

ADVISORY COMMITTEE
Probate Law Revision

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

Dates) 1:30 p.m., Friday, August 19, 1966
and : and
Times) 9:00 a.m., Saturday, August 20, 1966
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland

Suggested Agenda

1. Approval of minutes of July meeting.
2. Reports on miscellaneous matters.
3. Inventory and appraisal.

Consideration of ORS 116.405 to 116.465, and report by Butler thereon (see Appendix, Minutes, Probate Advisory Committee, 6/17, 18/66).
4. Nonintervention will procedure.

Report by Allison, Mapp and Zollinger.
5. Actions and suits affecting decedents' estates and administration.
 - a. Court authorization for personal representative to sue.

Reports by Carson and Richardson.
 - b. Nonabatement of action or suit by death, disability or transfer; continuing proceedings (ORS 13.080).

Revised draft by Lundy.
6. Support of surviving spouse and minor children; homestead.

Reports and drafts by three subcommittees (subcommittee #1: Gilley and Krause; subcommittee #2: Husband and Mapp; subcommittee #3: Allison, Braun and Lisbakken). Copies of reports by subcommittees #1 and #2 have been mailed to all members of both committees.
7. Establishing foreign wills and ancillary administration.

Report by Mapp and Riddlesbarger, and consideration of Uniform Probate of Foreign Wills Act and Uniform Ancillary Administration of Estates Act.
8. Next meeting.

ADVISORY COMMITTEE
Probate Law Revision

Twenty-eighth Meeting, August 19 and 20, 1966
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The twenty-eighth 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 19, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Frohnmayer, Jaureguy (arrived 1:50 p.m.), Lisbakken and Mapp. Butler, Carson, Gooding, Husband and Riddlesbarger were absent.

The following members of the Bar committee were present: Gilley, Braun (arrived 2 p.m.), Copenhaver, Krause, Richardson and Warden. Bettis, Boivin, Field, Hornecker, Lovett, Luoma, Rhoten, Tassock and Thalhofer were absent.

Also present was Robert W. Lundy, Chief Deputy Legislative Counsel.

Miscellaneous Matters

Publicity. Lundy reported that, in accordance with instructions given him at the July meeting, he had communicated to Allan G. Carson, Chairman of the Law Improvement Committee, the suggestion that Carson might wish to contact the Portland The Oregonian on the possibility of giving some publicity to the Oregon probate law revision project, in the light of a recent The Oregonian article on the book "How to Avoid Probate," and had sent Carson a revised version of the news release previously prepared for the Oregon Voter. Carson had subsequently told Lundy that Norman Stoll, a member of the Law Improvement Committee, had previously contacted The Oregonian which had promised publicity on the probate project, and Carson had done nothing further pending development of this possibility. Lundy called attention to the editorial and news story on the probate project in the July issue of the Oregon State Bar Bulletin.

Revised Probate Codes in Other States. Lundy referred

to materials he had sent to members of both committees in the latter part of July, consisting of an explanation of the Uniform or Model Probate Code project being undertaken by special committees of the National Conference of the Commissioners on Uniform State Laws and American Bar Association, and a Forbes magazine article on Norman F. Dacey and his book "How to Avoid Probate."

Lundy noted that committees of the Wisconsin State Bar planned to present a proposed revised probate code to the 1967 session of the Wisconsin legislature, and commented that he would attempt to procure copies of the proposed code for members of the advisory and Bar committees as soon as they became available.

Lundy reported that he had received information indicating that the revised New York probate codes, both substantive and procedural, had been enacted and would become effective September 1, 1967. Dickson appointed a subcommittee, consisting of Lisbakken and Mapp, to make a study of the New York probate codes, with a view to determining whether they contained provisions worthy of consideration for inclusion in the proposed revised Oregon probate code. Dickson directed that the report of the subcommittee be scheduled for consideration at the October meeting of the committees.

Minutes of July Meeting.

There being no objection, Dickson ordered that reading of the minutes of the last meeting (July 15 and 16, 1966) be dispensed with and that they be approved as submitted.

Nonintervention Will Procedure

Allison explained in some detail the Washington nonintervention will statutes as set forth in chapter 11.68, 1965 Washington Probate Code, commenting that, under these statutes, the will was required to provide specifically that the decedent wished the estate to be settled without court intervention. He noted that Lundy had referred the subcommittee working on this project, consisting of Allison, Mapp and Zollinger, to an article by Professor Robert L. Fletcher, entitled "Washington's Non-intervention Executor-Starting Point for Probate Simplification," appearing in the January 1966 issue of the Washington Law Review. Allison reviewed Fletcher's article, which outlined the history of the Washington nonintervention will statutes

and set forth Fletcher's criticisms of the procedure in detail. Allison reported that Fletcher's final analysis was that an urgent need existed for two distinct types of probate systems. Fletcher recommended that one system encompass the formal probate procedure, with all the safeguards and court controls necessary, in decedents' estates which involved problem areas such as insolvency, claims resulting in adversary proceedings or administration complicated by an incompetent, dishonest or negligent personal representative. The second probate procedure Fletcher's article advocated would apply to solvent estates where precautionary proceedings were unnecessary.

Allison stated that the subcommittee agreed with Fletcher's recommendation for two separate types of probate proceeding, the second of which would be similar to Washington's nonintervention will statutes, and that the subcommittee further recommended that the proposed statutes should not be limited, as in Washington, to those cases where there was a will calling for the nonintervention procedure, but should be available to all simple, solvent estates, testate or intestate.

Zollinger agreed that the subcommittee was favorably disposed toward the approach outlined by Allison, and added that the proposed statutes should contain adequate provision by which those who were beneficially interested in an estate in any capacity could seek a full and formal administration of the estate. Zollinger noted that the special committee of the National Conference of Commissioners on Uniform State Laws had prepared a second tentative draft, dated May 18, 1966, of a portion of the proposed Uniform or Model Probate Code entitled "Independent Administration." He outlined the provisions of this independent administration draft, and indicated that the draft was free from many of the criticisms directed at the Small Estates Act previously proposed by the Oregon probate advisory committee. Zollinger reported that the joint conclusion of the subcommittee was that the independent administration draft merited serious consideration by the committees.

Krause asked if the independent administration draft referred to by Zollinger contained a limitation on the size of estates to which it could apply. Zollinger replied that the draft did not contain such a limitation, and expressed the view that it might be advisable to test the practicability of such a statute by first making it applicable to small estates only. Dickson observed that he saw no need

for a nonintervention will statute, and expressed the view that it was neither awkward nor cumbersome to handle any type of estate under regular probate proceedings pursuant to existing statutes.

After further discussion, Dickson directed that Lundy distribute copies of the May 18 draft on independent administration of the proposed Uniform or Model Probate Code to all members of both committees. Dickson appointed Allison, Lisbakken, Mapp and Zollinger as a subcommittee to study the draft and submit their separate suggestions for revision and possible inclusion thereof in the proposed revised Oregon probate code at the October meeting of the committees. Lisbakken and Mapp were in possession of copies of the recently enacted New York probate codes, and Lisbakken agreed to distribute copies of the small estates portion of those codes to Allison and Zollinger in order that the New York provisions could be considered in the subcommittee's study of the subject.

Abatement and Continuance of Actions and Suits

Lundy distributed to members present copies of his revised rough draft on abatement and continuance of actions and suits, which he had been asked at the July meeting to prepare [Note: See Minutes, Probate Advisory Committee, 7/15,16/66, page 21]. The revised rough draft read as follows:

"Section 12. ORS 13.080 is amended to read:

"13.080. Abatement and continuance of action or suit. [No] An action or suit shall abate by the death or disability of a party, [or by the transfer of any interest therein, if the cause of action survives or continues.] except that:

"(1) In case of the [death or] disability of a party, [the court may, at any time within one year thereafter, on motion, allow] the action or suit [to] shall be continued by or against [his personal representatives or successors in interest] the guardian or conservator of his estate on motion for substitution of the guardian or conservator made within one year after the date the guardian or conservator qualifies.

"(2) In case of the death of a party, the action or suit shall be continued by or against the personal representative of his estate on motion for substitution of the personal representative made before the expiration of one year after the date of death

of the party, or before the date the personal representative files his final account, whichever occurs first.

"Section 13. Continuance of action or suit without claim presentment. An action or suit against a decedent commenced before and pending on the date of his death may be continued as provided in subsection (2) of ORS 13.080 without presentation of a claim against the estate of the decedent."

Abatement and continuance of action or suit (ORS 13.080) (section 12). Lundy explained that section 12 of his revised rough draft, which would amend ORS 13.080, was based upon a proposal made by Zollinger at the July meeting. [Note: See Minutes, Probate Advisory Committee, 7/15,16/66, page 21.]

Lundy remarked that one of the problems he had encountered in preparing the revised rough draft arose from deletion of the provision in ORS 13.080 that an action or suit should not abate by the transfer of any interest therein, and inquired as to the effect of this deletion. He also pointed out that ORS 13.080, as amended by the draft, would apply only to cases of the death of an individual or the disability of an individual, and asked if it was intended that the statute refer to a disability of an individual person as opposed to, for example, a corporation in the event an action was brought by a corporation which had been dissolved pending disposition of the action.

Zollinger expressed the view that the provision on transfer of interest should remain in ORS 13.080, and suggested that the following wording be inserted at the beginning of ORS 13.080, as amended by section 12 of the revised rough draft: "No action shall abate by the transfer of any interest in the cause of action, but the transferee may be joined or substituted as a party upon the application of the transferee or any party." Frohnmayer asked Zollinger if the ordinary rules of court would apply in such a situation and received an affirmative reply.

Lundy noted that subsection (1) of ORS 13.080, as amended by the revised rough draft, referred to the "guardian or conservator of his estate, and that the guardianship statutes provided for representation of a ward

in actions and suits only by a guardian of the estate. [Note: See ORS 126.275], while ORS 13.051 provided for appearance of an incompetent in an action or suit by "general guardian." ORS 13.051, he said, gave the impression that the guardian of the person might appear for an incompetent. Zollinger remarked that "guardian of the estate" should be used in both ORS 13.041 and 13.051, rather than "general guardian." Gilley commented that, by court decision, a guardian was not a party in an action and there would be no occasion for substitution when an individual became disabled because the action would continue against the original party as represented by his guardian.

Zollinger moved, and the motion was seconded, that "guardian of the estate" be substituted for "general guardian" wherever the latter words appeared in statute sections that had reference to the guardian appearing in place of the ward. Motion carried.

After further discussion, Zollinger moved, seconded by Gilley, that ORS 13.080 be amended to read:

"(1) No action shall abate by the transfer of any interest in the cause of action, but the transferee of any interest in the cause of action may be joined or substituted as a party upon the application of the transferee or any party."

"(2) An action or suit shall abate by the death of a party unless the personal representative of his estate be substituted upon motion by any party or the personal representative before the expiration of one year after the date of death of the party, or before the date the personal representative files his final account, whichever occurs first." Motion carried.

Death of party after verdict does not abate action for wrong (ORS 13.090). Lundy called attention to the fact that ORS 13.090 provided that an action for a wrong should not abate by the death of any party after a verdict, and asked whether the situation described was not caused by ORS 13.080, as amended by action of the committees. Jauregui commented that ORS 13.090 was not appropriate under present law, and referred to the 1965 repeal of ORS 121.010 and amendment of ORS 121.020. Zollinger moved, seconded by Jauregui, that ORS 13.090 be repealed. Motion carried.

Continuance of action or suit without claim presentation (section 13). Lundy explained that section 13 of the revised rough draft provided that if an action or suit was pending against a person at his death, it could be continued without presentation of a claim against the estate of the deceased person. Allison inquired if section 12 of the revised rough draft would be included in the proposed revised probate code, and was told by Lundy that it would remain in ORS chapter 13, but that section 13 would be in the probate code and would have the built-in reference to ORS 13.080, as amended by section 12. Zollinger moved, seconded by Jaureguy, that section 13 be approved without change. Motion carried.

Support of Surviving Spouse and Minor Children; Homestead

[Note: Copies of the following two reports were distributed to all members of both committees prior to the meeting: "Support of Surviving Spouse and Minor Children; Homestead," dated May 14, 1966, prepared by Gilley and Krause; and "Support of Surviving Spouse and Minor Children; Exemptions (Homesteads), and Family Allowances," dated May 20, 1966, prepared by Mapp. Allison had distributed copies of his report entitled "Revised Draft--Support of Surviving Spouse and Minor Children" to members present at the June meeting. A copy of Allison's report constitutes the Appendix to these minutes.]

Gilley read the draft he and Krause had prepared, and commented that it was based upon a suggestion made at the April meeting by Zollinger. [Note: See Minutes, Probate Advisory Committee, 4/15,16/66, pages 12 to 14.]

Mapp read his report to the committee, and explained that the basic theory he was advancing would grant an exemption of the beneficiary's choice of the property of the estate, real or personal, to the total appraised value of \$10,000.

Allison next read his draft to the committee, and remarked that section 1 thereof was based on ORS 116.025, and that section 2 was derived from ORS 116.590 and 116.595, section 3 from ORS 116.020 and section 4 from ORS 113.070 and 116.005.

Braun asked Mapp what would happen under the latter's proposal if the family home were devised to someone other than the spouse, and was told that if the spouse chose to keep the house, an interest equal to the value of that house would have to be made up and given to the

devisee from whom the house was taken. Dickson commented that Mapp's proposal would deprive the widow of her right to an allowance according to her station in life and expressed the view that she was entitled to such an allowance in addition to her property. Gilley suggested that the right to limited occupancy of the place of abode be preserved in the statute, and Mapp agreed.

Zollinger suggested that there be a provision that the surviving spouse or minor children were entitled to property to the total appraised value of \$10,000, to be selected first from property not specifically bequeathed or devised, except that the beneficiaries could take the homestead, whether or not specifically devised, and if they did so, the devisee thereof could select property of a like value. Dickson commented that such a provision would result in a widow taking exempt property out of her residuary share, if she were the residuary beneficiary, rather than from the estate as a whole.

Allison contended that it would be preferable, in providing for an allowance, to allow the court to take into consideration the value of nonprobate property of the surviving spouse. He advocated adoption of the wording contained in section 5 of his draft, which was derived from a Wisconsin preliminary draft [Note: See Staff Report No. 2 dated June 1964, page 20.], as follows: "In making or denying such order the court shall take into consideration all assets and income available for the support of the spouse and children outside of the probate estate." Richardson expressed the view that the court should have discretion in such matters.

Allison asked Mapp if the latter's proposal envisioned setting aside \$10,000, all or part of which might be liquid assets of the estate, to the surviving spouse without setting aside money for funeral expenses and expenses of administration, and received an affirmative reply. Dickson suggested that the simplest procedure would be to abolish all exemptions and let the court award support payments whether the estate was solvent or insolvent. Richardson suggested that the \$10,000 exemption be eliminated and that the court be given authority to award support to the family for a year, whether or not the estate was solvent. Allison pointed out that the creditors would be alert to see that the court did not make extravagant support allowances from insolvent estates.

After further discussion, Zollinger observed that the trend of the discussion appeared to be in favor of the

proposal advanced by Gilley and Krause. Mapp objected to section 1 of the Gilley-Krause draft, stating that he was opposed to using the homestead or place of abode as a basis for exemption. Gilley explained that the purpose of section 1 was to avoid the immediate displacement of the family and to give them a right to occupy the home for at least one year. Richardson remarked that he would agree with section 2 of the Gilley-Krause draft with an added provision that the support not exceed \$10,000. Gilley observed that \$10,000 maximum would be more than necessary in many cases, and indicated a preference to leave the amount completely in the discretion of the court.

After further discussion, Dickson suggested that members of the committees devote additional thought to the problems under consideration and discuss them further the following morning.

The meeting was recessed at 5:10 p.m.

The meeting was reconvened at 9 a.m., Saturday, August 20, 1966, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

The following members of the advisory committee were present: Dickson, Zollinger, Allison, Butler, Carson, Frohnmayer, Jaureguy, Lisbakken and Mapp. The following members of the Bar committee were present: Gilley, Braun, Copenhaver, Krause, Richardson (arrived 9:30 a.m.) and Warden (arrived 10:15 a.m.). Also present was Lundy.

Support of Surviving Spouse and Minor Children; Homestead
(continued)

Draft by Gilley and Krause, dated May 14, 1966. Frohnmayer requested an explanation of the general theory of the proposal submitted by Gilley and Krause, as set forth in their draft dated May 14, 1966. Gilley advised that the purpose of his and Krause's proposal was to provide the surviving spouse and minor children with a place to live, at least temporarily, and that section 1 of the draft would assure their right to occupancy of their place of abode for one year if it had been owned by the decedent. The Gilley-Krause proposal would then, under section 2 of the draft, vest the court with almost unlimited power to make whatever allocation of property was reasonable under all the circumstances. Gilley noted that the proposal had been criticized because it contained no amount limitation on the allowance. Allison suggested addition of the following provision to section 2 of the draft:

"The allowance hereunder shall have priority over debts and administration expenses, but if the estate is insolvent, no more than one-half of the estate assets shall be available for such allowance, and it may not be granted for more than one year after the date of death."

Allison explained that his suggested additional provision was a compromise to avoid cutting off claims entirely by providing a reasonable or equal division of the assets of the estate between the allowance on the one hand and claims and administration expense on the other. The provision would be applicable, he stated, only in the case of insolvent estates.

Gilley pointed out that the 12-month time limitation in Allison's suggested additional provision was inconsistent with section 2 of the draft, which imposed a 24-month time limitation. He also suggested that the wording in Allison's suggested provision be changed to "but if the estate appears to be insolvent," because solvency could not be determined definitely in all cases. Zollinger commented that the court would know at least what one-half of the assets were at the beginning of probate, and before that amount was exhausted, it would be possible to find out whether the estate was insolvent. Gilley outlined a hypothetical situation wherein the court might want to make an award of \$20,000 home, but the total value of the estate was \$30,000, and Dickson remarked that in such an event the court would undoubtedly require a re-estimate of the estate at the end of the first six months. Dickson and Gilley agreed that the court order for support should not be final, but should be subject to change by the court.

Braun objected to limiting the period for keeping a solvent estate open to 24 months, and urged that the allowance right be continued throughout administration in the case of a solvent estate. Frohnmayer disagreed, commenting that there should be some incentive to bring estates to a conclusion as early as possible. Dickson asked Gilley for his opinion on shortening the time period, and Gilley pointed out that the time period would not be 24 months automatically; that it could be shorter. In keeping with the principle of enabling the court to meet unpredictable circumstances, Gilley said he would not like to see a stringent time limitation imposed. Dickson pointed out that if 24 months was set forth in the statute, it undoubtedly would become standard procedure for all estate attorneys to request the allowance for the 24-month period. Carson suggested that a shorter period of time be set forth, followed by "unless otherwise ordered by the court" or "unless extended by the court." Frohnmayer remarked that he could see no objection to the 24-month period.

Zollinger moved, seconded by Richardson, that the following be inserted as subsection (4) of section 2 of the Gilley-Krause draft, to be followed by Allison's suggested provision as subsection (5):

"(4) In making or denying such order, the court shall take into consideration all assets and income available for the support of the spouse and children outside of the probate estate."
Motion carried.

Carson noted that the last sentence of subsection (1) of section 2 of the Gilley-Krause draft was phrased in the alternative, and suggested that "or both" be added at the end of the sentence. Frohnmayer suggested that the wording of the sentence be ". . . personal property and for periodic payment . . ." Allison suggested the following wording for the sentence: "The order may be for periodic payment of funds while administration of the estate continues, not exceeding 24 months from the date of decedent's death, and for setting aside real and personal property of the estate to the survivor or to the minor children." The committees agreed to leave the matter of rewording the sentence to Lundy, with the understanding that the intent of the committees was that the order of court could be, for example, a transfer of specific real property, a transfer of specific personal property or periodic payments, or any combination thereof.

Braun suggested that property received by a widow under the Gilley-Krause draft should be charged against the widow's distributive share. Gilley expressed opposition to charging the court's allowance award against a widow's distribute share, but Richardson agreed with Braun, commenting that in a substantial estate the plan of distribution set up by the decedent could be distorted if such a charge were not made. Zollinger suggested extension of the court's discretion to allow certain sums given to a widow to constitute an expense of administration and other sums given to her to be charged against distribution to be made to her at a later time. Dickson pointed out that under present law testators must make provision in their wills to escape disruption of testamentary plans through allowance granted by the court, and urged that the law remain unchanged in this respect.

After further discussion, Gilley moved that the draft be amended by inserting the following as subsection (5) of section 2, and by renumbering subsection (5) previously approved by the committees as subsection (6):

"(5) The court may in its order direct that the amount of the allowance be charged against the distributive share of the person to whom the allowance is made."

Dickson suggested, and Frohnmayer and Zollinger agreed, that the problem might be solved by providing that the court could make partial distribution at any time, and that this could be accomplished by amendment of the present statute on partial distribution (i. e., ORS 117.350). Braun inquired if the partial distribution would be in lieu of support payments, and received a negative reply from Dickson, who explained that the statute would provide that partial distribution could be made to the surviving spouse and children at any time upon the proper showing. Gilley withdrew his motion.

Frohnmayer moved, seconded by Allison, that the Gilley-Krause draft be approved, with the revisions:

1. Last sentence of subsection (1) of section 2 to be reworded by Lundy in accordance with the expressed intent of the committees.

2. Subsection (4) to be added to section 2, to read as follows: "(4) In making or denying such order, the court shall take into consideration all assets and income available for the support of the spouse and children outside of the probate estate."

3. Subsection (5) to be added to section 2, to read as follows: "(5) The allowance hereunder shall have priority over debts and administration expenses, but if the estate is insolvent, no more than one-half of the estate assets shall be available for such allowance, and it may not be granted for more than one year after date of death."

4. Section 3 to be added to the draft, to be a repealer of existing statute sections covered by or inconsistent with the draft. Motion carried.

Repeal of ORS sections conflicting with proposed support statute. Lundy asked if ORS 113.070 should be repealed, and received an affirmative reply from Dickson.

The committees next discussed ORS 116.005, and concurred that it should be repealed. Allison suggested addition to the Gilley-Krause draft of a provision entitling the surviving spouse and minor children to "all the wearing apparel of the family and household furniture of the deceased," but other

members agreed that such a provision was unnecessary. The committees also agreed to the repeal of ORS 116.010 and 116.015.

ORS 116.020 was discussed, and Allison suggested that the limit on the value of the estate be increased to \$2,500 and the section be retained. Zollinger contended, and Dickson agreed, that if ORS 116.020 was repealed, the court's discretionary power to award support would accomplish everything necessary. Other members also concurred in the repeal of ORS 116.020, as well as of ORS 116.025, 116.590 and 116.595.

Gilley moved, seconded by Zollinger, that the following ORS sections be repealed: ORS 113.070, 116.005, 116.010, 116.015, 116.020, 116.025, 116.590 and 116.595. Motion carried.

Court Authorization for Personal Representative to Sue

Carson noted that at the July meeting he and Richardson had been requested to separately study and submit recommendations on the question of court authorization for personal representatives to sue generally. [Note: See Minutes, Probate Advisory Committee, 7/15,16/66, page 10.] Carson read to the committees a letter dated August 5, 1966, which he had written to Lundy with a copy to Richardson, as follows:

"As you have indicated in the second paragraph on page 2 of your letter, I did, at the July, 1966, meeting, eventually take the position that a personal representative should not be required, as a condition precedent to instituting action or suit, to obtain an order of the probate court authorizing him to do so, unless otherwise expressly provided by statute, as is, for example, provided by ORS 116.330 et seq. (avoidance of a fraudulent transaction made or suffered by the decedent).

"Although I do not fail to recognize the merits of the suggestion made by Mr. Campbell Richardson to the effect that a personal representative might obtain some protection by procuring authorization by order of the probate court before engaging in litigation, I suggest that, if the personal representative desires to have such protection as an ex parte order of the probate court may afford, he may, on his own initiative, and without being required so to do, take that step before engaging in the litigation,

and that the personal representative's adversary in the litigation should not be permitted to thwart the personal representative's action by reason of the absence of an authorizing order of the probate court. It appears to me that the authorizing order of the probate court could be granted by that court pursuant to its right to exercise supervisory control, generally of the personal representative pursuant to the last sentence of ORS 115.490, if not otherwise. That sentence is, as you will recall:

"It is the duty of the court or judge thereof to exercise a supervisory control over an executor or administrator, to the end that he faithfully and diligently performs the duties of his trust according to law."

"The matter of allowance of recovery of costs and disbursements in a suit or action to which a personal representative is a party seems to be governed appropriately by ORS 20.150, which provides, among other things, that the costs and disbursements

"shall be chargeable only upon or collected from the estate, . . . , unless the court or judge thereof shall order such costs and disbursements to be recovered from the executor, administrator, . . . personally for mismanagement or bad faith in the commencement, prosecution or defense of the action, suit or proceeding."

"In view of the provisions of ORS 121.020 (survival of causes, generally) as well as the provisions of ORS 13.030 (real party in interest), it appears to me that it is not necessary, so far, at least, as personal representatives are concerned, to enact an Oregon statute such as Section 81, 1963 Iowa Probate Code ('Any fiduciary may sue, be sued and defend in such capacity. '), which you mentioned in the fourth paragraph on page 2 of your letter, but I do not suggest that a general statute such as that would be of no benefit for any purpose. In any event, I believe that that Iowa statute is preferable to the Washington statute quoted, in part, in the same paragraph of your letter.

"In response to the two questions appearing in the final paragraph of your letter, I respectfully submit:

"(1) That there should not be 'any requirement that a personal representative, generally, obtain a court order authorizing him to sue;' and

"(2) That the substance (only) of ORS 116.330, 116.335, and 116.340 should be preserved and included in the proposed, revised Oregon probate code."

Richardson read to the committees a letter dated August 9, 1966, which he had written to Lundy with a copy to Carson, as follows:

"I agree in theory with Mr. Carson's position that a court order authorizing a personal representative to sue should not be required. I also feel that our code should contain general authority of a fiduciary to sue in addition to that provided by implication in ORS 13.030.

"However, as a practical matter, I also feel that a fiduciary should be provided some statutory protection against second guessing based upon hindsight where litigation is involved. At the last meeting I expressed the thought that to a limited extent prior court authorization for litigation, even of an ex parte nature, offered such protection. Better protection would be offered, I believe, by the insertion in the code of a general standard governing the actions of fiduciaries where litigation is involved. I looked quickly at the Washington, Iowa and Model codes, and found no helpful language. I like the language in ORS 20.150, quoted by Mr. Carson. I propose that this language be grafted on the substance of the Iowa statute, to produce the following for the consideration of the committees:

"Any personal representative may sue, be sued and defend in his fiduciary capacity, and shall be accountable only for mismanagement or bad faith in the commencement, prosecution or defense of the action, suit or proceeding."

Frohnmayr expressed the belief that the wording suggested by Richardson's letter was existing common law, and commented that a personal representative should not be given special protection by obtaining prior approval of the court to bring a lawsuit. Zollinger indicated concern over inclusion of a provision which would make a

personal representative accountable for mismanagement of the prosecution or defense of an action or suit if, for example, he did not call a witness and the omission might have caused a different result in the action or suit. Allison was of the opinion that a surcharge against the personal representative would be a better way to handle the situation, and Zollinger expressed an inclination to approve the first part of Richardson's suggested wording, which was derived from section 81, 1963 Iowa Probate Code, without making any provision for a surcharge. Allison concurred in Zollinger's proposal.

Carson indicated that it would not be necessary to repeal any of the existing statute sections related to the matter under discussion (i.e., ORS 20,150, 115.490, 116.330 to 116.340 and 121.020). Richardson called attention to section 172(c), Model Probate Code, and suggested the committees consider inclusion of a similar provision in the proposed revised Oregon probate code. Mapp noted that section 160, 1963 Iowa Probate Code, was similar to the Model provision.

Richardson moved, seconded by Mapp, that the following provision be included in the proposed revised Oregon probate code:

"Any personal representative may sue, be sued and defend in his fiduciary capacity."

Zollinger moved, seconded by Richardson, that the motion be amended by the following addition to the provision:

"No order of court shall be required prior to the commencement or defense of the suit or action by the personal representative except as otherwise provided in this code."

Motion to amend carried. Main motion carried.

Dickson suggested that a cross reference be inserted in ORS 13.030, dealing with real parties in interest, to refer to the provision just approved by the committees. Zollinger remarked that he did not recognize a need for this type of cross reference, and Dickson requested Lundy to determine whether or not the insertion was advisable or necessary.

Inventory and Appraisal

The committees began a consideration of ORS 116.405, relating to inventory and appraisal, and Butler's report thereon [Note: See Appendix, Minutes, Probate Advisory Committee, 6/17,18/66].

Inventory of estate; when and how made (ORS 116.405).

Frohnmayr expressed disapproval of the requirement in ORS 116.405 for filing an inventory within 30 days, but Allison took the opposing view, commenting that an early filing of the inventory was advantageous to the court. Frohnmayr indicated that in some cases it might be desirable to sell particular real property prior to appraisal, but Butler pointed out that such a procedure could create abuses when the person making the sale was not knowledgeable concerning property values.

Zollinger suggested a requirement that the inventory be filed within 30 days and, to the extent required by the order of the court, the inventoried property be appraised by one or more appraisers. This, he noted, would allow an appraisal if and when the court order was entered, and if no appraisal was necessary, as in the case of bank accounts, none would be required by the court. Frohnmayr concurred with Zollinger's suggestion. Dickson also expressed approval of the suggested procedure for the reason that the information would not then become public knowledge. With respect to determining clerk's fees, Dickson pointed out that such fees could be stipulated at the time of the final accounting. Zollinger indicated that his suggestion could be further modified by providing that with respect to the assets of readily ascertainable value, the value should appear on the inventory, and with respect to other assets, to the extent the court deemed an appraisal appropriate, the court should order an appraisal within a period to be determined by the committees. Richardson suggested that the time period conform with the comparable provision of the guardianship statutes. Frohnmayr noted that the guardianship statutes (i.e., ORS 126.230) prescribed a 60-day period for filing the inventory, and suggested that the provisions in the probate and guardianship codes be made consistent.

Appraisement; appointment of appraisers (ORS 116.420); compensation of appraisers (ORS 116.425). Butler recommended approval of the provisions of Senate Bill 308, amending ORS 116.420 and 116.425, which had been prepared by the advisory committee and introduced at the 1965 legislative session at the request of the Law Improvement Committee, and

which had provided that the court could waive the appointment of appraisers, and other members concurred in this recommendation.

Dickson pointed out that any revisions made in the inventory and appraisal provisions in ORS chapter 116 should be correlated with provisions on the same subject in ORS chapter 118. He then appointed Butler and Carson as a subcommittee to meet with the State Treasurer, or a representative of his office, to draft proposed provisions on inventory and appraisal. Dickson asked Butler and Carson if they could, in conjunction with the State Treasurer's office, have a draft of proposed provisions on inventory and appraisal completed in time for the October meeting of the committees, and they agreed to attempt to do so. Carson requested that Lundy submit a synopsis of the committees' discussion on this subject to him and to Butler for their use in drafting the proposed provision.

Dickson summarized the policies apparently agreed upon by the committees thus far in the discussion as follows:

1. The inventory should be separated from the appraisal.
2. The inventory should contain the estimated value of securities, if necessary, for the purpose of determining clerk's fees.
3. The appraisal should be on application of the personal representative at some later time, in connection with determining taxes, sale of property, etc.
4. Senate Bill 308, introduced at the 1965 legislature, should be incorporated.
5. All revisions should be correlated with ORS chapter 118.
6. The period for filing the inventory should be changed to 60 days to conform to the guardianship statutes.

Frohnmayr recommended that in the first filing of the inventory the values, if readily ascertainable, should be included.

Zollinger called attention to subsection (3) of ORS 126.230, which provided that the court could order all or any part of the property of the ward appraised as provided

in ORS 116.420 to 116.435. He remarked that similar wording should be incorporated in the revised probate code, and suggested that the subcommittee give consideration to inclusion of the following provision:

"The court may order all or any part of the property of the estate appraised as shall appear to be necessary for the determination of taxes or expenses of administration or otherwise."

Zollinger pointed out that his suggestion would include a determination of clerk's fees, a determination of personal representative's fees, a determination of attorney's fees and a determination of tax liabilities, and he reiterated that an appraisal should not be required if a conclusion as to value could be reached without an appraisal.

Oath of appraisers (ORS 116.430). Allison expressed doubt that the affidavits required by ORS 116.430 were of any significant value, and other members agreed.

Inventory and appraisal of copartnership property; duties of surviving partner (ORS 116.450). Butler remarked that ORS 116.450 was cumbersome and asked if there was a better way of requiring the surviving partner to disclose the assets of the partnership. Zollinger pointed out that the Uniform Partnership Law (see ORS 68.650) imposed the burden of disclosure on the surviving partner, and remarked that the assets of the partnership were essentially a debt owing to the estate of the deceased partner and the surviving partner should not be in a position different from any other debtor to the estate. Dickson commented that it was basically wrong to require a surviving partner to disclose the value of assets and liabilities of a partnership for the public record in an estate proceeding, but that the information should be made available to the personal representative on a confidential basis. Frohnmayer suggested that after 30 days, or whatever time might be determined by the committees, the surviving partner be required to furnish the necessary information to the personal representative.

Allison expressed disapproval of the requirements of ORS 116.450, and suggested that the committees study the Uniform Partnership Law (i.e., ORS chapter 68) with a view to making the necessary changes in that law rather than in

ORS 116.450. He said he assumed that a partnership was dissolved by the death of a partner, so that in the appraisal the personal representative would have to indicate for tax purposes the amount owing to the estate from the dissolved partnership. Frohnmayer objected to deletion of ORS 116.450. Braun called attention to the changes previously made by the committees in ORS 116.305, which expanded the discovery of assets procedures [Note: See Minutes, Probate Advisory Committee, 7/15, 16/66, pages 5 and 6].

Carson pointed out that it was common practice among some attorneys to include in their partnership agreements a condition that the surviving partner had the right to purchase the share of the deceased partner on particular terms, with the value to be determined by appraisal at the time of administration of the estate by the court. In view of this practice, Carson asked if the committees agreed or disagreed that appraisal of the partnership interest should be made in connection with the administration of the estate. Zollinger replied that a compulsory appraisal of a partnership interest would be erroneous because the value might be determined by distribution, agreement or negotiation, and expressed the opinion that appraisal should be discretionary with the court.

Carson requested the view of the committees on this question and Dickson replied that the committees apparently agreed that the appraisal served no useful purpose except for tax purposes and for setting a valuation on property for sale or distribution, such valuation, however, to be arrived at either with or without appraisal. Carson then asked if the value of the interest of the deceased partner in the partnership should be excluded from the general inventory even though there was no appraisal, and received an affirmative reply from Dickson, who added that an appraisal of individual items of property should not be required.

Allison suggested that, in view of the clear provisions concerning dissolution of a partnership, the subcommittee consider appropriate wording in the draft of proposed provisions on inventory and appraisal to eliminate the necessity of having a separate provision for appraisal of partnership assets in the case of a dissolved partnership.

Debt due from person named as executor; inclusion in inventory; liability for debt (ORS 116.440); discharge by will or bequest of a claim of decedent (ORS 116.445). Lundy pointed out that ORS 116.440 and 116.445 dealt with debts owed by the personal representative to the decedent, and

asked whether these provisions should be included with the provisions on inventory and appraisal as a part of Butler's and Carson's assignment. Dickson answered that ORS 116.440 and 116.445 would be included in the subcommittee's assignment. He expressed the view that a debt of the personal representative should be treated the same as any other just debt owing to the estate. Dickson also asked Lundy to make a special note to remind the committees to discuss this question when they reconsider obligations of fiduciaries, and Butler called attention to the fact that Bettis had accepted an assignment to make a study of that particular problem.

Establishing Foreign Wills and Ancillary Administration

[Note: In March 1966 Lundy distributed to all members of both committees pamphlet copies of the Uniform Probate of Foreign Wills Act, Uniform Ancillary Administration of Estates Act and Uniform Powers of Foreign Representatives Act, all drafted by the National Conference of Commissioners on Uniform State Laws.]

Mapp reviewed the history of the three Uniform Acts, and suggested that committee consideration on proposed adoption of the Acts in Oregon be postponed until the Acts had been reconsidered and finally approved by the special committees of the National Conference and American Bar Association in connection with the Uniform or Model Probate Code project presently in progress. He expressed the belief that uniformity among states was particularly important in these areas, and he was opposed to adopting portions of the Acts, rather than adopting the Acts intact. Frohnmayer and Zollinger did not agree that such postponement of consideration of adoption of an Act was necessarily advisable for the sake of uniformity. Mapp pointed out that the Bar committee had considered the three Acts at two different times in the past. On one occasion, he said, the Bar committee had recommended that all three be adopted, and on the other occasion it had recommended that none be adopted. Mapp commented that he and Riddlesbarger had discussed the Acts and did not feel that they would recommend their adoption.

Uniform Probate of Foreign Wills Act (drafted by National Conference of Commissioners on Uniform State Laws and approved September, 1950). Mapp noted that the Uniform Probate of Foreign Wills Act had been adopted in only two

states--Wisconsin in 1952 and Texas in 1955. He read the Act section by section, together with excerpts from the commissioners' prefatory note and portions of the commissioners' notes of explanation following each section. Mapp explained that the purpose of section 1 was to permit a will to be accepted in Oregon if it had been proven in another jurisdiction. In reply to a question by Frohnmayer, Mapp stated that if a will had not been submitted in another jurisdiction and was submitted for probate in Oregon in the first instance, section 5 would permit its acceptance in Oregon. Section 5, he stated, would also permit probate of a will which did not comply with requirements of the other jurisdiction, but did comply with Oregon requirements.

Zollinger recalled that the committees had previously discussed requirements of a will for probate and decided that a will could be received in Oregon if it was executed in a manner satisfactory to the requirements of the Oregon law, or the law of the state of execution or the law of the state where the decedent was resident. He expressed the view that this was a more sensible approach than that contained in the Uniform Act. Mapp suggested that Oregon might want to reject the will if a court in another state had rejected it for a reason such as undue influence. Section 5 of the Uniform Act, he explained, would require Oregon courts to follow the determination of the court of the decedent's domicile at the time of his death. Zollinger was opposed to the concept that an Oregon court should be bound by a finding of fact made in a court of another jurisdiction. Dickson expressed agreement with Zollinger's view, remarking that the law where the property was located should govern. Frohnmayer expressed the opposing view, commenting that his office, being close to California, had handled a number of such cases, that they simply took what California had admitted and proceeded to carry out the laws of Oregon in relation thereto, and that no great problems had been encountered in this procedure.

Mapp pointed out that under section 4 of the Uniform Act the Oregon probate court could decide not to admit a will if to admit it when it had been rejected elsewhere would upset the overall testamentary plan. He suggested insertion of the following provision, derived from the commissioners' notes following section 4, at the end of section 4: "Unless such admission would so badly disrupt the testator's plan for distribution of his estate that admission of the will to local probate would not promote the testator's overall intention as to his estate."

Butler suggested adoption of a reciprocity statute on admission of foreign wills. Allison observed that the proper approach to a Uniform Act was to treat it as such, and suggested that the Uniform Act under discussion be referred to the Bar Committee on Uniform State Laws. Zollinger expressed disapproval of this suggestion, and Dickson concurred that a matter pertaining to probate should not be referred to another committee.

Frohnmayr inquired concerning Iowa's approach to the problem, and was told by Lundy that Iowa's provisions (i.e., sections 495 to 499, 1963 Iowa Probate Code) appeared to have little relationship to the Uniform Act. Zollinger read section 497, 1963 Iowa Probate Code, pertaining to foreign wills as documentary evidence of title to property, and observed that Oregon had no comparable statutory provision, but that one should be adopted.

After further discussion, Zollinger read from pages 28 and 29 of the minutes of the January 1966 meeting of the committees. Frohnmayr moved, seconded by Zollinger, that in view of the action taken at the January 1966 meeting, the committees adhere to their original position on the matter of admission of foreign wills. Motion carried, with Mapp voting no.

Foreign personal representatives and ancillary administration. Lundy was directed to distribute copies of a first tentative draft, dated April 28, 1966, of a portion of the proposed Uniform or Model Probate Code entitled "Foreign Personal Representatives: Ancillary Administration" to all members of both committees, and to schedule this matter for consideration at the October meeting.

October Meeting of Committees

The following items were scheduled for consideration at the October meeting:

1. Independent administration (report by Allison, Lisbakken, Mapp and Zollinger).
2. Discussion of recently enacted New York probate codes (report by Lisbakken and Mapp).
3. Inventory and appraisal (report by Butler and Carson).
4. Foreign personal representatives ancillary administration (discussion to be led by Mapp and Riddlesbarger).

Page 24
Probate Advisory Committee
Minutes, 8/19,20/66

5. Possession and control of property (ORS 116.105)
(report by Richardson on income disposition).

The meeting was adjourned at 1:10 p.m.

APPENDIX

(Minutes, Probate Advisory Committee Meeting, August 19 & 20, 1966)

REVISED DRAFT
SUPPORT OF SURVIVING SPOUSE AND MINOR CHILDREN

(submitted by Stanton W. Allison)

1. If an intestate leaves neither surviving spouse nor minor children, all the property of the estate is assets in the hands of the administrator for the payment of funeral expenses, expenses of administration, the debts of the deceased, or distribution according to law.

2. When a homestead descends to or is devised to a child or grandchild, widow or widower, father or mother of the deceased owner of the homestead, it is taken free of judgments and claims against the deceased owner or his homestead estate except mortgages executed thereon and laborers' and mechanics' liens. Such homestead shall be subject to the expenses of his last sickness and for his funeral, the expenses of administration, and the claims of the State Public Welfare Commission and the State Board of Control.

3. If upon filing the inventory of the estate of an intestate decedent who died leaving a spouse or minor children, it appears from the inventory that the value of the estate does not exceed \$10,000 exclusive of the amount of liens and encumbrances thereon, the court or judge thereof shall make a decree providing that the whole of the estate, after the payment of funeral expenses and expenses of administration, be set apart for such spouse or minor children in like manner and with like effect as in case of property exempt from execution. There shall be no further proceeding in the administration of such estate unless further property is discovered.

4. The surviving spouse and minor children of the deceased are entitled to remain for one year following the date of death in the possession of the home occupied by them and owned by the decedent, all the wearing apparel of the family, and the household furnishings, and during such occupancy the home, apparel, and furnishings shall be exempt from execution.

5. The court may by order provide an allowance to the surviving spouse for the support of such spouse and any minor children, or to the minor children alone if there be no surviving spouse, in an amount adequate for support during the administration of the estate. In making or denying such order the court shall take into consideration all assets and income available for the support of the spouse and children outside of the probate estate. The allowance hereunder shall have priority over debts and administration expenses; but if the estate is insolvent, the allowance may not be granted for more than one year after date of death.

Note: The provisions for sale of real and personal property should provide that sales may be made for support of surviving spouse and minor children.

REPORT
May 14, 1966

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

From: Robert W. Gilley and Donald G. Krause

Subject: Support of Surviving Spouse and Minor Children; Homestead

One of the matters scheduled for consideration by the Advisory and Bar Committees at the meeting to be held May 20 and 21, 1966, is support of surviving spouse and minor children and homestead.

At the April meeting three subcommittees were appointed to prepare independently and submit for consideration at the May meeting different proposals for support and other family rights. The following draft was prepared by Subcommittee #1, consisting of Mr. Gilley and Mr. Krause, and is submitted for your consideration.

DRAFT

Section 1. A surviving spouse and minor or incompetent children of the decedent may continue for one year after the death of the decedent to occupy the place of abode, owned by the decedent, which they occupied at his death. During their occupancy, such place of abode shall continue to be exempt from execution to the extent that it was exempt from execution while decedent lived. They shall not commit or permit waste. They shall keep the improvements insured against fire. They shall pay taxes as payment becomes due.

Section 2. (1) Upon the petition of the surviving spouse or the guardian of the estate of minor or incompetent children for the award of property or funds for their support, citation to parties in interest and the personal representative, and hearing thereon, the court shall make by order such provision for their support as shall be reasonable. The order may be for the transfer of real or personal property or for

periodic payment of funds while administration of the estate continues, not exceeding 24 months from the date of decedent's death.

(2) The petition for such award shall show what other assets and income are available for the support of the spouse and children and what expenses for their support are anticipated.

(3) The personal representative shall show in his answer to the petition the nature and value of the assets of the estate and the nature and amount of claims, taxes and expenses, so far as known.

[Note: One of the matters scheduled for consideration by the Advisory and Bar Committees at the meeting to be held June 17 and 18, 1966, is support of surviving spouse and minor child and homestead.

At the April meeting three subcommittees were appointed to prepare independently and submit for consideration at a future meeting different proposals for support and other family rights.

A draft prepared by Subcommittee #1, consisting of Mr. Gilley and Mr. Krause, was embodied in a report dated May 14, 1966, copies of which were distributed to all members of both committees prior to the May meeting.

Subcommittee #2 consists of Senator Husband and Professor Mapp. Copies of the following report, dated May 20, 1966, by Professor Mapp were distributed to most members present at the May meeting.]

REPORT
May 20, 1966

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

From: Thomas W. Mapp

Subject: Support of Surviving Spouse and Minor Children; Exemptions (Homesteads), and Family Allowances

Exemptions (Homesteads)

Statutes protecting certain basic personal property assets of a family unit from the claims of creditors existed in the United States as early as 1773 and are in force in virtually all of the states. Atkinson, Wills 127 (2d ed. 1953). Their stated purpose is to protect the family members from privation, and from becoming public charges, because of the economic misfortunes and/or follies of the head of the family. Applied to real property, the exemption principle has taken the form of the Homestead Exemption.

The following table summarizes the current Oregon exemption provisions.

<u>ORS</u>	<u>Exempt Property</u>	<u>Exempt Value</u>
23.240	Homestead (abode of the family)	\$ 7,500
23.160	{a} Books, pictures, musical instruments	75
	{b} Wearing apparel of deceased, plus for each member of the family	100
		50
	{c}&{d} Tools used to earn living, and vehicle to value of \$400, total	800
	{e} Domestic animals for family use	300
	{f} Household goods, furniture, TV, and provisions and food for family for 60 days	400
23.164	Mobile home (if no homestead claimed)	3,000
23.181	Wages, for each 30 day period	250

In most states it has been considered important to continue these exemptions after the death of the husband for the benefit of the surviving spouses and minor children. See ORS 116.010.

But, in addition to sheltering a minimal amount of property from the deceased's creditors, these provisions also with draw this minimal amount of property from the deceased's possible irresponsible testation, and provide an immediate fund free of the delays of administration.

Granting that these provisions impose some limitations on freedom of testation, and result in some injustice to creditors, it is believed that the net benefits to the family unit greatly outweigh the disadvantages, and that the principle should be continued. However, statutes such as those of Oregon, whatever relevance they may have had in a strictly agrarian economy, fail to accomplish their purpose in a society in which the families most in need of protection depend on a wage-earner who may not own any interest in real property, have his own tools, or keep livestock for family use.

Therefore, it is recommended that the Oregon Probate Code exempt assets of a certain value, as \$10,000.

Recommendation:

- §1. Exempt property. (Outline of content of section)
- a. The surviving spouse or minor children of a decedent shall be entitled to property of the estate, real or personal, of the total appraised value of \$10,000.
 - b. The selection shall be made by the surviving spouse, if living, or by the guardians of the estates of the respective minor children, or by the court.
 - c. Such property shall not be subject to administration, and shall be exempt from claims of creditors except such as hold liens on the specific property selected.
 - d. Such property shall be in addition to the interstate share of any recipient.
 - e. Such property shall be in addition to the testate share of any recipient unless the testator expressly conditions benefits under the will by waiver of exempt property.

Comment:

This provision would give the family the greatest flexibility in selecting property needed for support. The decedent's equity in the family residence, or a favorable lease on the family residence, might be chosen in order to avoid a move. Articles of sentimental value could be selected. The family car and household equipment could be selected, thus reducing common distribution problems.

Recommendation:

- §2. Order to dispense with administration. (Substance of § 7 of original Allison draft, substituting "\$10,000" for "\$2,500 over and above property exempt from execution.")

Comment:

Considering that most spouses now hold much of their property in joint tenancy, the further blanket exemption of \$10,000 of the deceased's property from administration could have a profound effect on the speed of small estate administration in Oregon.

Family Allowances

Recommendation:

§3. Family Allowance
(Section 2 of Gilley-Krause draft with addition of
"in addition to exempt property" after first comma
in subsection (1).)

(I have assumed that provision will be made elsewhere
to the effect that family allowance is to be paid
after administration and funeral expenses, but before
all other claims. Exempt property is not treated as
part of the estate for any purpose.)