

PROBATE ADVISORY COMMITTEE  
Probate Law Revision

Fortieth Meeting

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

Dates) 1:30 p.m., Friday, September 15, 1967

and: and

Times: 9:00 a.m., Saturday, September 16, 1967

Place: Suite 2201 Lloyd Center

(This Board Room is at the head of the  
spiral stairway on the Central Plaza,  
or take elevator to the medical section.)  
Portland, Oregon

Suggested Agenda

1. Approval of July minutes.
2. Miscellaneous matters.
3. Powers and duties of personal representative. Discussion to be led by Mr. Allison, Mr. Butler and Mr. Zollinger.
4. Elective share of surviving spouse. Discussion to be led by Mr. Allison and Mr. Richardson.
5. Probate courts and jurisdiction. Discussion to be led by Mr. McKay, Mr. Copenhaver, Judge Warden, Judge Thalhoffer and Mr. Gooding.
6. Inheritance tax. Discussion to be led by Mr. Carson, Mrs. Braun and Miss Lisbakken.
7. Restricted access to wills filed and inventories.
8. November meeting dates.
9. Next meeting.

PLEASE NOTE MEETING PLACE, LLOYD CENTER

ADVISORY COMMITTEE  
Probate Law Revision

Fortieth Meeting, September 15 and 16, 1967  
(Joint Meeting with Bar Committee on Probate Law and Procedure)

Minutes

The fortieth 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, September 15, 1967, in Suite 2201, Lloyd Center, Portland, by Chairman Dickson.

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

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

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

Report from Allison

Allison reported on the status of his drafting of the proposed Oregon probate code. He advised the committees that he had not drafted the section on definitions of terms, and that draft would be at the conclusion of his work. With reference to the draft on the powers of the court he indicated that there is still some difference of opinion concerning the powers to be given to the clerk of court. Allison told the committees that the draft on intestate succession has been circulated among a small group of members of the committees for their comments or suggestions. The drafts on advancements, adoption, felonious death and illegitimacy have been completed. The draft that defines the rights of an alien to inherit is being delayed pending a decision of the United States Supreme Court. The draft of the rights of persons to inherit when there has been a simultaneous death was not changed from the draft in the book of drafts distributed to the members. The draft on wills has been sent to Legislative Counsel. The draft on initiation of probate has been sent to a few members of the committees for their comments or suggestions. Allison explained to the members that he had

discussed the draft on allocation of income with Mr. McMurchie, and that he and Mr. McMurchie had tentatively decided that this draft should be in the chapter relating to distribution.

Judge Dickson advised the committees that Mr. Carson wrote to him and asked that another member be appointed to the subcommittee on taxation and that Mr. Butler would be the fourth member and work with that subcommittee.

#### Approval of August Minutes

Allison called attention to an error in the minutes of the August meeting. Butler moved the approval of the minutes with the following correction in subsection (2) of section 6 (page 11):

(2) "...extend or renew"

and this would replace "extend or remove." The motion was seconded and carried.

#### Miscellaneous matters

Mapp advised the members that he had ordered copies of the Uniform Probate Code and that they will be distributed before the October meeting.

Frohmayer suggested that the committees hold the October meeting some place other than Portland, and after discussion, it was decided to hold the October 20, 21 meeting in Eugene.

#### Powers and Duties of Personal Representative Section 1

Section 1 was amended to read: "The provisions of this code shall apply without any distinction between real and personal property."

#### Section 2

Section 2 was amended to read: "Upon the death of a person, his real and personal property vests in the persons to whom it is devised by his last will, or, in the absence of testamentary disposition in his heirs, subject to family allowance, rights of creditors, elective share of the surviving spouse, and administration."

Krause questioned the wording of section 1 that explained that the purpose of the chapter is the prompt settlement of the estate. Mapp explained that the policy statement was

merely public relations and that the provision was inserted for that purpose. Frohnmayer suggested that if such a statement is to be made, it should be made at the very beginning of the code. Dickson agreed with Frohnmayer.

There was some discussion of whether the wording concerning title of property "passes" to or "vests in" the heirs. Jaureguy favored "vests in" and although no formal motion was made, the members agreed with Jaureguy.

Allison explained that he had discussed the matter of allocation of income with Mr. McMurchie, and that they felt that under the powers and duties of a personal representative section there should be a provision substantially as follows: "The personal representative shall collect all income and rent from decedent's estate and pay taxes on all property in his possession. He shall keep buildings and fixtures in his possession in full repair and maintain action to recover any property or to determine title thereto."

Piazza was of the opinion that the committees had gone to great length to spell out the powers and duties in these matters in section 14 and further elaboration was not necessary.

Zollinger was of the opinion that the personal representative should not be charged with the duty of collecting rent or taking possession of property unless necessary to pay claims or costs of administration.

Dickson said that he favored limiting the obligations of the personal representative to collecting rent and receiving income from property in the possession of the personal representative. Frohnmayer agreed with Dickson.

Frohnmayer said that he was against the provision in section 2 that would make the request for possession of property by the personal representative conclusive evidence of the necessity of possession by the personal representative. He favored a prima facie presumption if there is to be a presumption at all.

Zollinger suggested the further change to limit the duty of the personal representative to pay taxes and keep the property in repair to a duty only to do so the extent that funds were available for those purposes.

Richardson said that he would give the personal representative the right to all of the income except to the extent that the personal representative released the income.

Gilley indicated that the purpose the members intended could be accomplished by giving the personal representative the right to waive his right to personal property.

Butler was of the opinion that section 14 provided the personal representative sufficient power to take possession.

McKay favored giving the personal representative possession unless there was a showing made that possession by him was unnecessary.

Zollinger favored the following provision: "A personal representative has a right to and shall take possession of or be accountable for property in the possession of persons presumptively entitled thereto as heir or devisee and not reasonably required for administration."

Riddlesbarger said that he would add the following: "During the time the property is in the possession of the executor or administrator it is his duty to keep the same in repair and preserve it..."

The committees adopted the substance of Zollinger's proposed wording.

There followed a discussion of whether or not the powers should be in a separate section from the duties of the personal representative and it was the consensus of opinion of the majority of the members that the sections should be separate.

It was moved, seconded and the motion carried to amend section 3 to read:

"(1) A personal representative is a fiduciary who, in addition to the specific duties and authority expressed under authority of law, is under a general duty to collect income of the estate, preserve and distribute the estate of the decedent in accordance with the terms of the will and provisions of law, and as expeditiously and with as little sacrifice of value as is reasonable under the circumstances. He shall use the authority conferred upon him as provided by law, the terms of the will, if any, any order of the court, and the rules generally applicable to fiduciaries, for the best interests of creditors of the decedent and

successors to the estate."

"(2) A personal representative of a decedent who was domiciled in this state at his death has the same standing to sue and be sued in the courts of any jurisdiction as his decedent had immediately prior to death."

There followed a discussion over whether the chapter on powers and duties should also provide for the authority of the personal representative to bring actions and suits and the members agreed that there should be a separate chapter providing for actions and suits by the personal representative.

### Section 3

Section 3 was amended to read: "The duties and powers of a personal representative commence upon the issuance of his letters. The powers of a personal representative relate back in time to give his acts occurring prior to appointment the same effect as those occurring thereafter. A personal representative may ratify and accept acts on behalf of the estate done by others where such acts would have been proper for a personal representative."

### Section 4

Allison explained to the committees that he had not defined the authority of the personal representative in as broad of terms as the Uniform Probate Code. He said that he was opposed to the theory of allowing the personal representative to act without court authority. Mapp favored providing broad authority for the personal representative to act and without prior court authority. Mapp explained that the theory of the Uniform Probate Code was that the personal representative would have very broad powers, but that if any interested party thought the personal representative was acting wrongfully, they could petition the court to supervise the acts of the personal representative. He said that the Uniform Probate Code also made provision for the personal representative to petition the court for authority or supervision when necessary. Allison said that it was his opinion that the Uniform Probate Code provided two separate proceedings, one formal and one informal.

Frohnmayr called attention to the action of the committees at the August meeting at which time it was decided that the personal representative should have broad powers, and that he could take what action he deemed necessary except in specified exceptional situations provided by the code.

The committees adopted the following language proposed by

Zollinger: "Except when otherwise provided in this code or by order of the court, a personal representative shall proceed expeditiously with the settlement and distribution of decedent's estate without notice of hearing or order of court, but he may apply to the court for an adjudication of questions concerning the estate or its administration."

#### Section 5

Mapp explained that the Uniform Probate Code intended the provisions of section 5 of Allison's draft, (taken from the Uniform Probate Code) to give the personal representative absolute power over property of an estate. He explained that by giving this power to the personal representative, he could transfer property, and even though improper, a bona fide purchaser would receive good title. He noted that this would free title companies and transfer agents of possible liability even if the personal representative acted improperly. Zollinger was of the opinion that section 5 was too brief and that sections 15 and 21 of the draft said the same thing but in much more detail. He favored deleting section 5. The committees decided to defer consideration of section 5 until the rest of the sections of the draft had been considered.

#### Section 6

Consideration of section 6 was passed temporarily.

#### Section 7

Consideration of section 7 was passed temporarily.

The meeting was recessed at 4:30 p.m.

The meeting was reconvened at 9 a.m., Saturday, September 16, 1967, by Chairman Dickson in Suite 2201, Lloyd Center, Portland.

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

The following members of the Bar committee were present: Gilley, Krause, Lovett, Meyers, McKay, Thalhofer, Thomas, Richardson, and Bettis.

Also present was James Sorte.

Section 14 Transactions authorized by personal representative

Riddlesbarger moved that "...acting reasonably for the benefit of the interested persons..." be deleted from section 14. Motion carried.

Mapp moved that the wording be that the personal representative be "authorized" to take the action outlined in section 14. He said that he preferred that particular wording to distinguish authority from power. The committees decided that Allison should include in the section on definitions the words "power", "duty" and "authority."

The committees changed the word "improper" to "unsuitable" in subsection (2) of section 14.

Frohmayer moved the adoption of subsection (3) of section 14. Motion carried.

Subsection (4) of section 14 was amended to read: "Execute and deliver a deed of conveyance upon satisfaction of any sums remaining unpaid, or receipt of the purchaser's note, adequately secured.

With the changes indicated above subsection (4) of section 14 was approved.

Subsection (5) of section 14

Subsection (5) was amended to read: "Satisfy written pledges of the decedent irrespective of whether such pledges constituted binding obligations of the decedent or were property presented as claims."

Subsection (6) of section 14

Subsection (6) was amended to read: "Deposit funds not needed to meet debts and expenses currently payable and not immediately distributable, in banks or savings and loan accounts or invest the same in short-term United States government obligations."

Subsection (7) of section 14

Dickson voiced his objection to allowing the personal representative the power to abandon property without prior court order. Gooding agreed with Dickson and noted that the bankruptcy courts require prior authority before a trustee abandons property. Allison said that he would favor giving the property, even if worthless, to the people entitled to it, and if they want to abandon it they could do so. Butler said

that the personal representative should be authorized to abandon property when it was a burden to the estate. Gilley said that to restrict the power of the personal representative would be inconsistent with prior action, and if this was to be the position now taken, then reconsideration of other powers granted the personal representative should be made.

Zollinger's motion to adopt the following language carried: "Abandon burdensome property when it is valueless or is so encumbered or is in such a condition that it is of no benefit to the estate;"

Subsection (8) of section 14

Subsection (8) was adopted as drafted.

Subsection (9) of section 14

Subsection (9) was amended to read: "Pay calls, assessments, and other sums chargeable or accruing against or on account of securities."

Subsection (10) of section 14

Subsection (10) was adopted as drafted.

Subsection (11) of section 14

There was some discussion concerning whether the personal representative should insure only the assets of the estate or the assets and himself against personal liability. Butler moved adoption of the following language: "Insure the assets of the estate against damage and loss and himself against liability to third persons."

Subsection (12) of section 14

Subsection (12) of section 14 was adopted as amended to read: "Advance or borrow money with or without security."

Subsection (13) of section 14

Subsection (13) of section 14 was amended to read: "If the personal representative holds a mortgage, pledge, lien or other security interest, in lieu of foreclosure he may accept a conveyance or transfer of the encumbered assets in full or partial satisfaction of the indebtedness."

Subsection (14) of section 14

After discussion over whether or not there should be a

time limitation written into subsection (14) the section was adopted to read: "Pay taxes, assessments and expenses incident to the administration of the estate."

Subsection (15) of section 14

Subsection (15) was adopted with the understanding that Allison would move the section so that it would follow subsection (9) or (10).

Subsection (16) of section 14

The committees decided to delete subsection (16) because there is to be a separate provision elsewhere in the code dealing with the allocation of income.

Subsection 17 of section 14

Zollinger moved, seconded by Butler, that subsection (17) be deleted. Motion carried.

There was discussion of whether it was proper to authorize the personal representative to compensate persons associated in business with him. The majority of members felt that to allow such a practice would open the door to many irregular practices. It was the consensus of opinion that to give the personal representative unrestricted authority to hire others help him administer the estate would encourage him hiring work done that he should be doing himself. There was also a discussion concerning the extent of liability of the personal representative for acts of others hired by the personal representative to assist in the administration of the estate. Butler favored limiting his liability if he acted reasonably in selection of assistants and took reasonable action to keep informed of the action of the party hired. Riddlesbarger called attention to the fact that subsection (17) and subsection (10) overlapped somewhat. Richardson said that the committees should reconsider their action by which they deleted from the first part of section 14 the wording "Acting reasonably for the benefit of the interested persons..." The committees voted to reinstate the wording quoted.

Frohmayer called attention to the possible ethical problem involved if the personal representative could hire a member of his own firm to assist in the administration of the estate. The committees voted to omit "...even if they are associated with the personal representative..." There followed

considerable discussion of whether the personal representative should be forced to make independent investigations of action of persons hired to administer the estate. Dickson said that the language adopted "...acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary..." would relieve the personal representative of liability for acts of the person hired to help administer the estate.

Subsection (17) was amended to read: "Employ qualified persons, including attorneys, accountants and investment advisors, to advise and assist the personal representative and to perform acts of administration, whether or not discretionary, on behalf of the personal representative."

Subsection (18) of section 14

Subsection (18) was adopted as drafted.

The committees recessed at 12:10 p.m.

When the meeting reconvened at 1 p.m., the following members were present: Advisory Committee, Dickson, Zollinger, Allison, Butler, Gooding, Husband, Jaureguy, Mapp and Riddlesbarger; Bar committee, Gilley, Krause, Lovett, Meyers, Piazza, Thalhoffer, Thomas, Richardson and Bettis.

Also present was Sorte.

Subsection (19) of section 14

Riddlesbarger questioned the use of the word "unincorporated" before the word "business." A motion carried to have subsection (19) read: "Continue any business or venture in which decedent was engaged at the time of his death to preserve the value of the business or venture."

Subsection (20) of section 14

Subsection (20) was amended to read: "Discontinue and wind up any business or venture in which the decedent was engaged at the time of his death."

Subsection (21) of section 14

Subsection (21) was adopted as drafted as follows: "Provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate."

Subsection (22) of section 14

Subsection (22) was adopted as drafted as follows: "Satisfy and settle claims and distribute the estate as provided in this Code." Riddlesbarger favored adding language to the effect that the personal representative had such further authority as necessary to administer the estate. After discussion the following language was added to section 14: "Perform all other acts required or permitted by law or by the will of decedent."

Section 15

Section 15 was adopted as drafted.

Section 16

Section 16 was amended to read: "Property sold, mortgaged or leased by a personal representative shall be subject to liens and encumbrances of record but shall be free and clear of rights of creditors based on the filing and allowance of a claim of the estate. The filing and allowance of a claim in an estate does not make the claimant a secured creditor."

There followed a discussion of whether or not the personal representative should be given the power to create a servitude on estate property. It was the consensus of opinion that Allison should draft the section to include in the powers of the personal representative the power to create a servitude. Zollinger opposed the motion saying that this is an area that has not, in the past, created problems, and that specific provision to create a servitude was not necessary.

The committees adopted the following language: "A transfer agent or a corporation transferring its own securities incurs no liability to any person by making a transfer of securities in an estate as requested or directed by a personal representative."

Section 17

Zollinger moved the deletion of section 17. Motion carried.

Section 18

Thalhofer moved the deletion of section 18. Motion carried.

### Section 19

Riddlesbarger questioned whether section 19 would be useful. He expressed his belief that the statute could not cure a jurisdictional defect because of the due process clause of the United States Constitution. Riddlesbarger moved that the committees refer the problem to Mapp for research. McKay seconded the motion and it carried.

### Section 20

McKay questioned the wording of section 20 and suggested that the word "void" replace "voidable." Allison was of the opinion that the word "voidable" was the proper one. McKay asked for what period of time a transfer would be voidable and Riddlesbarger said for the statute of limitations on the action. The committees amended section 20 by deleting the following: "(1) The transaction was consented to by all interested persons affected thereby except any who were under legal disability for whom no guardian had been appointed; ..."

### Section 21

Section 21 was amended to read: "If the exercise of power by the personal representative in the administration of the estate is improper he shall be liable for breach of his fiduciary duty to interested persons for resulting damage or loss to the same extent as a trustee of an express trust. Exercise of power in violation of a court order is a breach of duty. Exercise of power contrary to the provisions of the will may be a breach of duty."

### Section 22

The committees discussed the right of a personal representative to file or otherwise perfect a lien right of the decedent. The section was adopted as drafted.

### Section 23

Section 23 was adopted as drafted.

### Section 24 and 25 (Section 24 will be put in chapter 97.)

The committees adopted section 25 but eliminated the following: "...and the knowledge or information is otherwise unavailable to the personal representative." Subsection (5) of section 25 was amended to read: "That officers or agents

of a corporation refuse to allow examination of the books and records of the corporation which the decedent had the right to examine."

#### Section 26

Section 26 was adopted as drafted.

#### Section 27

Gooding moved that section 27 be broadened and correlated with existing law. Motion carried with instructions to Allison to redraft the section.

#### Section 28

There was some question of whether or not the personal representative should be held liable for double the damage to the state. Zollinger favored compensatory damages in place of double damages. Bettis moved the deletion of section 28. Motion carried.

Powers of clerk at court [Note: A copy of the draft is Appendix A without the changes.]

Allison pointed out that paragraphs (a), (b), and (c) should be changed to subsection (1), (2), and (3) and under subsection (2) the numbered paragraphs should be changed to (a), (b), (c), etc. Allison suggested a paragraph under subsection (2) relating to "Appointment of appraisers." He also made a change in subparagraph (c) "Allowance of attorney fees, appraiser fees and fees for the personal representative.", and in subparagraph (d) "Approval of accounts." Zollinger suggested the clerk be allowed to perform these functions even if the court is available. Thalsofer did not want the clerk to appoint the appraisers. Zollinger felt that the clerk should be authorized to fix the amount of bond, subject to judicial review. Dickson felt the judges could set up guidelines for the clerks. Husband felt the judge should designate the newspaper for publication of notice to creditors and final account. Dickson closed the discussion indicating that Gooding and Thalsofer knew what the committees had in mind.

#### November Meeting

It was decided that the November meeting would be held November 24,25, at the Lloyd Center if this can be arranged.

The meeting adjourned at 4:30 p.m.

APPENDIX A

(Note: This draft has not been corrected to reflect the Committees' action. Refer to minutes for changes.)

Section \_\_\_\_\_. Powers of the Clerk. (a) Except as set forth in subsection (b) the clerk shall act upon applications for informal probate of wills and informal appointment of personal representatives; and may hear and determine any matters and make all orders, judgments and decrees in connection therewith which the judge could make, subject to being set aside or modified by the judge at any time within 30 days thereafter; but if not so set aside or modified, his orders, judgments and decrees shall have the same effect as if made by the court or judge.

(b) Clerks powers shall not extend to the following matters:

- (1) A matter contested in any way.
- (2) Allowance of support money for widows and children.
- (3) Allowance of attorney fees.
- (4) Approval of final accounts.
- (5) Determination of heirship.
- (6) When approval of the judge is required under [UPC Sec. 3-211 or 3-218] or until notice is given as required under [UPC Sec. 3-212].

(c) Any matter presented to the clerk may be referred by him to the judge.

Section 1. Devolution of estate at death; restrictions.

The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations expressed or implicit in this chapter to facilitate the prompt settlement of estates. Upon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will, or, in the absence of testamentary disposition, to his heirs, subject to family allowance, rights of creditors, elective share of the surviving spouse, and to administration. The provisions of this chapter shall apply without any preference or priority as between real and personal property.

References: Uniform Probate Code,  
Sec. 3-101 (1967)

Section 2. Duty of personal representative; possession of estate. Every personal representative has a right to, and shall take possession or control of the decedent's estate, except that property in the possession of the person presumptively entitled thereto as heir or devisee shall be possessed by the personal representative only when reasonably necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by the heir or devisee shall be conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is reasonably necessary for purpose

of administration. The personal representative shall pay taxes on all property in his possession. He shall keep buildings and fixtures in his possession in tenantable repair. He may maintain an action to recover possession of any property or to determine the title thereto.

References: Uniform Probate Code,  
Sec. 3-409 (1967)  
ORS 116.105

Section 3. Time of accrual of duties and powers. The duties and powers of a personal representative commence upon the issuance of his letters. The powers of a personal representative relate back in time to give his acts occurring prior to appointment the same effect as those occurring thereafter where beneficial to the estate. A personal representative may ratify and accept acts on behalf of the estate done by others where such acts would have been proper for a personal representative.

References: Uniform Probate Code,  
Sec. 3-401 (1967)

Section 4. General duties; relation and liability to persons interested in estate; standing to sue.

(1) A personal representative is a fiduciary who, in addition to the specific duties expressed in this chapter, is under a general duty to settle and distribute the estate of the decedent in accordance with the terms of the will and this chapter, and as expeditiously and with as little sacrifice of value as is reasonable under all of the circumstances. He shall use the authority

conferred upon him by this chapter, the terms of the will, if any, any order of the court, and the rules generally applicable to fiduciaries, for the best interests of creditors of the decedent and successors to the estate. A personal representative shall not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time.

(2) A personal representative of a decedent who was domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as his decedent had immediately prior to death.

References: Uniform Probate Code,  
Sec. 3-403, (1967)

Section 5. Powers of personal representative; in general.  
Until termination of his appointment a personal representative has the same power over the title to property of the estate as an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing, or order of court.

References: Uniform Probate Code,  
Sec. 3-412, (1967)

Section 6. Notice to creditors. (See Section 11.A of chapter on Initiation of Probate draft dated 7/5/67.

Section 7 - 13, inclusive. Inventory and Appraisal. (See

second draft pursuant to minutes of 8/18, 19/1967.)

Section 14. Transactions authorized for personal representative. Except as restricted or otherwise provided by the will or by court order, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

(1) Direct and authorize disposition of the remains of the decedent pursuant to ORS 97.130 and incur expenses for the funeral, burial or other disposition of the remains in a manner suitable to his condition in life.

(2) Retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested or which are otherwise improper for trust investment.

(3) Receive assets from fiduciaries, or other sources.

(4) Complete, compromise, or refuse performance of the decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may:

(a) Execute and deliver a deed of conveyance, for cash payment of all sums remaining due, or the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or

(b) Deliver a deed in escrow with directions that the

proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement.

(5) Satisfy written charitable pledges of the decedent irrespective of whether such pledges constituted binding obligations of the decedent or were properly presented as claims when, in the judgment of the personal representative, the decedent would have wanted the pledges completed under the circumstances.

(6) When funds are not needed to meet debts and expenses currently payable and are not immediately distributable, deposit liquid assets of the estate, including moneys received from the sale of other assets, in federally insured interest-bearing accounts or other short-term loan arrangements that may be reasonable for use by trustees generally.

(7) Abandon property when, in the opinion of the personal representative, it is valueless, or is so encumbered or is in condition that it is of no benefit to the estate;

(8) Vote stocks or other securities in person or by general or limited proxy.

(9) Pay calls, assessments, and other sums chargeable or accruing against or on account of securities, unless barred by the provisions relating to claims.

(10) Hold a security in the name of a nominee or in other form without disclosure of the interest of the estate but the

personal representative shall be liable for any act of the nominee in connection with the security so held.

(11) Insure the assets of the estate against damage, loss and liability and himself against liability in respect to third persons.

(12) Borrow money with or without security to be repaid from the estate assets or otherwise; and advance money for the protection of the estate.

(13) Effect a fair and reasonable compromise with any debtor or obligor, or extend, renew or in any manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge or other lien upon property of another person, he may, in lieu of foreclosure, accept a conveyance or transfer of encumbered assets from the owner thereof in satisfaction of the indebtedness secured by lien.

(14) Pay taxes, assessments, compensation of the personal representative, and other expenses incident to the administration of the estate.

(15) Sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(16) Allocate items of income or expense to either estate income or principal, as permitted or provided by law.

(17) Employ persons, including attorneys, auditors,

investment advisors, or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary.

(18) Prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties.

(19) Continue any unincorporated business or venture in which the decedent was engaged at the time of his death:

(a) In the same business form for a period of not more than four months from the date of appointment of the personal representative where continuation is a reasonable means of preserving the value of the business including good will.

(b) In the same business form for any additional period of time that may be approved by order of the court, or

(c) Throughout the period of administration if the business is incorporated by the personal representative and if none of the probable distributees of the business who are competent adults object to its incorporation and retention in the estate.

(20) Upon order of the court discontinue and wind up any business or venture in which the decedent was engaged at the time of his death.

(21) Provide for exoneration of the personal representative

from personal liability in any contract entered into on behalf of the estate.

(22) Satisfy and settle claims and distribute the estate as provided in this Code.

References: Uniform Probate Code,  
Sec. 3-416, (1967) and

ORS 116.110, 116.125,  
116.130, 116.135,  
116.170, 116.175 &  
116.180.

Section 15. Power of personal representative to sell, mortgage and lease. A personal representative has power to sell, mortgage or lease property of the estate without notice, hearing or court order. The rights and title of any purchaser, mortgagee or lessee from the personal representative are in no way affected by any provision in a will of the decedent or any procedural irregularity or jurisdictional defect in the administration of the decedent's estate. A transfer agent or a corporation transferring its own securities incurs no liability to any person by making a transfer of securities in an estate as requested or directed by a personal representative.

Section 16. Free of claims and creditors. Property sold, mortgaged or leased by a personal representative shall be subject to liens and encumbrances of record but shall be free and clear of rights of creditors based on the filing and allowances of a claim in the estate. The filing and allowance of a claim in an estate does not make one a secured creditor.

Section 17. Contract of decedent to sell or lease land.

When any person legally bound to make a sale, mortgage or lease dies before making the same and the personal representative fails or refuses to perform in accordance with the decedent's contract, any person claiming to be entitled to the sale, mortgage or lease may petition the court for specific performance of the contract. Upon satisfactory proof the court may order the personal representative to make a sale, mortgage or lease or may by its own order make a conveyance, mortgage or lease to the person entitled thereto upon the performance of the contract.

Section 18. Except as may be required by section 17, any sale, mortgage or lease of property by a personal representative shall be without express or implied warranties.

Section 19. Persons dealing with personal representatives; protection. A person dealing with or assisting a personal representative without actual knowledge that the personal representative is improperly exercising his power is protected as if the personal representative properly exercised the power. The person is not bound to inquire whether the personal representative is properly exercising his power, and is not bound to inquire concerning the provisions of any will or any order of court that may affect the propriety of the acts of the personal representative. No provision in any will or order of court purporting to limit the power of a personal representative shall be effective except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets

paid or delivered to a personal representative. The protection here expressed extends to instances where some procedural irregularity or jurisdictional defect, including the case where the alleged decedent is found to be alive, occurred in proceedings leading to the issuance of letters.

References: Uniform Probate Code,  
Sec. 3-415, (1967)

Section 20. Sale or encumbrance to personal representative voidable; exceptions. Any sale or encumbrance to the personal representative, his spouse, agent or attorney, or any corporation or trust in which he has more than a one-third beneficial interest, is voidable unless,

(a) The transaction was consented to by all interested persons affected thereby, or approved by the court.

(b) The will expressly authorized the transaction by the personal representative with himself.

The title of a purchaser for value without notice of the circumstances of the transaction with the personal representative is not affected unless the purchaser should have known of the defect in the title of his seller.

References: Uniform Probate Code,  
Sec. 3-414, (1967)

Section 21. Improper exercise of power; breach of fiduciary duty. If the exercise of power concerning the estate is improper, the personal representative shall be liable for breach of his

fiduciary duty to interested persons for resulting damage or loss to the same extent as a trustee of an express trust. The exercise of power in violation of court order, or contrary to the provisions of the will may be breaches of duty. The rights of purchasers and others dealing with a personal representative shall be determined as provided in ORS \_\_\_\_\_ and \_\_\_\_\_ and may be unaffected by the fact that the personal representative breached his fiduciary duty in the transaction.

References: Uniform Probate Code,  
Sec. 3-413, (1967)

Section 22. Right to file notice of and perfect lien. The personal representative shall have the same rights to file notice of or otherwise perfect a lien or security interest as the decedent would have had if he were living.

References: Advisory Committee Minutes:  
6/17, 18/66 p. 19; and Appendix

ORS 116.120

Section 23. ORS 97.130 is amended to read:

97.130. Right to Control Disposition of Remains. The right to control disposition of the remains of a decedent, unless other directions have been given by him, vests in his surviving spouse, his surviving children, his surviving parents and the person in the next degree of kindred to him, in the order named. If disposition of the remains has not been directed

and authorized within ten days after the death of decedent the special administrator or the personal representative of the deceased may direct and authorize disposition of the remains.

Section 24. Authority of executor when will includes gift of body for scientific and medical purposes; nonliability for actions. The authority of a person named executor of a will which includes a gift pursuant to ORS 97.132 extends to performing acts necessary to carrying out the gift although letters testamentary have not been issued. A person named executor who carries out the gift of the testator before issuance of letters testamentary or under a will which is not admitted to probate shall not be liable to the surviving spouse or next of kin for performing acts necessary to carry out the gift of the testator.  
Reference: ORS 116.115

Section 25. Discovery of assets during procedure by personal representative. The court may order any person to appear and give testimony as provided in ORS chapter 45 if it appears probable:

(1) That he has concealed, secreted or disposed of any property of the estate of a decedent.

(2) That he has been intrusted with property of the estate of a decedent and refuses or neglects to account therefor to the personal representative.

(3) That he has concealed, secreted or disposed of any writing or other instrument or document relating or pertaining to the estate.

(4) That he has knowledge or information that is necessary to the administration of the estate and the knowledge or information is otherwise unavailable to the personal representative.

(5) That corporate officers or agents refuse to allow inspection of books and records of a corporation in which there are stocks, bonds or debentures of the estate.

References: Advisory Committee Minutes:  
6/17, 18/66 Appendix  
7/15, 16/66 pp. 5 and 6; and Appendix

ORS 116.305  
116.320

Section 26. Proceedings when person refuses to appear and give testimony. If the person cited as provided in ORS \_\_\_\_\_ refuses to appear, or to answer questions asked of him as authorized by the order of the court, he is in contempt and may be punished as for other contempts.

References: Advisory Committee Minutes:  
6/17, 18/66 Appendix  
7/15, 17/66 pp. 5 to 7; and Appendix

ORS 116.315

Section 27. Power to avoid transfers. The property liable for the payment of debts of a decedent shall include all property transferred by him by any means which is in law void or voidable as against his creditors, and the right to recover such property, so far as necessary for the payment of the debts of the decedent, shall be exclusively in the personal representative.

References: Uniform Probate Code,  
Sec. 3-410, (1967)

ORS 115.330, 116.335,  
116.340

Section 28. Property embezzled or converted. If any person embezzles or converts to his own use any of the personal property of a decedent before the appointment of a personal representative, the person shall be liable to return the property or its value to the estate. No person shall be charged as executor by his own wrong [de son tort].

References: Uniform Probate Code,  
Sec. 3-411, (1967)

ORS 116.325

Section 29. Repeal of existing statutes:

Proposed revised Oregon probate code  
POWERS AND DUTIES OF PERSONAL REPRESENTATIVE  
2nd Draft  
September 1, 1967

Prepared by  
Stanton W. Allison

#### COMMENTS

In view of the general directive to your draftsman at the meeting of August 18 and August 19, 1967, to incorporate to a substantial extent the applicable language of the 1967 Draft Uniform Code, I suggested that I prepare a tentative draft of Tabs 15, 19, and 21 to be combined in a single chapter. However, since Tab 19 covering discharge of incumbrance has not been on the agenda for consideration by the committees, I have not included this material in the present draft. Since Section 7 of the first draft of April 27 also appears in Tab 19, I have not included that section.

The sections on notice to creditors and inventory and appraisal have been separately redrafted, and since these were thoroughly considered at the previous meeting and at earlier meetings, I have not included these items.

Tab 21 covering sale, mortgage, and lease of property was considered and discussed at previous meetings as noted on the draft. Although powers in this category are included within the general section of the Uniform Code, because Tab 21 had been carefully discussed and also because in your draftsman's opinion it will be preferable to have a separate section on real property sales, I have included the separate section from Tab 21.

In preparing this tentative draft I followed as closely as possible the general order and outline of the first draft. As

will be noted, a number of the sections use the language of the first draft. However, where I felt the language of the Uniform Code covered the same material and in some cases with broader language, I have incorporated the language of the Uniform Code.

The following separate comments are not intended for use when the final draft is approved and written but are primarily for the understanding of the two committees to explain the changes or substitutions from the former draft. It should also be stated that minor changes and some eliminations have been made in the Uniform Code sections, but, somewhat to your draftsman's surprise, the sections seemed appropriate without any extensive editing.

Section 1. Devolution of estate at death.

Although the discussion of this subject is on the agenda for the September meeting, I felt the language taken from Section 3-101 of the Uniform Code was so in line with our previous discussion that it would be helpful to have it included here.

Section 2. Duty of Personal Representative; Possession of Estate.

The comment on Section 1 is equally applicable to Section 2. The language has been taken from Section 3-409 of the Uniform Code without change.

Section 3. Time of accrual of duties and powers.

This section is taken verbatim from Section 3-401 of the

Uniform Code. There is no precise counterpart in ORS but this supplies language applicable in a number of situations, particularly in regard to ORS 116.115.

Section 4. General Duties; relation and liability to persons interested in estates; standing to sue.

The language of this section, with minor modifications, is the same as Section 3-403 of the Uniform Code. Although there is now a counterpart for this section in ORS, it was felt advisable to include this language to implement the general theory of the new code that the personal representative, except in special instances where order of court was required, would be given powers to operate without court order. It is, however, the general understanding that the administrator should have the supervision of the court and complete permission to secure court order when needed. Please note, however, that the draftsman has not included the language of Section 3-404 of the Uniform Code which reads as follows: "Except where supervised administration has been ordered, a personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate without adjudication, order, or direction of the (judge), but he may invoke the jurisdiction of the (probate) court, in proceedings authorized by this Code, to resolve questions concerning the estate or its administration." The proposed code does not adopt the distinction in the Uniform Code between informal probate and supervised administration. In view of the proposal that the county clerk act in ex parte matters, it would seem advisable to make it permissive

in all cases for a personal representative to seek the advice and the authority of the probate court. Any hard and fast legislation in the form of the above-quoted section might tend to change this concept.

Section 5. Powers of personal representative; in general.

This language is taken verbatim from Section 3-412 of the Uniform Code. No comparable section is now in ORS. This is the basic section for the protection of persons dealing with a personal representative under the broad powers given by the proposed code. It was thought advisable to place this basic section prior to the later specific sections on powers and particularly that of the power of sale. It is the intention to incorporate all or at least a major part of the comment in the Uniform Code when the definitive comments are prepared on these individual sections.

Section 6. Notice to creditors.

This has been drafted and placed temporarily in the second draft of the Initiation of Probate chapter which has been already circulated to key members of the committees.

Sections 7 to 13, covering Inventory and appraisal, as stated above, have been drafted separately and will be circulated separately.

Section 14. Transactions authorized for personal representatives.

As instructed by the last joint meeting, this language was incorporated from Section 3-416 of the Uniform Code. The changes

from 3-416 have been minimal. To comply with directions of the August meeting, I have included a section which would authorize disposition of the remains of the decedent when authority was given under ORS 97.130, which provides that authority can be given when no directions have been received for ten days following the death. I have eliminated the provisions for sale, mortgage, and lease since, as stated, those are included in a separate section and I have included a specific section authorizing a discontinuing and winding up of a business upon court order, which complies with present ORS.

Sections 15-21 cover Tab 21. Minor editing changes have been made. However, the sections covering breach of duty have been taken from comparable provisions of the Uniform Code and appear as Sections 16, 17, and 18.

Section 22 is Section 4 of Tab 15.

Section 23 implements the instructions from the August meeting to give the power to the personal representative to provide for funeral and burial of the remains where the family failed to act for ten days. The amendment is to ORS 97.130.

Section 24 is identical with the present ORS 116.115. However, since the reference to ORS 97.130 is incorporated in the general section giving the power of the personal representative to control the remains, it would seem preferable that 116.115 be placed to follow ORS 97.134. It should be noted that 97.132 was Section 1 of Chapter 674, Session Laws of 1961, 97.134 comprised Sections 2 and 3 of this chapter, and ORS 116.115 was Section 4 of the same chapter, Please note also that 116.115 applies

not only to wills which have been probated but also applies to unprobated instruments. There therefore seems no reason why this section would have to be incorporated in the probate code.

Sections 25 and 26 cover Sections 11 and 12 of Tab 15. Please note that Section 7 of Tab 15 will be considered as a part of Tab 19; that Section 9 of Tab 15 is now included as Section 19 of Tab 23. I suggest that Section 10, Recording with copies, be considered where it is later shown as Section 16 of Tab 23.

Section 27 would substitute Section 3-410 of the Uniform Code for ORS 116.330, 116.335, and 116.340 shown as Sections 14, 15, and 16 of Tab 15.

Section 28 covers present ORS 116.325. I have incorporated the language of Section 3-411 of the Uniform Code which would seem more comprehensive than Section 13 of the present Tab 15.

To summarize, your draftsman has checked the comparable ORS sections and believes that all of the pertinent sections have been covered by the proposed draft or the drafts for future consideration.