PROBATE LAW REVISION
ADVISORY COMMITTEE

MINUTES

September 18, 1965

Meeting convened at 9 a.m. Saturday, September 18, 1965, in Judge Dickson's courtroom, Portland. The following members of the Advisory Committee were present:

Judge Wm L. Dickson
Otto J. Frohnmayer
W. P. Riddlesbarger
Stanton W. Allison
R. Thomas Gooding
H. E. Butler
C. E. Zollinger

The following members of the Probate Law and Procedure Committee were present:

Duncan L. McKay
H. E. Butler
J. Ray Rhoten
Robert W. Gilley
Charles M. Lovett
William M. Keller

Mr. David Frohnmayer was also present as a guest.

Frohnmayer presented a draft on descent and distribution of real and personal property, prepared as per the discussions at the Medford meeting in August. Copies were distributed to all members.

At Allison's suggestion, sub-paragraph V (5) was amended to read as follows:

> "(5) If no issue, parent, grandparent, or issue of either parent survives the intestate, to the issue of deceased grandparents in the nearest degree of kinship to the intestate within the fifth degree computed according to rules of the civil law, per capita without representation."

Gilley raised the question as to whether or not the last sentence of paragraph VI reading, "all distributees except those in the nearest degree take by representation." is in conflict with the language of paragraph V (5) which requires a per capita distribution. Zollinger explained that paragraph VI is limited to the definition of "representation". That definition is obviously not necessary to an interpretation of paragraph V (5) but only to paragraph V (3).

Allison raised a question concerning the word "lawful" in paragraph I (3). It was pointed out that paragraph XIII will specifically define the status of illegitimate children and therefore the word lawful will not be construed as affecting their status but only relates to adopted children who are likewise specifically covered in paragraph XII.

Under item two of the material distributed to all members by Frohnmayer (proposals discussed but not finally adopted by the committee) there was a discussion concerning Zollinger's redraft of the article on "title and possession of property". The purpose of Zollinger's redraft was to make it clear that the article would apply to a situation where the decedent died intestate. The following redraft was approved by the committee:

"Article_____

"Title and Possession of Property

"When a person dies intestate, title to his real and personal property passes at his death to his heirs; if a decedent dies testate, title to his real and personal property passes at his death to those to whom it is given by his Will. The title of the heirs or beneficiaries to the real or personal property of the deceased owner is subject to the rights of his surviving spouse and minor children and any claims for which the estate is liable. During administration the personal representative shall be entitled to possession of the real or personal property and shall have power to sell, mortgage, lease or otherwise dispose of the same as provided in this title."

Allison raised a question regarding the use of the terms "heirs","beneficiaries", etc. It was decided that the matter of defining terms at this point and throughout the draft is referred to Messrs. Wallace Carson and Bob Lundy.

Upon motion by Dickson, seconded by Riddlesbarger, it was decided to tentatively place the article "Title and Possession of Property" at the beginning of the appropriate chapter. However, it was pointed out that arrangement and sequence is an over-allproblem to be handled accordingly.

Riddlesbarger asked if, as per the Iowa Code, we substitute the word "estate" for "real and personal property". It was decided that this should not be done, as there are Supreme Court decisions on this question which should be clarified.

The motion to approve the article on "Title and Possession of Property", as set forth above, was made by Zollinger, seconded by Frohnmayer and unanimously passed.

Frohnmayer presented the chapter distributed to the members as item three, relating to inheritance from victims of murder.

A 1936 Harvard Law Review article by Wade (49 Harv. LR 715) was discussed. It was noted that Washington, in its new Probate Code, had adopted

Wade's suggestions almost verbatim.

It was pointed out that this problem was not limited exclusively to probate; that other matters such as trusts, joint and entirety property, guardianships and insurance were involved.

Frohnmayer's statement that the words "felonious intent" were superior to the word "feloniously" as used in the present statute went unchallenged (presumably because he is correct but the temporary secretary suspects considerable ignorance on the committee with respect to criminal law).

The title of the chapter was discussed. It was pointed out that the two primary words in the title, "inheritance" and "murder" were both somewhat inappropriate. The following proposals were made:

1. Allison - "Rights of persons causing death of others."

2. Gilley - "Person causing death not be benefit therefrom." (This is taken from the present heading ORS 111.060.)

Nothing was concluded with respect to the title of this chapter, it being agreed that this was essentially Mr. Lundy's problem.

There was a discussion concerning the elimination of the words "dower" and "curtesy" from section (3) of this chapter. No final decision was reached but the consensus was that the words should probably not be eliminated, even if dower and curtesy were eliminated prospectively.

Section IV of this chapter was discussed. Dickson suggested the possibility of providing that, as to all property rights covered, the slayer is deemed to have predeceased the decedent. It was pointed out that there are exceptions, i. e. joint property, tenants by the entirety, etc. Section IV was tentatively changed to read as follows:

"Section IV: Property passing by will or trust:

"The slayer shall be deemed to have predeceased decedent as to property which would have passed to or for the benefit of the slayer by will of the decedent, or by trust instrument."

There ensued a long discussion with respect to Section V, relating to tenancy by the entirety. Hargrove v. Taylor, 236 Or. 451 and other cases were discussed. It was finally agreed that Allison and Zollinger should collaberate with Frohnmayer to redraft this section, probably providing for the passage of title to the heirs of the decedent with the slayer having a life interest in one-half of the profits.

Section VI, relating to jointly owned property, was then discussed. Zollinger feels that the solution as to joint property should be the same as tenants by the entirety. There was general agreement upon this thought.

Allison suggested using such language as "survivorship" etc., rather than "joint tenancy". This is because joint tenancy is supposed to have been abolished in Oregon.

Gilley and Keller started a discussion with respect to the difference between jointly owned bank accounts and other property. It was pointed out that a bank account is a more temporary fluid transaction than a permanent manner of holding title. There was a lengthy discussion with respect to the rights of creditors. It was suggested, with considerable support, that the line should be drawn on the basis of whether both (or all) signatures are required to effect a withdrawal or transfer.

Dave Frohnmayer, reading Wade's article in Harvard Law Review, suggested that Section VI (3) covers this problem by giving the courts the power to settle the matter equitably. The committee was polled and it was agreed that the statute should specifically do something with respect to bank accounts.

Zollinger suggested the following language:

> "If property is subject to withdrawal or transfer by instrument executed by less than all of the owners, it shall be deemed owned by the party who deposited or otherwise invested it. In the absence of proof of source, it shall be deemed owned equally by the parties in whose names it is held."

The entire matter of joint property, including the exception to be made with respect to bank accounts, was referred to Zollinger and Allison for the working out of appropriate language.

Section VII was discussed. It was decided to adopt the language of the Washington Code reading as follows:

> "Section VIII - Reversions, Vested Remainders, Contingent Remainders, and Future Interests. Property in which the slayer holds a reversion or vested remainder and would have obtained the right of present possession upon the death of the decedent shall pass to the estate of the decedent during the period of the life expectancy of decedent; if he held the particular estate or if the particular estate is held by a third person it shall remain in his hands for such period.
>
> As to any contingent remainder or executory or other future interest held by the slayer subject to become vested in him or increased in any way for him upon the condition of the death of the decedent:
>
> (a) If the interest would not have become vested or increased if he had predeceased the decedent, he shall be deemed to have so predeceased the decedent;

(b) In any case, the interest shall not be vested or increased during the period of the life expectancy of the decedent."

Section VIII was approved as submitted by Frohnmayer.

Section IX was tentatively approved.

Section X relating to insurance proceeds was next discussed.

The question was raised as to whether subsection (2) relating to disability insurance is properly within the scope of this chapter. It was felt that the adding of the word "disability" to the title of the chapter might eliminate the problem.

The question of the inclusion of rights under pension plans, profit sharing plans, annuity contracts, etc., was likewise discussed.

The entire section was referred to Allison and Zollinger to rewrite in accordance with the thoughts expressed.

Section XI was next discussed. It was pointed out that Washington Code did not require a written notice. Dickson indicated he definitely preferred the requirement of a written notice. The following language was suggested and received general approval:

"Section XI: Payment by insurance company, bank, etc., no additional liability.

"Any insurance company making payment according to the terms of its policy or any bank or other person performing an obligation for the slayer as one of several joint obligations shall not be subjected to additional liability by the terms of this chapter if such payment or performance is made without written notice of a claim arising pursuant to this chapter."

This section was likewise assigned to Allison and Zollinger for redrafting.

Section XII was discussed. Upon it being pointed out that this section only related to bonafide purchasers, no furtherproblems seem to be in evidence.

Section XIII was discussed at length. The question arose as to whether or not an acquittal should control so asto relieve an alleged slayer from any liability or disability under this chapter and it was decided that it should not.

Contrary to the original consensus that a conviction should be conclusive, it was finally decided, largely because of the long and tortuous course of practically all criminal convictions, that a conviction itself would not be conclusive but that the record of the conviction should be admissible in evidence in every case. The language of the Washington Code (11.84.130) was generally approved. The matter was referred to Allison and Zollinger for the preparation of a further draft.

Inheritance by, through and from an adopted child.

Shetterly presented the results of his study of this problem. He reviewed the present statutory law in Oregon and the treatment of the matter elsewhere, including the Iowa Code. After considerable discussion, the following language was approved and ordered submitted to Mr. Lundy:

> "For the purpose of inheritance, by, through and from an adopted child, whether adopted in Oregon or elsewhere, the child shall be regarded as the child of the adopting parent, and he shall not be regarded as the child of his natural parent; except that if the spouse of a natural parent adopts the child, the child shall be regarded as the child of the natural parent and the adopting parent."

There was a brief discussion of ORS 111.070 relating to reciprocity between foreign countries and the right of non-resident aliens to take property. Dickson suggested that he contact Peter Schwabe and Catherine Zorn, who have had the most experience in such matters. If they are willing to do so, they will be asked to prepare a draft of proposed legislation relating to this subject. It is expected that such drafts would be submitted to the committee for study without written or oral argument.

Uniform Simultaneous Death Act.

It was agreed that since Chap. 112 ORS contains the Uniform Act only, no changes are necessary.

Dower and Curtesy

Allison commenced the discussion of this subject by reviewing the relationship of the various changes contemplated to be made in the law of descent and distribution. He suggested that if the widow's intestate inheritance of real property is changed to 50% of the fee interest, the reason for dower has largely disappeared.

Allison also mentioned that he felt the reception of the Judiciary Committee was favorable with respect to substituting a fee interest in a widow, but that it was not favorable with respect to the declaration of marital rights.

Upon motion duly made and seconded the following Resolutions received the approval of both committees:

1. The bill to be submitted to the legislature should eliminate dower and curtesy, and not be a part of any companion bill relating to marital right or otherwise.

2. The rights given to a surviving spouse under ORS 113.050 (right to take as against a will) should be extended to real property as well as personal property.

It was further decided to refer to Allison the task of preparing appropriate draft of proposed legislation to be submitted by Dickson to Lundy.

Inheritance by, through and from an illegitimate child.

Shetterly presented the results of his study of this matter. The statutory history in Oregon was reviewed. It was moved, seconded and passed that ORS 111.231 be recommended for repeal and that the following revision of the language of Section 309 of the Uniform Act be recommended:

"For the purpose of inheritance to, through, and from an illegitimate child

(1) The child shall be treated as the legitimate child of his mother; and

(2) The child shall also be treated as the legitimate child of the father if, during the lifetime of the child

(a) The father marries the mother;

(b) The father acknowledges in writing that the child is his own; or

(c) A Court determines the paternity of the child during the father's lifetime in a proceeding brought for that purpose."

Advancements

Shetterly presented his study of this subject. The present law was reviewed.

The first problem presented was whether the rule as to advancements should apply to a child and other lineal descendants only, or should it apply to any heir. The feeling of both committees was that the doctrine should logically extend to all parties.

A resolution was then made, seconded and adopted that the subject of advancements be continued on the agenda for the next meeting and that the secretary be instructed to include as an appendix to these minutes section 310 of the Uniform Code and the new Washington Code section (11.04.041) dealing with advancements.

AGENDA NEXT MEETING

It was decided to omit the October meeting and to have a 2-day meeting in the courtroom of Judge Dickson beginning Friday, November 19, 1965 at 1:15 p.m., to continue that afternoon and all day Saturday, November 20th.

The agenda for the 2-day November meeting was determined to be as follows:

1. Continuation of discussion concerning advancements and retainer.

2. Consideration of Bills redrafted pursuant to decisions made at this September meeting, including primarily the section on inheritance from victims of murder.

3. Consideration of the chapter on wills --- presentation by Mr. Riddlesbarger.

4. Consideration of the reciprocal rights of inheritance - non-resident aliens.

Meeting adjourned.

APPENDIX

Washington - "Sec. 11.04.041 ADVANCEMENTS. If a person dies intestate as to all his estate, property which he gave in his lifetime as an advancement to any person who, if the intestate had died at the time of making the advancement, would be entitled to inherit a part of his estate, shall be counted toward the advancee's intestate share, and to the extent that it does not exceed such intestate share shall be taken into account in computing the estate to be distributed. Every gratuitous inter vivos transfer is deemed to be an absolute gift and not an advancement unless shown to be an advancement. The advancement shall be considered as of its value at the time when the advancee came into possession or enjoyment or at the time of the death of the intestate, whichever first occurs. If the advancee dies before the intestate, leaving a lineal heir who takes from the intestate, the advancement shall be taken into account in the same manner as if it had been made directly to such heir. If such heir is entitled to a lesser share in the estate than the advancee would have been entitled had he survived the intestate, then the heir shall only be charged with such proportion of the advancement as the amount he would have inherited, had there been no advancement, bears to the amount which the advancee would have inherited, had there been no advancement.

Section 310 Uniform Probate Code (advancements.)

(a) If a person dies intestate as to his entire estate property transferred in his lifetime as an advancement to a person entitled to inherit a part of the estate is to be counted toward the advancee intestate share, and to the extent that it does not exceed the intestate share is to be included in computing the estate to be distributed.

(b) A gratuitous inter vivos transfer is not an advancement unless the intestate expressed that intention in writing or the donee acknowledged it in writing.

(c) If the advancee dies before the intestate, leaving a lineal descendant who takes from the intestate, the advancement is to be taken into account in the same manner as if it had been made directly to the descendant. If the descendant is entitled to a smaller share of the estate than the advancee would have been entitled, the descendant shall be charged only with the proportion of the advancement as the amount he would have inherited in the absence of the advancement bears to the amount the advancee would have inherited in the absence of the advancement.

(d) An advancement is to be valued as of the time of the advancement.