

ADVISORY COMMITTEE
Probate Law Revision

Sixth Meeting

Dates) 7 p.m., Friday, September 11, 1964
and : and
Times) 9 a.m., Saturday, September 12, 1964
Place: Judge Dickson's courtroom
244 Multnomah County Courthouse
Portland

Suggested Agenda

1. Approval of minutes of August 22 meeting of advisory committee.
2. Report on miscellaneous matters (Lundy)
3. Dower and curtesy.

Consideration, among other matters, of (1) changes in and additions to proposed legislation entitled "Changing Dower and Curtesy" (Rough Draft, 8/4/64), (2) revision of proposed legislation on protecting property right during marriage by recorded declaration, (3) proposed legislation on statement by grantor in deed of real property not joined in by grantor's spouse that property not place of residence of grantor or spouse, and (4) reports by members on reaction by attorneys and other acquaintances on proposal to abolish inchoate dower and curtesy and on possible substitutes therefor (including recorded declaration device and grantor's deed statement device).

4. Guardianship and conservatorship.

Consideration, among other matters, of proposed legislation (Rough Draft, 7/18/64), starting with section 2 thereof (accounts of guardian of estate). Pending matters on section 2 are: Revised rough draft of subsection (4) (intermediate accounts), revision of subsection (5) (final accounts), and effect of settlement of final accounts and discharge of guardian.

Note: The secretary will not be available to take minutes at that part of the meeting scheduled for Friday evening, September 11. Therefore, it is suggested that the proceedings of that part of the meeting be limited, in so far as possible, to preliminary discussion of matters under suggested agenda items 3 and 4, and that other matters and decision making be postponed until that part of the meeting scheduled for Saturday morning, September 12.

ADVISORY COMMITTEE
Probate Law Revision

Sixth Meeting, September 12, 1964

Minutes

The sixth meeting of the advisory committee was convened at 9:05 a.m., Saturday, September 12, 1964, in Chairman Dickson's courtroom, 244 Multnomah County Courthouse, Portland. All members, except Frohnmayer, were present. Also present was Robert W. Lundy, Chief Deputy Legislative Counsel.

Dickson reported that a quorum had not been present at that part of the sixth meeting scheduled for Friday evening, September 11, and that that part of the meeting had been adjourned soon after convening, with no substantial discussion of the matters scheduled for consideration.

Lundy distributed to the members present a second loose-leaf notebook (brown) in which materials received by members might be filed, and suggested that certain materials filed in the blue notebook previously supplied to each member be transferred to the brown notebook.

1. Minutes of Last Meeting. Gooding moved, seconded by Butler, that reading of the minutes of the last meeting (August 22, 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 not been prepared, since the last meeting had been held after the deadline for submission of material to be published in the August issue of the Oregon State Bar Bulletin. He commented that the news releases on this meeting would include a reference to the last meeting. He indicated that the news release on the July 18 meeting had been published in the August issue of the Bar Bulletin.

Lundy distributed to the members present two new comments and suggestions on problem areas in Oregon's probate and related law reproduced for insertion in the "Comments & Suggestions Received" section of their notebooks. He noted that one of these (i.e., a letter from Raymond J. Salisbury, attorney, Grants Pass) and a recent letter from William F. Schulte, attorney, Portland (not yet reproduced for insertion in the "Comments & Suggestions Received" section of the notebooks), concerned matters involved in the handling of small estates of decedents, and that he had sent a copy of each to Denny Z. Zikes, who was engaged in research for the committee in the area of summary proceedings for administration of small estates. He indicated that he had also sent Zikes a paper

entitled "A Proposal for a Simplified Probate Procedure," written by Thompson Snyder, attorney, Corvallis. [Note: See Minutes, Probate Advisory Committee Meeting, 8/22/64, pages 1 and 2.]

Lundy reported that the National Conference of Commissioners on Uniform State Laws, at its annual conference in August, had approved a final draft of a Model Special Power of Attorney for Small Property Interests Act. [Note: Tentative drafts of this Model Act are filed in the committee notebook after the divider tabbed "Model Special Power of Attorney Act."] He noted that Frohnmayer had indicated interest in this Model Act, and that copies of the approved final draft would be obtained for members.

Dickson suggested that the legislation proposed by the Bar Committee on Probate Law and Procedure, to the extent approved by the Bar at its annual meeting in October, be scheduled for consideration by the advisory committee at a meeting to be held in November 1964. [Note: See Minutes, Probate Advisory Committee Meeting, 7/18/64, pages 2 to 4.] Carson moved, seconded by Butler, that the committee adopt Dickson's suggestion. Motion carried. Lundy indicated that he would be unable to attend a meeting held in November.

3. Dower and Curtesy. The committee considered in detail (1) the rough draft of proposed legislation entitled "Changing Dower and Curtesy" (dated August 4, 1964), prepared by Allison and Lundy and distributed to members before the last meeting, and (2) a rough draft of proposed legislation entitled "Protecting Property Right During Marriage" (embodied in a report dated September 11, 1964), prepared by Allison and Lundy and distributed to members before the present meeting.

a. Proposed legislation entitled "Changing Dower and Curtesy" (Rough Draft, 8/4/64).

(1) Section 1. Allison referred to subsection (1) of ORS 111.020, as amended by section 1 of the rough draft entitled "Changing Dower and Curtesy" (dated August 4, 1964), and noted that Zollinger had suggested deletion of "other" in the tenth line of subsection (1), deletion of "and" in the eleventh line and substitution of "and" for "or" in the thirteenth line. Allison expressed agreement with Zollinger's suggestions, but indicated his preference for deletion of "or" in the thirteenth line of subsection (1) over substitution of "and" therefor. Butler suggested deletion of the semicolon and "and" in the eleventh line of subsection (1), insertion of a period, making the balance of the sentence a separate sentence and substitution of a semicolon for the comma in the thirteenth line. After further discussion, Gooding moved, seconded by Butler, that "other" in the tenth line of subsection (1) be deleted, that "; and if" in the eleventh line be

deleted and ". If" be inserted in lieu thereof, and that
", or" in the thirteenth line be deleted and a semicolon in-
serted in lieu thereof. Motion carried.

At Jaureguy's suggestion, the committee discussed briefly
the policy of that part of subsection (1) of ORS 111.020, as
amended by section 1 of the rough draft, providing for descent
of real property per capita to lineal descendants in the same
degree of kindred to the intestate and per stirpes to lineal
descendants not in the same degree of kindred. The committee
agreed that no change in that policy should be proposed, at
least at this time.

Allison moved, seconded by Butler, that subsection (2)
of ORS 111.020, as amended by section 1 of the rough draft,
be approved. Motion carried.

Allison referred to subsection (3) of ORS 111.020, as
amended by section 1 of the rough draft, and noted that at
the last meeting Zollinger had suggested that real property
should descend to the father and mother of an intestate, if
married to each other, as tenants by the entirety, rather
than as tenants in common. [Note: See Minutes, Probate
Advisory Committee Meeting, 8/22/64, page 5.] In answer to
a question by Lundy, Zollinger commented that "tenants by
the entirety" appeared to be the proper terminology to use,
and that he did not intend a father and mother to take as
tenants by the entirety if they were not married to each
other or to create a right of survivorship in that circumstance.
Allison suggested that the first sentence of subsection (3)
be amended to read: "If the intestate leaves no lineal de-
scendants or surviving spouse, such real property shall descend
to the father and mother of the intestate as tenants by the
entirety if then married to each other." Lundy suggested the
need of some provision to cover the circumstance of a father
and mother not married. Carson suggested a provision that a
father and mother not married take as tenants in common.
Allison suggested that the real property descend to the father
and mother of the intestate "to take as tenants by the entirety
if then married to each other; otherwise as tenants in common."
Gooding and Butler questioned the necessity of "to take."
Zollinger commented that if a verb was necessary, it should
be "hold" instead of "take." Gooding suggested that subsection
(3) might be shortened by elimination of the last two sentences
and incorporation of the intent thereof in the first sentence
by reference to the father and mother of the intestate "or
the survivor thereof." Zollinger indicated that, for purposes
of clarity, he favored the separate sentences applicable to
the circumstances of only a mother and only a father. Allison
moved, seconded by Butler, that the wording of the first
sentence of subsection (3) be that the real property "descend
to the father and mother of the intestate as tenants by the

entirety if then married to each other; otherwise as tenants in common." Motion carried.

Carson suggested that the singular rather than the plural form of "descendant" be used in subsection (3) of ORS 111.020, as amended by section 1 of the rough draft. Lundy noted that the plural form also was used in other subsections, and asked whether the committee wished to change all plural forms used after "no", including "children" in subsection (6) to the singular. Allison moved, seconded by Zollinger, that the plural forms used after "no" in subsections (2) to (7) be changed to the singular. Motion carried.

Allison referred to subsection (5) of ORS 111.020, as amended by section 1 of the rough draft, and noted that Zollinger had suggested deletion of "shall be preferred" in the seventh line of subsection (5) and insertion of "such real property shall descend to" before "those" in the sixth line. Butler moved, seconded by Carson, that the changes suggested by Zollinger be made. Motion carried.

The committee discussed the policy of subsection (6) of ORS 111.020, as amended by section 1 of the rough draft. Butler noted that subsection (6) applied only to real property which descended to a child from an ancestor, and asked whether it should apply also to real property which descended to a child from a brother or sister. In answer to a question by Riddlesbarger, Butler commented that "person" or "relative" might be substituted for "ancestor." Zollinger indicated that he did not favor broadening the application of subsection (6) to real property other than that which descended from an ancestor. Dickson questioned whether real property descending under subsection (6) was subject to claims of creditors of the child. Allison commented that he construed subsection (6) as prescribing descent not from the child but from the ancestor, and that under this theory the creditors of the child would have no claim against the real property. Butler, Carson and Zollinger expressed the view that real property descending under subsection (6) was subject to claims of creditors of the child, pointing out that all subsections of ORS 111.020 were prefaced by a statement that descent was subject to debts of the intestate and that subsection (6) merely provided, in a particular circumstance, a different line of descent than provided in the preceding subsections. Carson suggested that "whom" be substituted for "which" in the fourth line of subsection (6) and that "though" be substituted for "if" in the fifth line. Zollinger moved, seconded by Carson, that the changes suggested by Carson be made. Motion carried. The committee apparently agreed that no other changes should be made in subsection (6), at least at this time.

Zollinger moved, seconded by Riddlesbarger, that subsection (7) of ORS 111.020, as amended by section 1 of the rough draft, be approved. Motion carried.

(2) Section 2. Allison referred to ORS 113.050, as amended by section 2 of the rough draft, and briefly explained the changes proposed by the amendment, including deletion of "domiciled in this state at the time of death" in the second line of subsection (1). Dickson referred to that part of subsection (1) of ORS 113.050, as amended by section 2 of the rough draft, providing that the interest taken under the election against will was in addition to, and not in lieu of, homestead, and suggested that the interest be taken in addition to "any other statutory right," thus including such things as the rights of the surviving spouse and minor children to exempt property and support, as well as the right of homestead. The committee agreed with Dickson's suggestion.

Butler questioned the combination of election against will as to both real and personal property in subsection (1) of ORS 113.050, as amended by section 2 of the rough draft, pointing out that title to real property passed immediately upon the death of a decedent, while title to personal property did not pass until distribution after administration of the estate of a decedent, and suggesting separate provisions for election against will as to real and personal property. Zollinger expressed agreement with Butler's suggestion, and commented that perhaps there should be a right to elect as to either or both real and personal property. Allison and Butler expressed the view, and the committee agreed, that there should be no right to elect separately as to real and personal property; that there should be one election applicable to both real and personal property, although election as to real and personal property should be stated separately for other reasons.

Zollinger suggested that "domiciled in this state at the time of death" be retained as applicable to election as to personal property under subsection (1) of ORS 113.050, as amended by section 2 of the rough draft. Carson proposed that the election be whether to take under the will of a decedent "or to have and take by descent as to real property and, if the decedent was domiciled in this state at the time of death, upon distribution as to personal property." Allison expressed agreement with Carson's proposal. The committee discussed briefly the conflict of laws problems under the election against will provisions of subsection (1).

Lundy asked whether the committee was willing to adopt in principle the changes in subsection (1) of ORS 113.050, as amended by section 2 of the rough draft, it had apparently agreed upon, and to allow him to work out the specific wording thereof. Carson moved, seconded by Zollinger, that the committee adopt in principle the propositions that subsection (1) should provide for one election applicable to both real and personal property, but stated separately; for retention

of "domiciled in this state at the time of death" applicable to election as to personal property; and for the interest taken against will to be in addition to "any other statutory right," leaving to Lundy the task of working out the specific wording thereof. Motion carried.

(3) Section 3. Lundy referred to ORS 113.060, as amended by section 3 of the rough draft, and pointed out that subsection (2) thereof (a new provision on waiver of the right of election against will) was discussed at the last meeting and that the committee had agreed at that time that subsection (2) should be deleted. [Note: See Minutes, Probate Advisory Committee Meeting, 8/22/64, page 5.] He commented that the other changes in ORS 113.060 proposed by the amendment were minor improvements in wording, which were probably not essential to the primary purpose of the rough draft. Zollinger moved, seconded by Allison, that section 3 be removed from the rough draft. Motion carried.

Riddlesbarger left the meeting at this point (11:10 a.m.).

(4) Section 4. Allison referred to and explained section 4 of the rough draft, which expressly abolished dower and curtesy and expressly saved dower and curtesy interests that had become vested. Lundy explained that the vested interest might be either an unassigned right (i.e., dower or curtesy consummate) or an assigned right (i.e., admeasured; an estate). In response to a question by Carson, Allison indicated that the effect of section 4 would be to abolish any inchoate right of dower or curtesy on the effective date of the proposed legislation. Jaureguy suggested, and Allison agreed, that the vested interests saved by section 4 be those vested "by reason of the death of the spouse." Lundy pointed out that the estate of dower or curtesy did not vest by reason of the death of the spouse, but rather by reason of subsequent assignment or admeasurement proceedings. Butler suggested that the vested interests saved be those "which became vested upon or subsequent to the death of the spouse and before the effective date of this Act." Zollinger proposed that the order of the two sentences of section 4 be reversed; that the section should read: "Rights to and estates of dower or curtesy in the surviving spouse of a deceased owner of real property in existence on the effective date of this Act are preserved and shall be governed by the law in effect immediately before the effective date of this Act. Dower and curtesy, including inchoate dower and curtesy, are otherwise abolished." Allison expressed the view that the abolishment provision should come before the saving provision. Zollinger commented that if the abolishment provision came first it should at least be prefaced by "except as provided in this section." He also remarked, and Carson and Jaureguy agreed, that it appeared to be a clearer statement of the intent to specify that the interests being preserved were those in real property

of a person who died prior to the effective date of the proposed legislation. Zollinger moved, seconded by Carson, that section 4 should read: "Dower and curtesy, including inchoate dower and curtesy, are abolished, except that any right to or estate of dower or curtesy in the spouse of any person who died before the effective date of this Act shall be governed by the law in effect immediately before that date." Motion carried.

(5) Section 5. Allison referred to section 5 of the rough draft, which repealed a number of existing statute sections relating wholly to dower and curtesy, and noted that, pursuant to his suggestion, 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. Zollinger moved, seconded by Carson, that section 5 be approved. Motion carried.

Lundy called attention to the fact that the rough draft did not include amendments of statute sections relating partially to dower and curtesy for the purpose of deleting pertinent portions thereof. He indicated that he had discovered some 15 statute sections that appeared to require such amendment, and that he would include amendments of these statute sections in the next version of the rough draft entitled "Changing Dower and Curtesy" submitted to the committee.

b. Proposed legislation entitled "Protecting Property Right During Marriage" (Rough Draft, 9/11/64). Allison referred to and explained briefly the rough draft entitled "Protecting Property Right During Marriage" (embodied in a report dated September 11, 1964), which was a revision of the previous rough draft with the same title dated August 4, 1964. [Note: The report dated September 11, 1964, is reproduced as an Appendix to these minutes.] Allison called attention to several differences between the revised rough draft and the original rough draft, including omission of "inchoate" from references to the marital right to be protected by a recorded declaration; deletion of the requirement that a declaration include a description of the real property; deletion of the requirement that a copy of a declaration be served on the spouse owning the real property; insertion of a provision for release of the marital right by means of a separate conveyance by a declarant, in addition to joinder by the declarant in a conveyance; and rearrangement of the order in which certain of the provisions appeared.

(1) Section 1. Gooding referred to section 1 of the rough draft, noted that the marital right and the declaration claiming such right were described in some detail several times in section 1 and suggested that a single definition or description of the right and the declaration would be sufficient, as

well as reduce the length of section 1. Allison commented that a definition of the declaration should not incorporate the matter of the recording of the declaration.

Gooding questioned the necessity of including in the declaration form set forth in subsection (1) of section 1 of the rough draft a lengthy description of the effect of the recording of the declaration, and suggested deletion of this description. Lundy pointed out that if the description was deleted from the declaration form, the second sentence of subsection (1), which required such description, also should be deleted. In answer to a question by Lundy, Butler and Gooding expressed the view, in which Zollinger concurred, that the declaration form should not contain a reference to section 1. The committee apparently agreed that the requirement of a description in the declaration form of the effect of the recording of the declaration should be deleted, and that the declaration form should not be required to include a reference to the statute upon which it was based.

In response to a question by Jaureguy concerning the effect, as provided in subsection (3) of section 1 of the rough draft, of the recording of the declaration, Allison pointed out that the marital right claimed by the declaration would not be affected if the owner spouse conveyed the real property to which the declaration was applicable without joinder of the nonowner spouse in the conveyance, even though the proceeds derived from the conveyance were made available to the nonowner spouse on the death of the owner spouse. Allison and Zollinger commented that a similar result under the same circumstances would occur under present dower and curtesy.

Zollinger referred to subsection (3) of section 1 of the rough draft, and questioned the wording pertaining to release and subordination of the marital right. He commented that "to release" and "to subordinate" appeared to be purpose wording, and suggested, and the committee apparently agreed, that "thereby releasing" and "thereby subordinating" should be used.

Carson noted that subsection (3) of section 1 of the rough draft referred to mortgages, and asked whether a reference to trust deeds should be added. Allison pointed out that the trust deed statutes contained a provision that a trust deed was deemed to be a mortgage on real property and was subject to all laws relating to mortgages on real property except where inconsistent with the trust deed statutes themselves. [Note: See ORS 86.715], but indicated that he had no objection to adding a reference to trust deeds to subsection (3). Gooding suggested the use of "encumbrance" instead of a reference to mortgages and trust deeds. Zollinger noted that the use of "mortgage" in the fourth line of subsection (3) was

as a verb, and commented that addition of a reference to trust deeds in the fourth line would not be appropriate. However, he pointed out that the use of "mortgage" in the eighth line of subsection (3) was in the sense of an instrument, and suggested, and the committee apparently agreed, that "or trust deed" be inserted after "mortgage" in the eighth line.

Zollinger referred to paragraph (a) of subsection (4) of section 1 of the rough draft, relating to the recording of a revocation of a recorded declaration, and suggested that a revocation applicable to either all or part of the real property covered by the declaration should be permitted. He indicated that he contemplated a situation in which a nonowner spouse had recorded a declaration but wished to preserve the marital right only as to the homestead, and commented that the nonowner spouse in such a situation should be able to revoke the declaration except as to the homestead. In response to a question by Lundy, Zollinger and Butler indicated that they favored application of both a declaration and a revocation thereof either to all or part of the real property in the county of recording. The committee apparently agreed that a declaration and a revocation thereof should be authorized as to all or part of such real property.

Allison suggested, and the committee apparently agreed, that, in view of the decision that a declaration be authorized as to all or part of the real property in the county of recording, two alternative declaration forms be set forth in subsection (1) of section 1 of the rough draft. Dickson suggested, and the committee apparently agreed, that the titles of the two declaration forms should reflect their different applications, such as "Declaration Claiming Marital Right" and "Partial Declaration Claiming Marital Right."

Gooding referred to paragraph (b) of subsection (4) of section 1 of the rough draft, relating to revocation of a recorded declaration by an annulment or divorce decree, and suggested that some provision be made for revocation of a recorded declaration in a decree of separate maintenance. The committee apparently agreed that some provision as suggested by Gooding should be made.

Gooding asked whether "or suit" should be inserted after "action" in the fifth line of subsection (5) of section 1 of the rough draft. Lundy expressed the view that "action" would be construed to include a suit.

(2) Section 3. Zollinger referred to section 3 of the rough draft, relating to the authority of a guardian of the estate to record a declaration or a revocation thereof for the ward, and commented on the difficulty that would face a guardian in determining whether to record a declaration. He expressed the view, with which Dickson agreed, that a guardian,

who had the duty to protect the estate of the ward, probably could not justify a conclusion that he should not record a declaration. Zollinger suggested that the guardian should be authorized, with prior approval of the court, to revoke a declaration, but not to record a declaration. In response to a question by Lundy, Zollinger indicated that the guardian should be authorized to release (by joinder in a conveyance or by a separate conveyance) or subordinate (by mortgage) the marital right for the ward, as well as record a revocation of a declaration.

Butler asked whether, with respect to guardianships in existence on the effective date of the proposed legislation, a declaration should be presumed to have been recorded for the ward. Zollinger and Dickson expressed approval of such a presumption. In response to a question by Allison, Dickson and Zollinger commented that the guardian should not be required to record a declaration; that the guardian would find it difficult to discover the location of real property owned by the ward's spouse in sole right and might have to record a declaration in every county in the state in order to be on the safe side. Zollinger stated that without a presumption of the recording of a declaration, a nonowner spouse who was a ward on the effective date of the proposed legislation would be precluded from claiming the marital right during the pendency of the guardianship. Dickson noted that a nonowner spouse who became a ward after the effective date of the proposed legislation would similarly be precluded if a declaration was not recorded before the guardianship came into existence. Lundy asked about the notice problem with respect to a legal presumption that a declaration had been recorded in every county in the state for a nonowner spouse who was a ward on the effective date of the proposed legislation. Zollinger remarked that a bona fide purchaser might have to be exempted from the effect of the presumption in the absence of a record of the existence of the guardianship in a county in which the real property was located. After further discussion, the committee agreed that the presumption should not be made, in view of the complications involved and of the fact that the existing guardianship situation represented only a relatively minor aspect of the matter of a declaration claiming a marital right in lieu of abolished inchoate dower and curtesy.

Zollinger moved, seconded by Butler, that section 3 of the rough draft be amended to delete the authority of the guardian to record a declaration for the ward, and to add authority of the guardian to release (by joinder in a conveyance or by a separate conveyance) or subordinate (by mortgage) the marital right for the ward, in addition to the recording of a revocation of a declaration. Motion carried.

4. Next Meeting of Advisory Committee. Gooding suggested that the next meeting of the advisory committee be scheduled at some time during the annual meeting of the Oregon State Bar in Salem, October 7-10. The next meeting was scheduled for Thursday, October 8, in Salem, with members dining together at around 6 p.m. and the meeting to follow. Lundy was requested to make arrangements for a place to dine and a place to meet thereafter.

Lundy and Allison asked whether the committee wished to make any kind of report to the Bar at the annual meeting on the activities of the committee and the proposed legislation under consideration by it. Zollinger expressed the view, with which the committee agreed, that such a report should not be made, since the committee had made no final decisions on the proposed legislation under consideration and since the committee's function was that of an advisor to the Law Improvement Committee, which would probably wish to review the proposals of the advisory committee before they were released for consideration by others.

Lundy asked about the matters to be scheduled for consideration at the next meeting, pointing out that Denny Z. Zikes' report on his research for the committee in the area of summary proceedings for administration of small estates of decedents had been tentatively scheduled for consideration at a meeting to be held in October. [Note: See Minutes, Probate Advisory Committee Meeting, 6/13/64, pages 2 and 3.] The committee agreed that Zikes' report would be considered at the next meeting if the report was available then; otherwise, the committee would continue its consideration of the rough draft of proposed legislation on guardianship and conservatorship (dated July 18, 1964), and, if available then, would consider a revision of the rough draft entitled "Protecting Property Right During Marriage."

Lundy explained that the amount of his time officially allocated to the probate law revision project for this year had been exhausted, and that, except for attendance at meetings and preparation of minutes thereof, his time available for assisting the committee during the remainder of the year would have to be the very limited amount he could devote outside regular office hours.

The meeting was adjourned at 1:45 p.m.

APPENDIX

(Minutes, Probate Advisory Committee Meeting, September 12, 1964)

REPORT

September 11, 1964

To: Members of the Advisory Committee
on Probate Law Revision

From: Stanton W. Allison and Robert W. Lundy

Subject: Revised rough draft on "Protecting Property Right
During Marriage."

Prior to the last meeting of the Advisory Committee, we submitted a rough draft of proposed legislation entitled "Protecting Property Right During Marriage," dated August 4, 1964. The aim of that rough draft was to provide protection, by means of a recorded declaration, of a right of a surviving spouse to receive, upon the death of the other spouse, a fee estate in an undivided one-fourth interest in real property owned during the marriage by the other spouse in his sole right against an attempt by the owner spouse to convey or mortgage such real property without the joinder of the nonowner spouse in the conveyance or mortgage, and thus to defeat or diminish the right of the surviving spouse to receive such an interest in the real property by intestate succession or election against will under the provisions of the rough draft entitled "Changing Dower and Curtesy," dated August 4, 1964.

The rough draft entitled "Protecting Property Right During Marriage," dated August 4, 1964, was considered at length at the last meeting of the committee, and a number of objections thereto were raised. See Minutes, Probate Advisory Committee Meeting, 8/22/64, pages 3, 4 and 7 to 9, and Appendix A. At that meeting Mr. Allison indicated that we would endeavor to prepare and submit a revised rough draft embodying the declaration device to protect a property right during marriage, which would meet some of the objections raised. See Minutes, Probate Advisory Committee Meeting, 8/22/64, page 11. Following is such a revised rough draft.

Protecting Property Right During Marriage

Section 1. (1) A married person, referred to in this section as the declarant, may cause to be recorded in the record of deeds of any county in which real property owned by the spouse of the declarant in his sole right is situated a

written, signed and acknowledged declaration claiming a marital right in and to an undivided one-fourth interest in the real property so owned in the county by the spouse of the declarant. The declaration shall include a statement of the effect of the recording of the declaration as provided in subsection (3) of this section. The declaration may be in the following form:

DECLARATION CLAIMING MARITAL RIGHT

_____, declarant, is now married to _____, the owner of (name of husband or wife owning real property) real property in _____ County, State of Oregon, in sole right, and declarant hereby claims a marital right in and to an undivided one-fourth interest in and to all real property now or hereafter owned during the marriage by _____ (name of husband or wife owning real property), the spouse of the declarant, in sole right, in the above named county.

The effect of the recording of this declaration, as provided in section 1, chapter _____, Oregon Laws 1965 (Enrolled Bill _____), is that the above named spouse of the declarant may not, during the marriage and while this declaration remains unrevoked, convey or mortgage real property owned in sole right by such spouse in the county in which this declaration is recorded free of the marital right of declarant

in and to an undivided one-fourth interest in such real property unless declarant either joins in the conveyance or executes a separate conveyance to release the marital right, or joins in the mortgage to subordinate the marital right.

(Acknowledgment)

Declarant

(2) If a declaration claiming a marital right has been recorded as provided in subsection (1) of this section, upon the death of the spouse of the declarant an undivided one-fourth interest in and to all real property owned during the marriage by the spouse of the declarant in sole right in the county in which the declaration is recorded shall become vested in the declarant, unless the marital right has been released either by the joinder by the declarant in a conveyance or the execution of a separate conveyance, or the declaration has been revoked as provided in subsection (4) of this section.

(3) If a declaration claiming a marital right has been recorded as provided in subsection (1) of this section, the spouse of the declarant may not, during the marriage and while the declaration remains unrevoked, convey or mortgage real property owned in sole right by such spouse in the county in which the declaration is recorded free of the marital right of the declarant in and to an undivided one-fourth interest in such real property unless the declarant either joins in

the conveyance or executes a separate conveyance to release the marital right, or joins in the mortgage to subordinate the marital right.

(4) A declaration recorded as provided in subsection (1) of this section is revoked by:

(a) A written, signed and acknowledged revocation caused by the declarant to be recorded in the record of deeds of the county in which the declaration was recorded.

(b) A decree declaring the marriage void or dissolved.

(c) The death of the declarant before the death of the spouse of the declarant.

(d) A court order as provided in subsection (5) of this section.

(5) The spouse of a declarant, or any person to whom he conveys or mortgages real property to which a declaration recorded as provided in subsection (1) of this section is applicable without the joinder of the declarant, may maintain, within 10 years after the date of the recording of the declaration, an action to determine the validity and sufficiency of the declaration in the circuit court for the county in which the declaration is recorded. If the court finds that the declaration is invalid or insufficient, the court shall order the revocation of the declaration.

Section 2. Section 3 of this Act is added to and made a part of ORS 126.006 to 126.565.

Section 3. A guardian of the estate, with prior approval of the court by order, may exercise for and on behalf of the ward, the right of the ward to cause a declaration claiming a marital right of the ward or a revocation thereof to be recorded as provided in section 1 of this 1965 Act.