

ADVISORY COMMITTEE
Probate Law Revision

Fifth Meeting

Date: Saturday, August 22, 1964
Time: 9 a.m.
Place: Judge Dickson's courtroom.
244 Multnomah County Courthouse
Portland

Suggested Agenda

1. Approval of minutes of July 18 meeting of advisory committee.
2. Report on publicity and miscellaneous matters (Lundy).
3. Dower and curtesy.
 - a. Proposed legislation entitled "Changing Dower and Curtesy" (Rough Draft, 8/4/64).
 - b. Proposed legislation entitled "Protecting Property Right During Marriage" (Rough Draft, 8/4/64).
 - c. Report by Gooding in opposition to proposed legislation.
4. Guardianship and conservatorship (if time permits).

Continued consideration of proposed legislation (Rough Draft, 7/18/64), starting with section 3 thereof.
5. Next meeting of advisory committee.

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Fifth Meeting, August 22, 1964

Minutes

The fifth meeting of the advisory committee was convened at 9:05 a.m., Saturday, August 22, 1964, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland. All members were present. Also present was Robert W. Lundy, Chief Deputy Legislative Counsel.

Before the meeting was convened, Riddlesbarger suggested that a matter the committee might wish to consider at some future time was that of allowing an attorney an advance on his fees for legal services performed for a decedent's estate before the settlement of the account of the executor or administrator thereof. He pointed out that the statutes presently do not provide for such advances, and commented that the committee should give some thought to the advisability of proposing a statutory provision on the matter. [Note: See ORS 117.660.]

1. Minutes of Last Meeting. At Dickson's request, Lundy summarized briefly the proceedings at the last meeting of the committee. Zollinger moved, seconded by Jaureguy, that reading of the minutes of the last meeting (July 18, 1964) be dispensed with and that they be approved as submitted. Motion carried.

2. Report on Publicity and Miscellaneous Matters. Lundy reported that news releases on the last meeting had been prepared and copies thereof distributed according to the established pattern. He indicated that the news release on the June 13 meeting had been published in the July issue of the Oregon State Bar Bulletin. He noted that he had received no comments and suggestions on problem areas in Oregon's probate and related law since the last meeting.

Lundy also reported that Thompson Snyder, attorney, Corvallis (formerly a member of the staff of the Legislative Counsel Committee), had contacted him with regard to the area of the committee's immediate program pertaining to summary proceedings for administration of small estates of decedents. Snyder had indicated that he had noted the committee's interest in this area as reported in the publicity on committee activities, and that he had recently done some research and prepared a paper on simplified probate procedure in certain decedents' estates situations, including small estates, apparently in connection with the current project of special committees of the National Conference of Commissioners on Uniform State Laws and the American Bar Association to work

on a uniform or model probate code. [Note: See Staff Report No. 1 ("Probate Law Revision in Oregon--An Initial Staff Report to the Advisory Committee on Probate Law Revision," dated April 1964), pages 37 and 38.] Snyder had promised to send a copy of his paper to Lundy, and Lundy remarked that he would forward this to Denny Z. Zikes, who was engaged in research for the committee in the area of summary proceedings for administration of small estates.

Dickson reported that he had recently consulted with Zikes and two other attorneys assisting Zikes on the small estates research project. He indicated that he would inform Zikes of Snyder's interest and suggest that Zikes contact Snyder on the matter. Dickson also reported that those engaged in the small estates research project were tentatively thinking of small estates in terms of a maximum value of \$10,000. Some members expressed the view that this maximum value probably was too high, but the committee agreed that this was a matter that should be postponed until the research report was before the committee for consideration and that the maximum value could be adjusted as determined desirable at that time.

Lundy asked Dickson about the progress being made by Campbell Richardson on the research project for the committee in the area of probate courts and their jurisdiction, whether Richardson contemplated the submission of any proposed legislation in this area to the 1965 legislature and whether Richardson needed any assistance from the Legislative Counsel's office in regard to the project. [Note: See Minutes, Probate Advisory Committee Meeting, 6/13/64, page 2.] Dickson responded that he had not discussed the matter with Richardson recently, but would do so and suggest that Richardson contact Lundy.

3. Dower and Curtesy. [Note: Before the meeting copies of the following had been distributed to members: (1) A rough draft of proposed legislation entitled "Changing Dower and Curtesy" (dated August 4, 1964), prepared by Allison and Lundy pursuant to and based upon action by the committee at the June 13 meeting; (2) a rough draft of proposed legislation entitled "Protecting Property Right During Marriage" (dated August 4, 1964), prepared by Allison and Lundy pursuant to and based upon action by the committee at the June 13 meeting; and (3) a report containing critical comment on and expressing views in opposition to the two rough drafts of proposed legislation, prepared by Gooding. A copy of Gooding's report constitutes Appendix A to these minutes.]

Allison outlined the aims of the two rough drafts, referred to some of the details thereof and commented on the policy which they were intended to implement. He expressed the views that the proposed fee estate in one-fourth of a decedent's real

property was a more desirable interest for the decedent's surviving spouse than the present life estate in one-half of such real property, and that there should not be much opposition to this proposal. He commented that the nature of the interest of a spouse to be protected during the marriage by the declaration proposal justified the characterization "inchoate marital right." Allison noted that Gooding's report argued that the device of the recorded declaration to protect an inchoate right would probably seldom be used and that its use involved unusual burdens on the nonowner spouse, such as obtaining knowledge of the owner spouse's separate real property, obtaining legal advice and assistance in connection with preparing and recording the declaration, securing an accurate description of the property and causing personal service on the owner spouse. Allison agreed that the declaration device would probably be used only in unusual cases, since most conveyances of real property to married persons were in the form of tenancies by the entirety, and commented that tenancies in common in such situations were unusual. He expressed the view that the declaration device would most likely be used only with respect to property inherited by the owner spouse or acquired by the owner spouse before the marriage or in cases in which the spouses were separated. He remarked that the proposed form for the declaration included in the rough draft was an uncomplicated one that need not necessarily be prepared by an attorney, and that there would probably be sufficient sources from which a nonowner spouse might learn of the declaration device in those cases in which the protection afforded thereby was necessary or desirable. He suggested that in some instances the owner spouse might urge the use of the declaration device by the nonowner spouse. Allison expressed the views that the present inchoate dower and curtesy caused many problems with respect to real property, as where, for example, spouses had separated but there was no divorce, or a nonowner spouse had disappeared and could not be found, and that the advantages of abolishing the present dower and curtesy and substituting the more substantial interest in real property of the owner spouse at his death, together with the declaration device for use in the unusual situations in which the nonowner spouse needs or wants the protection afforded thereby, outweighed the advantages of the present dower and curtesy.

Gooding summarized the points made in his report in opposition to the two rough drafts. He expressed agreement with the proposal to change the dower and curtesy interest from a life estate in one-half to a fee estate in one-fourth, but argued against abolition of the inchoate interest. He commented that a principal drawback of the proposed declaration device was the requirement of personal service on the owner spouse; that such service would most likely cause marital discord. He also pointed out that if the declaration device

were to become law, every time an owner spouse wished to convey any of his separately owned real property a check on whether the nonowner spouse had recorded a declaration would have to be made, or the nonowner spouse would be joined in every such conveyance as a matter of course.

Allison commented that it was his impression that the trend in recent revisions of probate law in other states was to abolish dower and curtesy, including the inchoate interest. Lundy remarked that there appeared to be such a trend, but that the movement away from dower and curtesy also appeared to be a slow and somewhat reluctant one. He reported that, in so far as he had been able to determine, all aspects of dower and curtesy had been abolished in 13 states (i.e., Alaska, Colorado, Connecticut, Georgia, Mississippi, Missouri, New York, North Dakota, Oklahoma, South Dakota, Tennessee, Vermont and Wyoming), and most recently in Missouri in 1955 and Alaska in 1963. He pointed out that dower and curtesy had been abolished expressly by name in some other states, but the inchoate interest had been retained under some other designation, and referred to section 238 of the 1963 Iowa Probate Code as an example of this. He noted that dower and curtesy had been substantially abolished in England in 1833 by permitting the owner spouse to defeat the inchoate interest by conveyance or will, and that the last remnants of dower and curtesy had been eliminated in 1925. England and many of the Commonwealth countries, Lundy indicated, now had "family maintenance" legislation, which was roughly similar to the allowances to surviving spouses and minor children in this country, but more flexible and with aspects of election against will. He remarked that there was a considerable body of recent literature on the subject of dower and curtesy and proposals for substitutions therefor designed to establish and preserve family rights in decedents' estates. Such proposals, he commented, included treatment by the Model Probate Code of certain inter vivos gifts by a decedent as in fraud of marital rights, extension of election against will to inter vivos transfers by a decedent that are included in the decedent's estate for federal estate tax purposes, subjection of a portion of all real and personal property owned by a married person to a statutory trust in favor of the spouse of such person and several variations of the family maintenance legislation current in England and many of the Commonwealth countries. Lundy pointed out that those involved in the probate law revision project currently being prosecuted in Wisconsin had been exploring aspects of some of these proposals, but thus far apparently had not agreed on the suitability of any of them as a substitute for dower and curtesy.

The committee then discussed in some detail the two rough drafts and possible alternatives to the proposed declaration device as a means of recognizing and protecting some kind of inchoate interest in the real property of an owner spouse in favor of the nonowner spouse during the marriage.

a. Proposed legislation entitled "Changing Dower and Curtesy" (Rough Draft, 8/4/61). All members expressed approval of the proposal embodied in the rough draft to change the interest of a decedent's surviving spouse in the real property owned by the decedent, whether taken in the case of the decedent's intestacy or by election against the decedent's will, from a life estate in one-half to a fee estate in one-fourth.

Zollinger referred to subsection (3) of ORS 111.020, as amended by section 1 of the rough draft, and suggested, and Allison and Frohnmayer agreed, that real property should descend to the father and mother of an intestate, if married, as tenants by the entirety, rather than as tenants in common. Dickson suggested that the real property descend to them as joint tenants with the right of survivorship. Zollinger pointed out that joint tenancies had been abolished by statute. [Note: See ORS 93.180.] Dickson responded that the statute abolishing joint tenancies did not preclude another statute creating joint tenancies in certain circumstances.

Lundy raised the general proposition of whether the committee, in considering statute sections amended for purposes of changing dower and curtesy, wished also to consider aspects of those statute sections not necessarily related to the dower and curtesy matter, or to reserve such aspects for consideration in the future. Zollinger expressed the view, with which the committee apparently agreed, that it would be appropriate for the committee at this time to consider such aspects as were recognized as needing revision whether or not they necessarily related to the dower and curtesy matter.

Zollinger referred to the new provision on waiver of the right of election against will added to ORS 113.060 as subsection (2) thereof by section 3 of the rough draft, and commented on the difficulty of determining whether there had been "a fair consideration under all the circumstances" given to the person waiving the right. Lundy pointed out that the wording of the waiver provision was based upon the wording of section 39 of the Model Probate Code. Zollinger suggested, and Dickson agreed, that the words "after full disclosure of the nature and extent of the right and if the thing or promise given to the person waiving the right is a fair consideration under all the circumstances" should be deleted from the waiver provision. Allison pointed out that the waiver provision would apply to the right of election against will as to personal property as well as to real property, and expressed the view that the waiver provision might become a source of controversy. He commented that the waiver provision was not essential to the central theme of the rough draft (i.e., changing dower and curtesy), and suggested, and the committee agreed, that all of subsection (2) be deleted.

Lundy pointed out that in the Comment under section 3 of the rough draft he had raised some questions with respect to the statutory provisions relating to election against will; that is, (1) whether the manner of service of an election on the executor or his attorney should be specified, (2) whether some provision should be made for election against will on behalf of an incompetent surviving spouse for whom there was no guardian of the estate, (3) whether some provision should be made with respect to the nature of the right to make an election (e.g., personal, not transferable and not exercisable after the death of the surviving spouse), (4) whether some provision should be made with respect to whether an election once made was binding and with respect to the effect of failure to exercise the right to elect and (5) whether some provision should be made for barring, denying or reducing an election under such circumstances as where other adequate provision had been made for a surviving spouse, or a decedent and surviving spouse were living apart at the time of the decedent's death, or a surviving spouse had abandoned a decedent. Frohnmayer commented that these questions might involve controversial matters and might require a considerable amount of time to resolve, that the committee had adopted the view that changing dower and curtesy was a matter it wished to present to the 1965 legislature and that if these questions were considered and an attempt made to resolve them the proposed legislation relating to dower and curtesy might not be completed in time for submission to the 1965 legislature. The committee apparently agreed that these questions should not be considered at this time.

Allison pointed out that section 5 of the rough draft would repeal 41 existing statute sections that related wholly to dower and curtesy, but that ORS 113.090, imposing a 10-year statute of limitations on actions or suits by surviving spouses to recover or reduce to possession dower or curtesy, was not included in the list of statute sections to be repealed. He suggested that ORS 113.090 be retained, noting that Lundy had pointed out in the Comment under section 5 of the rough draft that this statute section would become obsolete 10 years after the effective date of the proposed legislation.

Lundy noted that in the Comment under section 5 of the rough draft he had pointed out that amendments of statute sections that appeared to relate partially to dower and curtesy for the purpose of deleting pertinent portions thereof were not included in the rough draft because of the substantial bulk they would have added thereto at this time, and that he had listed in the Comment a number of statute sections that probably should be amended in the proposed legislation in its final form. He reported that he had discovered, since preparation of the rough draft, a few additional statute sections not listed in the comment that related partially to dower and curtesy and that probably should be amended (i.e., ORS 91.020, 91.030,

94.330, 94.445 and 105.220).

Zollinger indicated that he had some relatively minor suggestions with respect to the wording of certain portions of the rough draft. At Dickson's suggestion, Zollinger agreed to send these suggestions to Allison and Lundy.

b. Proposed legislation entitled "Protecting Property Right During Marriage" (Rough Draft, 8/4/64). Jaureguy asked about the nature of the declaration device embodied in the rough draft and whether a nonowner spouse would have a protected inchoate right if a declaration was not recorded. Allison pointed out that there would be no inchoate right unless a declaration was recorded, and, in response to a question by Jaureguy, affirmed that recording a declaration would have the effect of creating an inchoate right.

Gooding commented, and Jaureguy agreed, that there might be considerable reluctance on the part of a nonowner spouse to have a copy of the declaration served personally on the owner spouse for fear of causing marital discord. Allison expressed the views that personal service on the owner spouse was not essential to the creation of the inchoate right by the recording of the declaration, and that he would not object to elimination of the personal service. Carson, Dickson and Zollinger agreed that the personal service should be eliminated. Frohnmayer remarked that, although personal service might not be essential to the creation of the inchoate right, if a nonowner spouse recorded a declaration without informing the owner spouse and the owner spouse later found out about the recording, as much marital discord might result as if there had been personal service at the time of the recording. Dickson and Jaureguy suggested that the declaration device might most often be used in those cases in which marital discord already existed. Carson noted that the requirement of personal service injected into the procedure the possibly bothersome matter of determining whether the service was valid. Lundy pointed out that personal service on the owner spouse was tied in with the right of the owner spouse to maintain an action to challenge the validity and sufficiency of the declaration within 10 years after the recording. Zollinger commented that if personal service was not required there would be no occasion for challenging the declaration and no reason for a statute of limitations on such a challenge; that the primary basis for challenge would be whether or not there had been personal service or its validity. Lundy suggested that there might be other grounds for challenging the recorded declaration, such as whether the owner spouse in fact owned the real property in his sole right, whether the alleged spouses were in fact married and whether the property was accurately described.

In answer to a question by Butler, Riddlesbarger pointed out that the rough draft required the declaration to describe the particular real property to which it was applicable, rather than the declaration being made applicable generally to property owned by the owner spouse in his sole right. Butler commented that in view of this circumstance it would be possible for one spouse to acquire property without knowledge on the part of the other spouse, who would have to check the records of deeds in order to learn about such property before undertaking to record a declaration to protect the inchoate right as to such property. Allison noted that in the early drafting stages consideration was given to making the declaration applicable to all property owned in sole right by the owner spouse in the county in which the declaration was recorded, but that some members at the last meeting had expressed a preference for the specifically described property approach. He commented that he contemplated a frequent use of the declaration device with respect to the homestead only. Butler asked about the possible situation in which one spouse acquired property and did not record the transaction, and whether in such a situation there should be a legal presumption that the other spouse had recorded a declaration applicable to such property. Frohnmayer commented that the situation of an unrecorded deed was very rare, and expressed the view that it was not necessary to be concerned about such a situation. Allison suggested that the declaration should be made applicable to all property in the county in which the declaration was recorded. Zollinger suggested, and Frohnmayer agreed, that the nonowner spouse recording the declaration should be permitted to designate either all property located in the county or particular described property so located.

Jaureguy commented that the principal unresolved questions appeared to be whether there should be a protected inchoate right in favor of the potential surviving spouse and, if so, whether the declaration device was the best means of protecting such an inchoate right. He remarked that the committee appeared to be concerned primarily with the situation in which one spouse did not wish to make suitable provision for the other spouse who survived him. He suggested that there might be cases in which a surviving spouse would prefer that all of the decedent's real property go to the children.

Zollinger questioned the policy of a protected inchoate right as to real property in favor of a potential surviving spouse, and whether there should be any more restriction on the inter vivos transfer of real property than on such transfer of personal property. He indicated that he favored no inchoate right as to real property. He commented that members had previously expressed a desire for protection afforded by an inchoate right, particularly with respect to the home in which the spouses lived and at least if the home was acquired

during the marriage; that the Alaska approach, requiring the joinder of both spouses in a conveyance of the family home or homestead, had been considered but abandoned because experience in that state had revealed the difficulty in determining what was the home; and that the committee had then turned to the declaration device applicable to any real property owned in sole right by one spouse. Zollinger expressed his willingness to accept the declaration device as less drastic than complete elimination of the inchoate right, which he nevertheless preferred.

Dickson expressed the view that there should be some way whereby a nonowner spouse was protected against the other spouse disposing of his real property inter vivos so as to adversely affect provision for the nonowner spouse at the owner spouse's death, and that the declaration device appeared to him to be the best way to do this; that it appeared to be a fair and just compromise of the differing views expressed by the members. He commented that the declaration device afforded a means of protecting the nonowner spouse in the extraordinary situations, and that it need only be used in such situations.

At Dickson's request the members were polled on the questions of adopting the declaration device and of completely eliminating an inchoate right. Zollinger indicated that he was willing to accept either the declaration device or complete elimination of the inchoate right. Carson expressed agreement with Zollinger's position. Jaureguy indicated that he was opposed to the declaration device and, although somewhat uncertain on the matter of complete elimination of the inchoate right, was inclined to favor such elimination. Butler expressed opposition to the declaration device and support for complete elimination of the inchoate right. Gooding commented that he was undecided on both matters. Allison indicated that he favored the declaration device for the practical reason that it would make it easier to secure approval by the legislature of the proposal for abolishment of dower and curtesy. Frohnmayer expressed agreement with Allison's position, and commented that, although he was opposed to the declaration device, the problem of securing legislative approval had to be considered, that some provision should be made for protecting the nonowner spouse in the difficult and unusual situations and that the declaration device might be adequate for such purpose. Riddlesbarger indicated that he opposed the declaration device and that he did not believe the legislature would approve it. Dickson commented that he favored the declaration device, but that he also so strongly favored elimination of inchoate dower and curtesy that he would be willing to support such elimination without the declaration device.

c. Alternatives to declaration device. Riddlesbarger indicated that he opposed the declaration device, and expressed the view that a nonowner spouse should not have to take such affirmative action in order to protect an inchoate right as to the real property owned by the other spouse. He suggested that inchoate dower and curtesy be retained and that waiver thereof be provided for by means of a declaration filed by the nonowner spouse. Zollinger and Allison disagreed with Riddlesbarger's suggestion. Allison commented that one of the principal practical problems arising out of the present dower and curtesy occurred where it was difficult or impossible to obtain joinder of a nonowner spouse in a conveyance of the property, and that Riddlesbarger's suggestion would not resolve that problem. Riddlesbarger then suggested the possibility of abandoning an inchoate right altogether and adopting an expanded and more flexible surviving spouse's allowance device, to be used when necessary and determined in an adversary proceeding as in the case of a divorce.

Indicating that he also opposed the declaration device, Frohnmayer commented that probably in most cases both spouses contributed to and were responsible for the acquisition of real property during the marriage, and suggested that an approach might be taken whereby if one spouse owned property and the other spouse refused to join in a conveyance thereof, the owner spouse could institute a proceeding to determine the extent of the interest of the nonowner spouse in the property, proceed to sell and convey the property and have a portion of the proceeds of such sale allocated to the nonowner spouse based upon the determined interest of the nonowner spouse. Zollinger remarked that Frohnmayer's suggestion appeared to involve an aspect of the community property concept.

Zollinger suggested that the application of the declaration device might be limited to the real property constituting the homestead. Frohnmayer expressed disapproval of requiring a nonowner spouse to record such a declaration, and suggested that the joinder of a nonowner spouse be required in a conveyance of the homestead and that to secure compliance with such requirement the owner spouse state in a conveyance without the joinder of the nonowner spouse that the property conveyed was not the homestead. Zollinger suggested that an owner spouse should make such a statement in his acknowledgment of the conveyance or in the form of an oath before a notary. In answer to a question by Riddlesbarger, Frohnmayer indicated that the homestead might be that as presently defined by statute. Riddlesbarger and Zollinger remarked that they did not favor the present statutory definition of a homestead. Zollinger suggested that the owner spouse's statement be that the property conveyed was not the place of residence of both spouses or either of them. Frohnmayer commented that

violation of the owner spouse's statement under oath would bring into play both criminal and civil sanctions. Zollinger commented that the probable practical effect of requiring such a statement by the owner spouse would be that a grantee would insist upon joinder of both spouses in the conveyance in all cases where it was at all evident that one or both spouses resided on the property.

Riddlesbarger suggested, and Dickson agreed, that members should make an effort to obtain the reaction of attorneys and others of their acquaintance to the declaration device and the owner spouse's statement device and report such reaction at the next meeting. Dickson suggested that this matter be publicized in the Oregon State Bar Bulletin for the purpose of soliciting the views of members of the Bar to be received before the next meeting. Lundy pointed out that the deadline for submission of material to be published in the August issue of the Bar Bulletin had already passed.

Dickson suggested, and the committee agreed, that the matter of the declaration device, the owner spouse's statement device and other possible devices for protecting an inchoate right should be considered again at the next meeting. Allison indicated that he and Lundy would endeavor to prepare, in time for consideration at the next meeting, a rough draft of proposed legislation embodying the concept of an owner spouse's statement to protect the right of the other spouse in the home of either or both spouses, and perhaps a revised rough draft embodying the declaration device, with personal service of the declaration on the owner spouse eliminated and application of the declaration extended to all property in the county in which the declaration was recorded.

4. Guardianship and Conservatorship. The committee continued its consideration, begun at the last meeting, of the amendment of ORS 126.336 (relating to accounting by guardians) by section 2 of the rough draft of proposed legislation on guardianship and conservatorship (dated July 18, 1964).

a. Intermediate accounts. Lundy pointed out that at the last meeting the committee had arrived at some tentative conclusions concerning the content of subsection (4) of ORS 126.336 (relating to the disposition of accounts other than final accounts of a guardian of the estate), and that he had been requested to prepare a revised draft of subsection (4) embodying, in so far as possible, the revisions apparently agreed upon by the committee. He distributed to the members copies of such a revised draft he had prepared. [Note: This revised draft is reproduced as Appendix B to these minutes.]

Frohnmayr indicated that he had read that portion of the minutes of the last meeting pertaining to the disposition of intermediate accounts, and expressed the view that copies of the accounts need not be furnished by the guardian to as many persons as contemplated by the revised draft of subsection (4). He remarked that interested persons could obtain copies of the accounts from the clerk of the probate court with whom they were filed.

Lundy referred to the present wording of subsection (4) (i.e., "The guardian of the estate shall give a copy of each account to the person or institution having the care, custody or control of the ward"), and noted that it was somewhat similar to that relating to service of citation in a proceeding for the appointment of a guardian. [Note: See ORS 126.131.] He also referred to the proposed code of probate procedure prepared by the 1942 Bar Committee on Probate Law and Procedure, and pointed out that section 206 of that proposed code provided for a hearing on the annual account of a guardian, with notice thereof to the ward's spouse, next of kin and creditors.

Riddlesbarger moved, seconded by Zollinger, that the revised draft of subsection (4) be approved. Motion carried, with Frohnmayr voting no.

Frohnmayr expressed the view that in most cases it was almost as much of a burden on a guardian to furnish notices of the filing of an account as copies of the account itself, and questioned the desirability of the provisions of the revised draft of subsection (4) relating to such notices. Riddlesbarger suggested that copies of the account should be sent to everyone entitled to receive notices if the account was not too voluminous. Zollinger suggested, and the committee apparently agreed, that, in terms of compliance with the notice requirements of the revised draft, sending a copy of the account should be considered the equivalent of sending a notice.

Allison indicated that in his opinion the provisions of the revised draft relating to notices should be deleted. He suggested that paragraph (a) (A) of the revised draft be revised by deleting the words "or a notice to the superintendent of the institution who has not so presented such a request," and that paragraph (a) (D) be revised by providing that if the ward was a minor or an incompetent, a copy of the account would be furnished to the ward's spouse who was not under legal disability "and to any other member of the ward's family or relative who has requested a copy of the account." Zollinger asked whether "member of the ward's family or relative" should be defined. Lundy suggested, and Allison agreed, that "any child, parent, brother or sister of the ward" be substituted for "any other member of the ward's family or relative."

Frohnmayer commented that the negative phrasing of paragraph (a) (C) of the revised draft was somewhat confusing and suggested that the paragraph might be phrased affirmatively; that is, "if the ward is a minor 14 years of age or older* * *." Zollinger suggested, and the committee apparently agreed that paragraph (a) (C) should be revised to read: "If the ward is a minor 14 years of age or older or a spendthrift, a copy of the account to the ward."

Allison moved, seconded by Frohnmayer, that Lundy be requested to prepare and submit to the committee at the next meeting a draft of subsection (4) based upon Allison's suggestions for revision of the present revised draft by eliminating the notice provisions thereof, so that the committee might have an alternative to the present revised draft to consider at that time. Motion carried unanimously.

At Riddlesbarger's request the members were polled on the question of whether the notice provisions of the revised draft of subsection (4) should be eliminated. It appeared that all members were favorably disposed toward elimination of the notice provisions.

Zollinger asked whether the proposed legislation should provide for the making of some kind of record of requests for copies of an account received by a guardian and some kind of record of compliance by the guardian with such requests. Allison commented that procedures to document compliance by a guardian in many other instances in which the guardian had duties had not been established by specific statutory provisions, and expressed the view that such procedures were not necessary with respect to the requirement that a guardian make a particular distribution of copies of his intermediate accounts. Riddlesbarger indicated that he saw no reason to require an affidavit of compliance of a guardian with respect to distribution of copies of intermediate accounts since settlement of such accounts was not binding on persons entitled to receive such copies, but that he might favor some such requirement with respect to final accounts if final accounts were binding.

Lundy asked whether the requirement of the revised draft of subsection (4) that a guardian distribute copies of an account to the persons entitled thereto before filing the account in the guardianship proceeding should be retained, noting that this requirement tied in with the affidavit of compliance requirement in paragraph (c) of the revised draft. Frohnmayer suggested that requests for copies of accounts should be filed with both the guardian and the court, so that the court would have a basis for verifying that the guardian had complied with such requests. Dickson expressed the view, with which Zollinger and Riddlesbarger agreed, that requests

for copies of an account which a guardian was required to distribute should be received by the guardian before he filed the account in the guardianship proceeding, and that the guardian should file an affidavit of compliance with such requests at the same time that he filed the account.

Dickson remarked that if a guardian received a request for a copy of an account after the account was filed in the guardianship proceeding, the furnishing of such a copy would involve an additional expense someone would have to bear. Riddlesbarger commented that perhaps the guardianship estate should bear the expense of furnishing copies of accounts requested after the accounts were filed. Zollinger and Butler expressed the view that a person requesting a copy of an account after the filing of the account, rather than the guardianship estate, should bear the expense of furnishing such copy. Lundy pointed out that the revised draft did not specifically prohibit a guardian from sending a copy of an account to a person who requested it after the account was filed, if the guardian wished to do so, but also that there was no specific authorization for a guardian to do so and no specific provision as to who would bear the expense of furnishing such a copy.

b. Final accounts. Noting that at the last meeting he had agreed to undertake some research on the effect of settlement of a guardian's final account and discharge of the guardian, the liability of the guardian thereafter and related matters, Riddlesbarger pointed out that ORS 126.540 threw some light on these matters by providing that upon settlement of a guardian's final account the court would discharge him and exonerate the sureties on his bond, but that this discharge and exoneration did "not relieve the guardian or the sureties on his bond from liability for previous acts or omissions of the guardian." Riddlesbarger commented that he concluded from this that the responsibility of a guardian was not terminated by settlement of his final account, and that therefore the settlement of the final account need not be in the nature of an adversary proceeding requiring personal service on interested persons. Zollinger expressed the view that settlement of the final account should terminate the responsibility of a guardian with respect to matters disclosed in the final account, although perhaps not as to fraudulent misconduct on the part of the guardian or matters not disclosed in the final account.

Riddlesbarger referred to the statutory provision relating to the consequences of settlement of the final account of an executor or administrator [Note: See ORS 117.630], and indicated that under this provision the court decree settling the final account was "primary evidence of the correctness of the account as thereby allowed and settled" in "any other action, suit or proceeding between the parties interested and their representatives." He remarked that Zollinger appeared to

favor a similar approach with respect to the effect of settlement of the final account of a guardian. Jaureguay indicated his willingness to accept Zollinger's approach with respect to the finality of the final account of a guardian if the one-year statute of limitations were applicable in all cases of such a final account [Note: See ORS 18.160]. Frohnmayer expressed doubt that ORS 18.160 applied to the settlement of the final account of an executor, administrator or guardian, and commented that if it did so apply, it perhaps should not do so.

Riddlesbarger noted that section 682 of the 1963 Iowa Probate Code provided for discharge of a guardian of the estate and exoneration of the surety on his bond upon settlement of his final account, and that section 479 of that Code provided that the court order approving the final account of the personal representative of a decedent constituted waiver of any omission from the final account of any of the specific recitals required to be made therein by section 477. Lundy pointed out that section 233 of the Model Probate Code provided for notice of hearing of every accounting to the same persons and in the same manner as required for notice of petition for the appointment of a guardian, and further provided that settlement of any account, subject to appeal and the power of the court to vacate, was binding on all persons except the ward or, if he died before settlement, his personal representative, who might question any item of the settlement within two years after the date of discharge of the guardian, but not thereafter.

After further discussion, the committee agreed to postpone until the next meeting further consideration of the matters of a guardian's final account, its finality, the persons who should receive copies thereof and the manner of furnishing copies thereof to such persons.

5. Next Meeting of Advisory Committee. The next meeting of the advisory committee was scheduled for Friday, September 11, at 7 p.m., and continuing Saturday, September 12, at 9 a.m., in Dickson's courtroom, 244 Multnomah County Courthouse, Portland.

Lundy asked whether the committee wished to consider the legislation relating to a guardian's access to the ward's safe deposit box proposed by the Bar Committee on Probate Law and Procedure [Note: See Minutes, Probate Advisory Committee Meeting, 7/18/64, page 3], with a view to including it in the advisory committee's proposed legislation on guardianship and conservatorship. The committee agreed that consideration of this and other Bar committee proposals should be postponed until after the Bar had acted thereon at its annual meeting in October.

The meeting was adjourned at 1:15 p.m.

APPENDIX A

(Minutes, Probate Advisory Committee Meeting, August 22, 1964)

REPORT

August 11, 1964

To: Members of the Advisory Committee
on Probate Law Revision

From: R. Thomas Gooding

Subject: Opposition to proposed legislation changing dower and curtesy, and proposed legislation protecting property right during marriage, submitted August 4, 1964

The proponents desire to change the choate right (dower and curtesy) to a fixed one-quarter interest in the nonowner survivor, provide for the antenuptial and postnuptial waiver and release of the survivor's right of election to the choate interest, propose to abolish all forms of dower and curtesy, and would establish an "inchoate marital right" by the filing of a declaration.

Dower and curtesy have received glowing, esteemed and vigilant support from the earliest of times. The books indicate that procedural and administrative changes have been effected but the basic substantive rights and concepts have remained. Of course, age alone is not sufficient to justify any concept, but the primary objection to the proposed legislation lies in its attempt to abolish the little protection now existing in favor of the nonowner spouse.

A change is unnecessary.

The owner spouse has no affirmative duty to create an estate to which these rights will presently attach. Personal property is exempt and conveyancing will defeat a nonowner spouse. The committee is of the opinion that our greatest wealth presently resides in personal property.

Real property may be exempted through corporate ownership. Land ownership is increasingly assuming a corporate form. The rights do not attach to partnership real property.

The rights may be prevented by an antenuptial contract, not an uncommon agreement between older people.

Most real property is held by the entirety. Moreover, almost all spouses' testamentary schemes, without exception, will all to the survivor or make suitable trust provisions for the survivor. In these instances, the rights are of no consequence.

Some of the committee favor abolition of dower and curtesy as useless impediments against conveyancing. In view of the fact that we are dealing with a limited, unusual situation, and a matter which, at its inception, may be avoided by a corporate ownership, an increasing trend, this argument appears to be somewhat exaggerated. At least, this argument cannot preponderate over the reasons and the purposes of dower and curtesy, the protection of the nonowner spouse. The nonowner spouse should not be put to seek the charity of the State or those who have received the fruits of the decedent's conveyancing shortly before death. The change is wholly unnecessary and it is rather unwise.

The choate interest of one-fourth.

This choate right of one-quarter is wholly ineffective if it is not preceded by the inchoate right, as it can be precluded by conveyancing. As mentioned later, the proposed declaration is regarded as unsatisfactory.

However, aside from the proposed abolition of the inchoate rights, the proposal to fix the interest at one-quarter in fee is more certain and manageable than the present life estate.

There has been some suggestion against a fixed interest and in favor of leaving the quantity in an uncertain amount to be ascertained by the court as in divorce cases and according to the survivor's needs, contribution, age, length of marriage and possibly other provisions made by the decedent for the survivor's benefit. This suggestion could be drafted by granting an alternate election with notice to interested people and a court determination. It is commendable in that a court could provide a more realistic quantity. However, it would serve to increase costs, expenses, and might tend to increase interfamily litigation. No favorable recommendation is given to this alternative.

Declaration of "inchoate marital right."

In discussing the "inchoate marital right," the proponents on page 4 of the rough draft state that "the protection afforded thereby resembles somewhat that afforded by inchoate dower and curtesy." At first glance, this procedure appears to completely reinstate the inchoate rights. This is logically inconsistent with the proponent's above abolition of the inchoate rights. If the arguments against the inchoate rights, ease of conveyancing and financing, are valid, then why should we create any loophole which reinstates these rights? Or is the proposed reinstatement of the inchoate rights a recognition of the good reasons for retaining these rights as they presently exist?

A wholesale use of this procedure would nullify the attempts to abolish dower and curtesy as they presently exist. It is doubtful whether these declarations would be widely used, but this is a matter of pure speculation.

It is surmised that a declaration would be seldom used. Witness the lack of the use of the homestead declaration. Its procedure involves the nonowner spouse obtaining knowledge of the owner's separate property, obtaining a lawyer, securing the correct description of all or the chosen parcel of separate property, the signing of the declaration and the onerous personal service of the declaration on the owner spouse. In this situation, it is suggested that personal service can only be safely obtained by the use of the sheriff's services.

Because of the unusual burdens placed upon the nonowner spouse, it is questionable whether the declaration would receive much use. If the reasons for the "inchoate marital right" are valid, the right should not be so encumbered with these burdens. Moreover, the exercise of this right would not be conducive to domestic harmony.

Thus, this procedure would seldom be used. In practical effect, it would not be a reinstatement of the present dower and curtesy and appears to be a useless act. It is not recommended.

APPENDIX B

(Minutes, Probate Advisory Committee Meeting, August 22, 1964)

REPORT

August 22, 1964

To: Members of the Advisory Committee
on Probate Law Revision

From: Robert W. Lundy
Chief Deputy Legislative Counsel

Subject: Disposition of intermediate accounts of guardian
of estate

At the last meeting of the Advisory Committee, I was requested to prepare a revised draft of subsection (4) of ORS 126.336, embodying, in so far as possible, the revisions apparently agreed upon by the committee at that meeting. See Minutes, Probate Advisory Committee Meeting, 7/18/64, page 1^{1/4}. Following is such a revised draft of subsection (4), which relates to the disposition of accounts other than final accounts of a guardian of the estate.

126.336. * * *

* * *

(4) (a) [The] Before filing any account other than his final account, a guardian of the estate shall [give a copy of each account to the person or institution having the care, custody or control of the ward.] cause to be mailed or delivered:

(A) If the ward has been committed or admitted to, and not discharged from, a state institution listed in ORS 426.010, 427.010 or 428.420, a copy of the account to the Secretary of the Oregon State Board of Control, and a copy of the account to the superintendent of the institution who has presented a request for a copy to the guardian before the filing of the account or a notice to the superintendent of the institution who has not so presented such a request.

(B) If there is a guardian of the person for the ward other than the guardian of the estate, a copy of the account to the guardian of the person.

(C) If the ward is not a minor under 14 years of age or an incompetent, a copy of the account to the ward.

(D) If the ward is a minor or an incompetent, a copy of the account to the ward's spouse who is not under legal disability; or, if there is no such spouse, a copy of the account to each of the ward's children who is not under legal disability and has presented a request for a copy to the guardian before the filing of the account and a notice to each of the ward's children who is not under legal disability and has not so presented such a request; or, if there are no such spouse and no such children, a copy of the account to each of the ward's parents who is not under legal disability; or, if there are no such spouse, no such children and no such parents, a copy of the account or a notice to each of the ward's brothers and sisters who is not under legal disability and has presented a request for a copy or a notice to the guardian before the filing of the account.

(b) The notice referred to in paragraph (a) of this subsection (4) shall include the following information:

(A) The names, residence and postoffice addresses of the ward and the guardian of the estate.

(B) The reason for the filing of the account, as provided in subsection (1) of this section.

(C) The place and date of the filing of the account.

(D) A statement that the recipient of the notice may obtain a copy of the account filed or of any account filed thereafter by the guardian by presenting a request therefor to the guardian.

(c) The guardian of the estate shall file with each account other than his final account his affidavit or other proof satisfactory to the court that copies of the account or notices have been mailed or delivered as provided in paragraph (a) of this subsection (4), showing the names of the persons to whom, and the addresses to or at which, the copies or notices were mailed or delivered. If the guardian, by the exercise of reasonable diligence, is unable to determine the name and address of any person to whom a copy of the account or a notice is to be mailed or delivered as provided in paragraph (a) of this subsection (4), the affidavit or other proof shall so state, and, with respect to such person, this is a sufficient compliance with paragraph (a) of this subsection (4).

(d) The guardian of the estate shall cause to be mailed or delivered a copy of any account other than his final account to any person who presents a request therefor to the guardian after the filing of the account and to whom a notice was mailed or delivered as provided in paragraph (a) of this subsection (4).

Comment: The revision of subsection (4) of ORS 126.336 by the above draft is based upon Minutes, Probate Advisory Committee Meeting, 7/18/64, pages 8 to 12; and section 2, Guardianship and Conservatorship Bill, Rough Draft, 7/18/64, pages 4 and 5. See also Minutes, Probate Advisory Committee Meeting, 6/13/64, pages 11 to 12, and Appendix C; Minutes, Probate Advisory Committee Meeting, 5/16/64, pages 10 and 11, and Appendix B, page 8.