject.

Section 8. Discharge or bequest in will of claim of testator. Allison remarked that section 8 involved the same question as raised in connection with section 7 and agreed to include section 8 in his research. Section 8 was approved with the same reservation as applied to the previous section.

Powers and Duties of Personal Representative

(Note: See draft by Legislative Counsel under Tab 15 entitled "Powers and Duties of Personal Representative" dated April 27, 1967.)

Section 1. Possession and control of property. Butler noted that section 1 referred to allocation of income which was to be discussed by Jack McMurchie at the September meeting and requested consideration of the section be postponed until that time.

Section 2. Performance of contract. Butler explained that section 2 broadened ORS 116.110 to cover personal as well as real property and preserved, in deference to the requirements of the title companies, the necessity for court approval prior to the conveyance of real property. (Note: See Minutes, Probate Advisory Committee, 6/17, 18/66, pp. 18 and 19.)

Zollinger recalled that a subcommittee had been appointed to seek an audience with the title companies to determine their attitude toward requiring a court order prior to sales by personal representatives and Allison said that Dickson had suggested waiting until Mapp returned with the Uniform Probate Code before meeting with the title companies. Mapp called attention to section 3-416 of the Uniform Probate Code and read the comment at the end of the section. He expressed the view that this section encompassed the basic concept of the code and emphasized its importance.

Butler moved that section 2 be adopted deleting "with prior approval of the court by order" with the understanding that the title companies would be contacted and if they objected, the matter would be reconsidered. Zollinger was of the opinion the section could be deleted if the personal representatives were given authority to perform contracts. Allison

remarked that the title companies would be most concerned with the type of language used in the code for the protection of bona fide purchasers. Zollinger suggested action on section 2 be postponed pending learning the attitude of the title companies and Butler withdrew his motion.

Dickson directed that Sorte prepare copies of the Uniform Code Provisions, the Wisconsin code provisions and the material behind Tab 21 in sufficient quantity to distribute to title companies and furnish such material to Allison. He appointed Allison, Chairman, and Zollinger as a subcommittee to arrange a meeting with the title companies at the earliest possible moment in order that the matter could be placed on the September agenda. Zollinger was not in favor of expecting the title companies to reach an immediate conclusion. He suggested they be furnished the material, be given an opportunity to study it in detail and said he would then be optimistic about their accepting the provisions of the uniform code.

Riddlesbarger suggested the committees first decide what approach they wished to adopt. Frohnmayer moved, seconded by Zollinger, that in connection with the powers of the personal representative the committees adopt the general policy of the Uniform Probate Code; namely, that the personal representative be given full power to deal with the assets of the estate and that if he dealt with a bona fide purchaser, the bona fide purchaser could rely upon the title given him by the personal representative. Motion carried unanimously.

Dickson indicated the meeting with the title companies would be left to the discretion of Allison and Zollinger and would be placed on the agenda when they were prepared to report on the subject.

Section 3. Gift of body of decedent; nonliability for delivery. Butler read section 3 and noted that it referred to written instruments other than the will. Zollinger noted that the section permitted a person authorized by writing to take such action as was necessary to implement a gift but did not say whether he was under an obligation to take such action. He suggested the section read ". . . may but shall not be required to take such action..." Butler said he did not see how "may" could be construed as anything other than permissive in this situation. Frohnmayer agreed that to include the suggested revision would open the door to problems. Riddlesbarger moved, seconded by Butler, that section 3 be approved as submitted. Motion carried.

Disposition of bodies (Chapter 97). Dickson suggested the committees consider the statutes dealing with the problem of decedent's remains and specifically determine whether or not the personal representative was entitled to make funeral arrangements when the next of kin could not be located. Allison called attention to a draft giving special administrators this authority and read portions of that draft which had not yet been distributed to committee members. Riddlesbarger expressed the view that the next of kin should be given preference in making funeral arrangements, but if none were available, the personal representative should be empowered to act. Butler maintained that such a provision should be placed in Chapter 97 and Allison expressed agreement.

After further discussion, Riddlesbarger moved, seconded by Gooding, that a section be inserted authorizing the personal representative to take charge of and dispose of the remains of the decedent within five days after his demise with the understanding that the next of kin or spouse had the prior right to make funeral arrangements. McKenna noted that the body would not actually have to be disposed of within the five-day period if the arrangements had been made within that time. Motion carried.

Section 4. Right to file notice of and perfect lien. Zollinger suggested "security interest" be included in section 4. He commented there were various kinds of security interests requiring filing of a notice either in order to perfect or in order to maintain perfection of the security interest.

Lisbakken moved, and the motion was seconded, that section 4 be approved with the addition of "a security interest." Motion carried.

Section 5. Right of personal representative to borrow money. Butler suggested subsection (1) of section 5 be amended to read:

"(1) The personal representative may borrow money when authorized by the will, or by order of court, to pay debts; taxes; expenses of administration; or for purposes of administration or distribution."

Zollinger moved, seconded by Butler, that section 5 be approved in the above form. Motion carried.

Section 6. Personal representative may compound for debts due estate. Butler noted that section 6 restated the ORS section whereas the committees had agreed to adopt the 1963 Iowa Probate Code provisions. The April 8 draft, he said, contained some of each with resulting confusion and he had therefore

rewritten the section. He called attention to the fact that his proposal substituted "compromise" for "compound" because "compromise" was more readily understandable. He proposed that section 6 read:

"Section 6. If it appears in the best interests of the estate, the personal representative may:

"(1) Compromise a claim of the estate against a debtor or other obligator; or

"(2) Extend or remove or otherwise modify the terms of an obligation owing to the estate; or

"(3) Accept a conveyance or transfer of property which is encumbered by a mortgage, pledge, lien or other security agreement in satisfaction of indebtedness to the estate secured by such encumbrance."

Riddlesbarger moved, seconded by Butler, that section 6 be approved as set forth above. Motion carried.

Section 7. Right to redeem mortgaged property. Butler explained that at the May and June, 1966, meetings it was agreed that a secured creditor should not be deprived of his right to receive payment according to the terms of a mortgage and should not be required to accept a lesser amount simply because the personal representative wanted to pay the debt in advance of its due date. If the committees stood by their previous decision, ORS 116.160 would be repealed and subsection (2) of section 7 of the draft should be deleted.

Zollinger expressed the view that the personal representative was not the one who should have the right to redeem from foreclosure sales. Frohnmayer commented the personal representative should have this right in limited situations. Butler disagreed stating that the personal representative's function was not the investment of estate assets and when he redeemed property sold on foreclosure, he was in effect making investments. Zollinger concurred with Butler.

Mapp read section 3-516 of the Uniform Probate Code and Riddlesbarger suggested "mortgage, pledge, security interest or other lien" be used in section 7 in order to conform to the Uniform Commercial Code. Mapp read the uniform code's definition of "mortgage" and Frohnmayer suggested the Oregon revised probate code also include a definition of "mortgage."

Butler moved, and the motion was seconded, that section 3-516 of the Uniform Probate Code relating to payment of liens on the property of decedent's estate be adopted with the inclusion of "security interest." Motion carried.

Section 8. Personal representative continue business.
Butler noted that section 8 in large measure paraphrased section 83 of the 1963 Iowa Probate Code. He was of the opinion the section should be rewritten to provide authority for the personal representative to continue the business of the decedent. Allison read section 3-416 subsection (S), of the Uniform Probate Code and expressed apprehension over giving the personal representative authority to carry on a business without court authority. Butler noted that the reporters on the Uniform Probate Code apparently shared his apprehension and said he considered the provisions of the 1963 Iowa Probate Code to be far better than the Uniform Probate Code in this respect.

Riddlesbarger suggested that because an existing business needed attention in order to survive, the personal representative be given authority to continue operation of a business subject to an express provision that he could be ordered to discontinue its operation.

Frohnmayr called attention to the provisions contained in the Wisconsin probate bill introduced in the legislature March 1, 1967, giving the court the right to authorize the personal representative to continue a business.

Dickson was of the opinion that a court order should not be required in the first instance and operation of a business should not require the court's attention until and unless it was a subject of controversy. Frohnmayr agreed that a court order was unnecessary and suggested the committees consider including in the revised Oregon code certain Uniform Probate Code provisions contained in sections 3-412, 3-413, 3-414 and 3-415 in addition to 3-403.

Powers of Personal Representative (Tab 15); Sale, Mortgage and Lease (Tab 21)

Frohnmayr asked if the subjects under Tabs 15 and 21 were to be considered at the September meeting and Dickson replied in the affirmative. Frohnmayr suggested the material under the two tabs be combined and updated and that the sections be presented in the same order in which they appeared in the uniform code.

Braun noted that tab 19 also concerned powers and duties of the personal representative and Dickson directed that the three tabs be combined and placed on the September agenda. Allison volunteered to perform this task and Dickson requested Butler, Zollinger and Allison to lead the discussion.

The committees recessed for lunch at 11:45 a.m. and reconvened at 1:15 p.m. with the following members of the advisory committee present: Dickson, Zollinger, Allison, Butler, Gooding, Husband, Jaureguy, Lisbakken, Mapp and Riddlesbarger. Members of the Bar committee present were: Bettis, Braun, Gilley, Kraemer, Krause and Richardson. Sorte was also present.

Elective Share of Surviving Spouse

(Note: See Minutes, Probate Advisory Committee, 6/16, 17/67, Appendix B.)

Riddlesbarger discussed generally the possible approaches to provide rights for the surviving spouse. Allison contended two revisions should be made in proposal #6:

(1) Inasmuch as dower and curtesy had to do with intestate estates, this provision should be placed in the intestate statute.

(2) The preliminary approach retaining language referring to real and personal property is out of line with the balance of the code and the separate reference to real and personal property should be eliminated. There should be a section on election of spouse without making a distinction between real and personal property.

Braun noted that the present proposal made no reference to the situation where a husband depleted his estate by transfers to third persons leaving the widow nothing against which she could elect. Riddlesbarger read the comment under section 861.17 of the 1967 Wisconsin bill and explained that inasmuch as it was virtually impossible to prove the primary purpose of the transfers was to defraud the spouse, Wisconsin had taken a position that would provide a deterrent to a spouse to deplete the estate in what could be regarded as a fraudulent manner by providing that the elective right against the estate was barred if the widow had already received property amounting to half the value of the estate. Mapp discussed the manner in which the reporters on the Uniform Probate Code had arrived at the provisions which required some property transferred by the decedent to be brought back into the estate properties.

Butler expressed opposition to a provision which would bring transfers made during a decedent's lifetime back into an augmented estate. He said this would not only complicate the statute but would create a vast amount of litigation. Dickson agreed that such a provision would go far beyond what the committees ought to do.

Riddlesbarger asked for an expression of the attitude of the committees on whether an augmented estate would be used as the basis for the spouse's election or whether the net probate estate would be used as the basis for election. Butler asserted that the committees should first decide whether there should be an elective right of the spouse and moved, seconded by Riddlesbarger, that the elective right be perpetuated. Braun spoke in opposition to the motion. She expressed the view, and Dickson agreed, that the support provisions adequately took care of the widow.

Riddlesbarger contended that the widow was entitled to have assets available to her in addition to support. Dickson was of the opinion that the code was broad enough to permit the court to set aside everything to the widow. Allison remarked that the philosophy under consideration was that a wife was entitled to a substantial share of the estate left by the will and it was not considered just for a husband, by provisions in his will, to entirely eliminate any provision for his widow. He maintained that the election statute and the support statute were entirely separate questions. Vote was then taken on Butler's motion to include provision for election against a will. Motion carried.

Zollinger moved, seconded by Butler, that the elective interest be confined to 1/4 of the net probate estate. Braun asked if this motion would permit a decedent to deplete his estate leaving nothing to his widow and received an affirmative reply from Dickson. Vote was then taken on the motion which carried.

Richardson explained that section 861.07 of the 1966 proposed Wisconsin probate code contained a provision barring the surviving spouse from electing against a will where it would upset a testamentary plan. Wisconsin, he said, gave the widow 1/3 of the net probate estate and barred her election if she received 1/2 of the total property reported for purposes of the federal estate tax. He read the comment under the Wisconsin section and expressed approval of the provision limiting the right to elect against the will to the situation where the spouse was completely cut out of the will. He moved, seconded by Zollinger, that this provision be adopted. Motion carried.

Zollinger suggested that if the surviving spouse elected to take the 1/4 share, the 1/2 figure should be used as the basis for barring the election. In other words, if the widow received 1/2 of the augmented estate, the right to elect the 1/4 share would be barred by the circumstance that she had

received 1/2 of the estate. Allison read the section from the 1967 Wisconsin bill comparable to section 861.07 of the 1966 proposed Wisconsin Probate Code. Kraemer noted that it would totally bar the widow's rights if she received 50% of the estate and would have no effect if she received 49%. He suggested his objection could be cured by stating that her share would not exceed 50%. The committees agreed with this amendment. Zollinger reviewed the action of the committees by indicating they had adopted the Wisconsin approach to barring the right of election with the further provision that the exercise of the right of election should not produce more than 50% of the augmented net estate. It was also understood, he said, that the estate would be considered in terms of a net probate estate rather than a gross estate subject to deductions as provided in the present statute.

Allison noted that the Wisconsin statute provided for six months and Dickson suggested that 90 days from admission of the will to probate would be a sufficient amount of time. He pointed out that the widow's decision was not irrevocable; she could, if she wished, withdraw her election or it could be barred. After further discussion, the consensus of the committees was that 90 days was ample time.

Mapp called attention to the provisions in the Uniform Probate Code dealing with the effect of separation of the parties and Dickson asked Allison to include those provisions in his draft in order that they could be considered at a later time.

Renunciation of Gift Under Will and Renunciation of Intestate Succession

(Note: See Minutes, Probate Advisory Committee, 6/17, 18/67, Appendix A, pp. 14 and 15, section 14 (c).)

Riddlesbarger explained that section 14 (c) of the wills draft was copied verbatim from the 1966 proposed Wisconsin Probate Code which had been amended by section 853.21 of the 1967 Wisconsin bill. He read section 853.21 and section 202-801 of the Uniform Probate Code together with the comment and addendum to comment in the uniform code. He was of the opinion that the right to renounce should be expressed in the proposed Oregon code and indicated preference for the Uniform Probate Code provisions.

Zollinger suggested the code provide that the renunciation of all or part of a share in the estate would apply unless the

will expressly prohibited partial renunciation. He also thought it was important to say that restriction upon alienation was not a prohibition of a partial renunciation.

Butler noted that the comment following section 14 (c) stated the section was intended to resolve the question of whether or not the renunciation would constitute a gift for tax purposes and asked if anyone had had the experience of state or federal authorities seeking to impose a tax on property that had been renounced. Braun pointed out that federal regulations looked to the local law on vesting and unless local law permitted renunciation, it would be taxed. She suggested that Oregon law be worded so as to receive the benefit of the federal exception.

Riddlesbarger moved that the substance of section 202.801 of the 1967 Wisconsin bill be adopted to provide the basis for a new section prohibiting partial renunciation of a will and including a provision that restrictions on alienation would not constitute such a prohibition.

Gilley objected to the inclusion of a provision applicable to a will which denied a right of partial revocation. He was of the opinion this was too fine a point to include in the code and the Uniform Probate Code should be adopted without the addition of such a provision. Gilley moved, seconded by Butler, that the changes suggested by Zollinger be eliminated.

Riddlesbarger moved, seconded by Butler, that instead of voting on Gilley's motion, the language of the uniform code on renunciation be adopted. Motion carried.

The meeting was adjourned at 3:15 p.m.

September meeting

The following matters were scheduled for the September 1967 meeting:

1. Powers of personal representative, sale, mortgage and lease
(Combine tabs 15, 19 and 21) Discussion to be led by Butler, Zollinger and Allison
2. 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 Riddlesbarger, Braun and Richardson and discussion to be led by them.)
3. Title to property
Allocation of income. Discussion to be led by Frohnmayer.
4. Advancements
Discussion to be led by Frohnmayer.

share of children or spouse, rights of creditors, and administration.

Section 3-203 Wills; Informal or Formal Probate; Necessity. Except where personal property can be collected by affidavit under section 3-901, to be effective to prove the transfer of property a will must be probated.

Section 3-233 Informal and Formal Probate and Testacy Proceedings; Ultimate Time Limit. No will may be probated, nor may an informal probate be contested, more than three years after a decedent's death. If no will has been probated, an assumption of intestacy, not judicially confirmed under section 3-231, becomes final.

Section 3-601 Successors' Rights Where No Administration. In the absence of administration, successors are entitled to a decedent's estate in accordance with the terms of a probated will or the laws of intestate succession, but they take subject to allowances, statutory share of children or spouse, rights of creditors, and administration. Person entitled to property by allowance, exemption or intestacy may establish title by proof of the decedent's ownership, his death, and their relationship to the decedent.

Section 3-504 Limitations on Presentations of Claim. All creditors claims which arose before the decedent's death are barred three years after the decedent's death.

Comment: Because of the bar to probate of a will after three years from the decedent's death, and the bar to creditors' claims three years from the decedent's death, interested persons may prefer to avoid administration if they have possession of the decedent's property and no problems re proof of title are involved. If title devolves directly to heirs at death,

their preference in this regard can be satisfied.

Section 3-208 Informal Probate or Appointment Proceedings; Application; Contents. Verified applications for informal probate, and informal appointment of a personal representative under a will or in intestacy, are directed to the Registrar. No notice is required. Informal probate is conclusive until and unless superseded by a formal probate under

Section 3-210 Informal Probate; Proof and Findings Required. If the will contains a recital by attesting witnesses of facts constituting due execution, the Registrar may presume due execution from the appearance and recital.

Section 3-220 Formal Testacy Proceedings; Nature; When Commenced. A formal testacy proceeding is a noticed judicial proceeding to probate a will, set aside an informally probated will, or obtain an order that the decedent died intestate.

Section 3-221 Formal Testacy or Appointment Proceedings; Petition; Contents. If an order that the decedent died intestate is sought in a formal testacy proceeding, a finding of heirship is also required.

The formal appointment proceeding, with its notice requirement under section 3-222, would also be used where disagreement may exist as to who should be appointed personal representative.

Section 3-231 Formal Testacy Proceeding; Effect of Order. The order is final after the time for appeal has passed.

Exceptions, however, exist as follows: A later discovered will may be probated, or heirship reconsidered, no later than six months after the estate is closed.

If the alleged decedent is alive, distributees are liable to restore the estate or its proceeds to him, through the normal process of tracing assets, without time limitation.

Section 3-404 Personal Representative to Proceed Without Court Order; Exception. Except for a supervised personal representative, a personal representative should proceed expeditiously to settle and distribute an estate, without court order if possible. Under section 3-416, he is given authority broad enough to permit him to carry out this general policy. He may, however, obtain judicial directions when he conceives them necessary.

Section 3-405 Duty of Personal Representative; Information to Heirs and Devisees. Within 30 days of appointment, an informally appointed personal representative must give INFORMATION of his appointment to heirs, or devisees, depending on the decedent's testacy status. This is not a notice, and failure to give it does not affect the powers and duties of the personal representative, but will constitute a breach of duty to persons entitled to the information. Specifically, the various protective devices discussed later would not be available to an interested party who simply had no information as to the estate administration, and such a person might well have a cause of action for damages against the personal representative.

Section 3-409 Duty of Personal Representative; Possession of Estate. The personal representative may take possession of any property of the estate necessary for purposes of administration.

Section 3-412 Powers of Personal Representative; In General. The personal representative has the same POWER over the title to estate property which an absolute owner would have, but in trust for those interested in the estate. This power may be exercised without notice, hearing, or order of court.

Section 3-416 Transactions Authorized for Personal Representatives; Exceptions. The personal representative is AUTHORIZED to do virtually anything with estate assets which the decedent would do, and without court order. However, this general statutory authority may be restricted by the will, or a judicial order under section 3-308.

Section 3-105 Supervised Administration; Petition. The personal representative, or any interested party, after notice to interested parties, and if the judge finds it necessary, may obtain an order that administration continue under court supervision.

Section 3-108 Supervised Administration; Powers of Personal Representative. The supervised personal representative has the same authority as a non-supervised personal representative under section 3-416, except that he is not authorized to pay creditors or distribute the estate without judicial order.

He has the same power as a non-supervised personal representative under section 3-412, but the judge may restrict his power and have his letters so endorsed, If the letters are so endorsed, the acts in violation of the restriction are void.

Section 3-308. Order Restraining Personal Representative. Any interested person may petition the court for an order restraining the personal representative from exercising an authority which he would otherwise have under section 3-416. A personal representative who violated a restraining order could be punished for contempt, and would be liable for any losses occurring as a result of the violation.

If the petition sought an order restraining the personal representative from affecting the title to estate real property, notice of the proceeding could be recorded, which would be effective to prevent a purchaser from acquiring a marketable title under the usual rules relating to recordation of real property titles.

Section 3-413 Improper Exercise of Power; Breach of Fiduciary Duty. If the personal representative's statutory AUTHORITY under section 3-416 were restricted by the will, or a judicial restraining order under section 3-308, but the personal representative violated the will or order by the exercise of his POWER under section 3-412, he would be liable for breach of his fiduciary duty to interested persons for any resulting losses.

Section 3-415 Persons Dealing With Personal Representative; Protection.

A person dealing with a personal representative without knowledge that the personal representative is exercising his power in violation of his authority under the will or court order is fully protected. Such a person is not bound to inquire concerning the provisions of the will or any restraining court order. A will can restrict a personal representative's authority under section 3-416, but it cannot affect his power under section 3-412 unless the purchaser from the personal representative has actual knowledge of the restricted authority.

Section 3-306 Demand for Bond by Interested Person.

An interested person may seek an order requiring bond from a personal representative who has not been required to furnish one.

Section 3-312 Termination of Appointment; Cause for Removal; Procedure. An interested person may seek an order removing a personal representative for cause at any time.

Section 3-502 Notice to Creditors. A personal representative is required to publish notice to creditors.

Section 3-504 Limitations on Presentation of Claims. Claims arising before the decedent's death are barred unless presented to the personal representative:

- 1) If notice to creditors has been published, four months after the first published notice;

2) If notice has not been published, three years after the decedent's death.

Section 3-508 Payment of Claims. The personal representative may pay valid claims at any time, but if he pays before the four month non-claim statute (section 3-504(a)(1)) has run, he is liable to any claimant who is injured by the payment.

Section 3-701 Formal Proceedings Terminating Administration; Order of General Protection. A personal representative or any interested person may petition for an order of complete settlement of the estate. Such an order may determine testacy, construe a will, determine heirs, approve a final account and distribution, and discharge the personal representative from further claim of any interested person. Notice to all interested persons is required.

Section 3-702 Formal Proceedings Terminating Testate Administration; Order of Limited Protection. This proceeding is comparable to that under section 3-701, except that it is used where a will was informally probated and testacy was never formally adjudicated under sections 3-220 through 3-232. Hence no notice is given to heirs, and their rights are not affected.

Section 3-703 Closing Estates; By Sworn Statement of Personal Representative. A non-supervised personal representative may close the estate by filing a sworn statement summarizing his administration of the estate. A copy of the statement must be sent to all distributees and creditors whose

claims are neither paid nor barred.

Section 3-705 Limitations on Proceedings Against Personal Representatives. Unless already barred by adjudication, the rights of successors and of creditors not then barred shall be barred against the personal representative for breach of fiduciary duty unless a proceeding is commenced within six months after the filing of the closing statement. Rights to recover from a personal representative for fraud, misrepresentation, or nondisclosure related to the settlement of the estate are not barred.

Section 3-609 Improper Distribution; Liability of Distributee. A distributee of property improperly distributed is liable to return the property, or its value if disposed of, unless the distribution can no longer be questioned because of adjudication (see sections 3-701 and 3-702) or limitation (see section 3-706).

Section 3-706 Limitations on Actions and Proceedings Against Distributees. Unless previously adjudicated in a formal testacy proceeding, or in a proceeding settling the accounts of a personal representative, or otherwise barred, the rights of successors or creditors to recover property improperly distributed or its value from distributees is barred at the later of:

- (a) three years from the decedent's death, or
- (b) one year from the time of distribution.

Comment: It should be noted that this code does not contain a separate Article or Part devoted to "Independent Administration." Rather, the theory of independent administration is an integral part of the entire code, and is reflected in the provisions for informal probate and appointment of a personal representative, in the broad statutory power and authority of a non-supervised personal representative, and in the verified non-judicial close statement permitted. On the other hand, the judicial authority of the court is available at any time to interested parties who have good cause for judicial supervision.

Appendix A, Minutes 6/17, 18/67, pp. 14 and 15,
Section 14(c) of Wills, Draft of Riddlesbarger.

Section 14 C. Renunciation of gift under will. Any person to whom property is given by the terms of a will may renounce all of such property, or unless the will expressly provides otherwise any part of such property, by filing a signed declaration of such renunciation with the county court and serving a copy on the personal representative within 180 days from admission of the will to probate; but the court may extend the time for cause shown. No interest in the property or part thereof so renounced is deemed to have vested in such person; but the renounced property or part passes as if such person had predeceased the testator unless the will provides otherwise. However, a renunciation is invalid to the extent that the person renouncing has prior to filing the renunciation effectively assigned or contracted to assign the renounced property, if prior to entry of the final judgment, or earlier distribution by the personal representative in reliance on the renunciation, the assignee files with the county court a copy of the assignment or contract and serves a copy on the personal representative.

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