

OREGON PROBATE LAW REVISION

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Received by Legislative Counsel's Office

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1

Source: Robert Mix, Attorney, Corvallis, letter 8/26/59.

Inheritance tax; deductions.

"If an estate is probated all outstanding debts are normally deductible. On the other hand, if an estate is not probated, only very limited expenses can be deducted such as those of last illness, funeral charges, mortgages and liens, etc. [Note: See ORS 118.070.] I have never considered it fair that a distinction be made between an estate that is being probated and one that is not being probated as to the items which are deductible."

2

Source: George H. Layman, Attorney, Newberg, letter 5/17/60.

Appraisal of estates of decedents and wards.

"One of the Newberg attorneys, Herbert Swift, has suggested a change which would apply to both the administration of regular estates, as well as guardianships and conservatorships. He points out that many such matters have assets limited to government bonds and cash, for which an appraisal is required, but in which no appraiser's fee is properly payable. It would be his suggestion that ORS 116.420 be amended to exclude cash from appraisal, and ORS 116.425 to exclude sub-paragraph (e). While this is not a major revision, you might wish to make a note of it for further consideration.

"In practice, we sometimes file a petition setting forth the amount in cash, and obtain a court order waiving further inventory and appraisal. However, there is no statutory authority for such an order, and Mr. Swift's suggestion would save this trouble, and also legalize the omission of such appraisal." [Note: See also Comment and Suggestion No. 4.]

3

Source: Clifford E. Zollinger, Vice President, The First National Bank of Oregon, Portland, letter 5/19/60.

Dower and curtesy; conveyance or mortgage of real property.

"The provisions of ORS 113.610 to 113.660 appear to conflict with ORS 93.170, to the extent that the latter statute is applicable. Applying the rule of construction that when

particular provisions are in conflict with general provisions, the particular will prevail, it appears that the spouse of an insane person committed to a public insane asylum may convey free from the dower or curtesy interest of the insane person, but if the incompetent is not insane (whatever that means) or is not committed, rather elaborate provisions are made to protect his interest. This is not sensible, nor do I think that the procedures required under ORS 113.610 to 113.670 are very appropriate. I am also uncertain whether, in the event that both spouses are incompetent, the guardian of the spouse in whose name title is vested may initiate such a proceeding." [Note: See also Comment and Suggestion No. 17.]

4

Source: Campbell Richardson, Attorney, Portland, letter 6/24/60.

Appraisal of estates of decedents.

"I think that ORS 116.425, relating to the compensation of appraisers in estates, could be made more definite by specifying the compensation for appraisal of municipal, corporate and government bonds. These items are not presently specifically mentioned in the section. In some cases these items are capable of mathematic determination and would logically appear to fall within the section providing for compensation for appraising listed securities; in other situations, they might logically fall within the section providing for appraising unlisted over-the-counter securities." [Note: See also Comment and Suggestion No. 2.]

5

Source: Nicholas Jaureguy, Attorney, Portland, response to guardianship questionnaire 8/23/62.

Guardianship; private sale of real property; published notice.

"Amend ORS 126.441(2) by striking from line 8 the word 'therein' and substituting 'published nearest to the place of sale.'"

6

Source: Judge Charles M. Johnson, District Court, Clatsop County, Astoria, response to guardianship questionnaire 8/24/62.

Guardianship; disposition of nonresident's property by foreign guardian.

"Some confusion seems to exist as to how to accomplish the provisions of Section 126.565."

7

Source: Judge Charles M. Johnson, District Court, Clatsop County, Astoria, response to guardianship questionnaire 8/24/62.

Guardianship; winding up affairs after termination; bank deposits.

"Some provision should be made to prevent the banks, holding accounts or deposits by guardians, from dishonoring the checks of guardians issued in winding up the affairs of a deceased ward under the provisions of ORS 126.530.

"It is suggested that Section 126.530 be amended to contain a provision to the effect 'That no bank holding the deposit of a guardian shall dishonor the checks of a guardian issued under the provisions of this section.'"

8

Source: Judge John C. Warden, District Court, Coos County, Coquille, response to guardianship questionnaire 8/24/62.

Guardianship; bond of guardian; waiver of requirement.

"ORS 126.171 could be improved to allow court to waive the necessity of a bond. Where the assets consist solely of funds held in a depository and the funds cannot be withdrawn except on court order and the depository acknowledges this condition to the deposit of the funds, it may not be necessary to have any bond or bond expense. It is not clear whether this situation is covered by the words 'Unless otherwise provided by law' but I assume that means statute and not rule of court or court practice."

9

Source: Judge Teunis J. Wyers, District Court, Hood River County, Hood River, letter 8/24/62.

Sale of real property of decedents and wards; terms of sale.

"I have hardly made a close study of these new guardianship statutes but they do appear more detailed and specific. I do find a problem in both these statutes (126.436) and the probate equivalent (116.755) having to do with 'terms of sale' of realty.

"There appears to be an ambiguity in 116.755. Does the first sentence mean that the court shall prescribe the terms of sale regardless of whether the sale is for cash or on

credit or does it mean only that the court shall prescribe which -- that is 'on credit' or 'for cash'. In both statutes confirmation appears mandatory except in case of:

"1. Substantial irregularity or

"2. The sum bid is disproportionate to the value and 10% more can be obtained. (Note here the wording -- 'can be obtained'. How can a court ever say just what 'can be obtained'.) [Note: See ORS 116.810 and 126.456.]

"I've talked to other probate judges, including my respected brother, Bill Dickson, of Portland. None appears to construe that they should, in the order of sale, set a price or interest rate or down payment or type of security or amount or frequency of periodic payments on the balance.

"I judge the pattern to be that the court generally makes an order of sale 'on cash or credit' in the discretion of the fiduciary and then confirms except in case of 'substantial irregularity'. That appears to me to mean that the court actually exerts no control over the price except it be not 'disproportionate to the value'. (And there's no 'value' in view of the court except the appraisal -- which we all know is set by appraisers selected in most courts by the fiduciary.)

"The guardianship statute on sale clearly requires the order to be 'subject to such terms and conditions as the court may consider necessary or proper'. Note the permissive 'may'. I'm sure the practice is to leave this to the discretion of the fiduciary. So -- I suggest you consider clarifying the legislative intent. If the 'terms of sale' are to be set by the court it should be clearly stated what they (the terms) are to cover -- price, interest rate, type of security, amount of down payment and periodic payments -- and if to be left to the discretion of the fiduciary in whole or part, clearly say so. If the court is to review and be satisfied with the 'terms' as a condition of confirmation, the statute should clearly say so."

10

Source: Judge Samuel A. Hall, District Court, Curry County, Gold Beach, response to guardianship questionnaire 8/27/62.

Guardianship; Veterans Administration participation.

"ORS 126.346 and other sections relating to Veterans Administration. [Note: See also ORS 126.131 and 126.250.] I question that part of policy which casts burden upon Guardian, lawyers and court of, in effect, accounting to V. A. which is what those sections amount to. It consumes time and expense

which if the court is doing its duty is unnecessary. There is more that could be said but this is sufficient to point out that I consider it an unnecessary part of policy."

11

Source: Judge Samuel A. Hall, District Court, Curry County, Gold Beach, response to guardianship questionnaire 8/27/62.

Guardianship; handling claims of minors and incompetents and transferring property without guardianship.

"I would suggest that there be enacted statutes whereby personal injury settlements and other claims of minors and incompetents be examined and approved or disapproved by the court without necessity for opening a guardianship where the court finds from a petition and proposal and hearing thereon that the interest of the minor or incompetent is served best and there is assurance the proceeds will be used for him. In many instances it is an undue expense and hardship to have a continuing guardianship which may run for years on end. The same respecting the transfer of title to properties. There could be safeguards in the statute, without the necessity of guardianship." [Note: See ORS 126.555.]

12

Source: Judge Edwin L. Jenkins, District Court, Washington County, Hillsboro, response to guardianship questionnaire 8/27/62.

Guardianship; appointment of guardian; service of citation.

"126.146(3) has been misunderstood in that the 'person' referred to includes the incompetent which contention I have flatly rejected."

13

Source: Judge Edwin L. Jenkins, District Court, Washington County, Hillsboro, response to guardianship questionnaire 8/27/62.

Guardianship; appraisal of estates of wards.

"ORS 126.230(3). Appraisal should be required unless court orders otherwise. Bonding is difficult without a value of the assets."

14

Source: Harold V. Johnson, Attorney, Eugene, letter 9/10/62.

Guardianship; accounting by guardian.

"In regard to your review and evaluation of Oregon's new guardianship statute, I direct your attention to ORS 126.336 paragraph (4) that says 'the guardian of the estate shall give a copy of each account to the person or institution having the care, custody or control of the ward.'

"The above statute refers to an annual account. It is uncertain whether such account must be given before or after the annual account is approved. In either event, no time limitation is set forth concerning the number of days before or after the account is filed and approved, within which delivery shall be made. It is not specified whether proof or delivery shall be made by affidavit similar to that used when a citizen makes service of summons.

"I would suggest that the statute provide that the copy of account be delivered within ten days after the original account is filed and order approving that account is entered, and that proof of delivery be made by affidavit above referred to. [Note: See also Comment and Suggestion No. 18.]

"Sub-paragraph (5) in ORS 126.336 indicates the copy of final account shall be 'served,' and within ten days after date of service objections can be filed to the account. I would suggest that the copy of final account be served upon the persons mentioned, at least ten days prior to the date order approving final account is to be presented to the Court. I believe a show cause proceeding with citation issued to the persons mentioned in a procedure similar to that followed when the guardian is originally appointed would be a sound procedure to follow."

15

Source: Judge George R. Duncan, Circuit Court, Marion County, Salem, response to guardianship questionnaire 9/11/62.

Guardianship; appointment of guardian; factors considered.

"RE: ORS 126.166. It is suggested that there be added to subsection (1), a provision that the appointing judge may take into consideration any request made orally by the incompetent in open court."

16

Source: Judge George R. Duncan, Circuit Court, Marion County, Salem, response to guardianship questionnaire 9/11/62.

Guardianship; gifts from ward's estate; expenditures for ward's relatives.

"RE: ORS 126.295. Referring to gifts from ward's estate and expenditures of relatives:

"It is suggested that before authorizing gifts to religious or charitable institutions or providing estate funds for persons who have been but no longer are related to the ward by marriage, that notice of the proposal be given to the ward and to the spouse and children, or to the parents of the ward if there be no spouse or children, or if none of the former be living, then to the ascertained next-of-kin."

17

Source: James R. Ellis, Attorney, Portland, letter 9/12/62.

Dower and curtesy; proceedings for release.

"I am writing to you concerning the note in the Oregon State Bar Bulletin that your office is interested in hearing from members of the Bar who have had experience with the new Guardianship Act.

"A year or two ago our office handled what is evidently a rather unusual proceeding, the statutory proceeding for release of dower or curtesy of an incompetent person. As you know, ORS 113.610 and following sets forth what is required in this proceeding. I was somewhat disappointed to see that the new guardianship code did not incorporate this release of dower proceeding, or provide for release of dower in a guardianship proceeding.

"In the matter we handled, the wife was the incompetent. A guardianship had been in existence for some years, with her husband serving as both guardian of the person and of the estate. On two occasions, in different years, he sold parcels of real property held in his name only. Notwithstanding the existence of the guardianship, in each instance it was necessary, in order to obtain title insurance, that a proceeding be filed under Chapter 113 to obtain a decree authorizing a guardian ad litem to sign a deed conveying her dower interest in his property.

"Our experience here has that the presiding Judge was quite dubious whether he even had authority over such matters, particularly when there was a guardianship in existence.

The procedure itself seems a little pointless. ORS 113.630 requires service of the order to show cause why a deed should not be required upon the incompetent person, his guardian, next of kin, and all persons interested in the land. Service upon the incompetent in most instances would be useless. The guardian is very often the person requesting the release of dower. The next of kin probably would not have much interest in the matter, since the right of dower will be extinguished upon the death of the incompetent in any event.

"It seems to me that the welfare of the incompetent could be protected better by requiring that the authorization for the conveyance of dower or curtesy be given by the Court having jurisdiction of the guardianship of that incompetent, if there is a guardianship in existence. A provision could be made that, where the guardian is the spouse requesting the release of dower or curtesy, a special guardian ad litem could be appointed if the Court deemed necessary.

"The whole purpose of the proceeding for release of dower or curtesy is to assure that adequate provision has been made for the protection of the interest and for the proper support of the incompetent. The Probate Court, having before it the incompetent's complete guardianship file, should be in a much better position to determine that there has been proper provision for the incompetent." [Note: See also Comment and Suggestion No. 3.]

18

Source: James R. Ellis, Attorney, Portland, letter 9/12/62.

Guardianship; accounting by guardian.

"The only other criticism of the new guardianship act that I have heard is one regarding ORS 126.336(4), requiring the guardian of the estate to give a copy of each account to the person or institution having the care, custody or control of the ward. It is not entirely clear whether this requires that a copy of the account be furnished a nursing home which is caring for the ward. If there is a guardian of the person, the guardian of the person probably has the 'care, custody or control' of the ward, even though the ward is actually being cared for by a nursing home. In any event, the thought has been expressed to me by one of the trust officers of one of the banks we represent as guardian of several estates that, when the nursing home receives a copy of the account and sees what the ward's assets are, the cost of the nursing home's care is going to increase sharply. It might be desirable, under the circumstances, to amend that subsection to require a copy of the account to be given to the guardian of the person or institution to which the ward has been committed, rather than the person or institution having the care, etc." [Note: See also Comment and Suggestion No. 14.]

19

Source: George W. Neuner, Attorney, Roseburg, letter 9/30/63.

Administration of estates of decedents.

"Although I do not practice extensively in this field, our office, I believe, has had its share of probate practice in this area. I have been continuously reminded by clients, particularly, that our probate procedures are completely out of date. From two standpoints I feel that the need for revision is critical.

"First, in this modern age the average person of means is almost antagonistic to the time required in which to 'settle' an estate. In a great majority of the estates the payment of creditors is no problem and it would seem that there is every reason for a procedure by which solvent estates could be closed expeditiously and in a period of even as little as 30 days.

"You are, of course, aware of the so-called non-intervention procedures available in many states. The present notice requirements contemplate a horse and buggy or even a pony express era. Personally, I have no feelings for a creditor who is not quite aware of the existence of his debtor and I feel that procedures could easily be provided to protect any such creditor without such extended notice requirements.

"Secondly, from the standpoint of the bar, it would seem to me that, in effect, a lawyer 're-does' an estate some three to four times; first, when the petition is filed; second, when the inventory is prepared; third, when the inheritance and estate tax returns are prepared; and fourth, when the final account is prepared. Perhaps it is my mediocre ability, but I feel that I have to, in effect, re-analyze the entire estate each time one of these procedures are accomplished. This requires more time and more expense to the client. Further, I find that laymen are more and more resorting to trusts, inter vivos transfers and other mechanisms to preclude the necessity of a probate proceeding. In fact, I have been guilty of encouraging these procedures when they were indicated, primarily because of the problems in connection with our probate procedures."

20

Source: Samuel M. Bove, Attorney, Grants Pass, letter 12/30/63.

Guardianship; filing name and address of guardian.

"Sec. 126.126 ORS provides for the contents of a petition for the appointment of a guardian. Sec. 126.181 provides for

the filing in the guardianship proceeding of the name, residence and post office address of the guardian. This is entirely superfluous and unnecessary as all the information is contained in the petition. Sec. 126.181 should provide only for such filing in the event of change of residence."

21

Source: Samuel M. Bowe, Attorney, Grants Pass, letter 12/30/63.

Copy of will to legatees and devisees.

"Chapter 447 Oregon Laws of 1963 requires that upon entry of an order admitting any will to probate the appointed representative shall cause a copy of the will to be mailed to each legatee and devisee named therein. [Note: See ORS 115.220.] This should be amended to make the requirement only in the case of original probate. There appears to be no reason why ancillary proceedings initiated in Oregon should require this procedure."

22

Source: Judge Don H. Sanders, Circuit Court, Douglas County, Roseburg, letter to William E. Love, Attorney, Portland, 2/7/64.

Claims against estates of decedents; time for presentation.

"Donald Dole and I have often discussed various aspects of revising Oregon's probate laws. He has suggested that I write to you in your capacity as chairman of the Committee on Probate Practices and Procedure and give the committee, through you, my thoughts on the subject. As you may have deduced, probate matters normally come before me.

"First, there is a need for me to set out the bases of my suggestions, which are few, simple, and, most important, the reasons for the limits I have set on my suggestions. As a practical matter, I conclude it is easier, i.e., can be accomplished with greater facility, to attempt to obtain from the legislature a few significant but relatively minor changes rather than an overall sweeping and often complex revision. The latter seems prone to becoming bogged down. Moreover, for the usual obvious reasons, each time some chapter of our statute is drastically revised, particularly those revisions in which there is a relatively substantial departure from the former rules, the parade to the Supreme Court starts to get new rulings covering the revised material. Experience indicates, so far as I know and am able to determine its teachings from attorneys in practice, that where the changes are made only a few at a time, such result is to a large extent avoided.

"Accordingly, practical reasons seem to suggest avoiding a sweeping and drastic change, in favor of fewer changes, which do not have the appearance of complete revision. A classic example is, of course, the defeat of the attempted Constitutional revision. * * * For the foregoing reasons, which amount to no more than argument, I urge the piecemeal approach. * * *

"Based on the foregoing, I offer the following suggestions to the committee:

"Amend O.R.S. 116.510, changing the initial period of time in which claims may be made against an estate to three months.

"I assume that the reasons justifying this change will occur to your committee as they have to me. I doubt a shorter period of time is feasible in cases involving federal taxes.

"The foregoing change necessitates amendments as to periods of time under provisions of O.R.S. 113.060. [Note: ORS 113.060 relates to election by the surviving spouse of a decedent to take under the will of the decedent or to take an undivided one-fourth interest in all the personal property of which the decedent died possessed.] There may be other related changes in periods of time involved under other statutes. I confess I have not attempted a complete research. From memory, it presently occurs to me there is, or at one time was, a statutory provision allowing a widow one year in which to claim a homestead exemption. My memory is hazy on this and it may not be related to probate. In any event, the ramifications of the change suggested would necessarily need be exhausted, and this letter becomes of alarming length already.

"I feel compelled, however, to set out the reasons for giving these changes priority. If I need to argue that the one area in which attorneys and courts are subjected to the greatest valid and legitimate criticism, it is in the propensity to let estates drag on interminably. * * * There seems to be locally a consensus of opinion that shortening the period of time will greatly expedite the handling of estates. From where I sit this is the most pressing problem.

" * * * Consider me ready and willing to respond, by letter, telephone or in person, should you or your committee wish me to answer questions on these suggestions or any other matters involving probate."

Source: William M. Keller, Attorney, Portland, letter to Judge William L. Dickson, Circuit Court, Multnomah County, Portland, and enclosure, 1/29/64.

Guardianship; access of guardian to ward's safe deposit box.

"Enclosed is a copy of a letter I am writing to the State Treasurer. The problem which has been assigned to me by the Probate Committee is fully outlined in the letter to Mr. Belton and I will not bore you by repeating it here.

"I would, however, appreciate it if you would give the matter some consideration and either call me or have your secretary indicate when I might come to the courthouse to discuss the matter with you.

"I would be interested primarily in your reaction to the following questions:

- "1. Do you feel that the possibility of abuse of the powers of a guardian in the manner indicated is sufficiently strong to merit the consideration of corrective legislation?
- "2. If your reaction to the first question is in the affirmative, do you have any ideas as to what party or agency should have the responsibility of taking an inventory of a safety deposit box.
- "3. If such responsible party or agency is given the responsibility of taking such an inventory, is there any necessity for any further action? With reference to this matter the thought occurred to me that such inventory should probably be filed with the Probate records and that such would suffice.

"I would appreciate very much if you would let me have your reaction to this problem."

Enclosure: William M. Keller, letter to Howard C. Belton, State Treasurer, Salem, 1/28/64.

"The Committee on Probate Law and Procedure of the Oregon State Bar has been requested to consider the possible abuse of the power given to a Guardian by the issuance of Letters of Guardianship. Reference has been made to cases wherein an elderly, infirm or senile citizen has been made a ward in guardianship proceedings. The Court, of course, has no idea as to the extent or nature of the estate at the time of the making of the appointment. Upon receiving his appointment and proper Letters of Guardianship, the Guardian is thereupon legally entitled to gain access to any safety deposit box standing in the name of the ward. [Note: See ORS 126.230 and 126.240.]

"It has been suggested that this opens the way to abuses, in that no person or agency, other than the Guardian himself, need be present at the time of the opening of the deposit box. Whatever bond may have been fixed by the Court is of course no protection if any cash or negotiable securities found in the deposit box are never inventoried. Not having been inventoried, the guardian need never account for them and the chance of detection of defalcation is slight.

"It has been suggested that this possibility of abuse might be remedied by the requirement that some responsible person be present when a Guardian first opens the deposit box of a ward. Such person might be a bank officer, the attorney for the Guardian, a representative of the State Treasurer's office or someone appointed specially by the Court. Due to the generally satisfactory experience with the requirement that your office be present and inventory the contents of the safety deposit box of the decedent, it has been suggested that the practical solution might be to extend this responsibility to your office. [Note: See ORS 118.440.]

"It might be said that the State Treasurer's office logically can have no interest in the inventorying of the assets of a living person. However, it seems unrealistic not to recognize the fact that many elderly, senile or infirm persons will shortly become 'candidates' for the services of your office. It seems to be locking the barn door after the horse has long been stolen to require the presence of your office at the opening of a deposit box of a person who has long been under guardianship, when the guardian was alone entitled to access to the box.

"It is, of course, recognized that many people not under guardianship may improvidently place their valuables in the custody of another or give someone else power of attorney to enter their deposit box. In a free society, one cannot always protect a person against his foolish actions. However, that would not appear to be justifiable cause for failure to protect against abuses which might result from the issuance of Letters of Guardianship by the Court itself.

"The writer is a member of the Committee on Probate Law and Procedure of the Oregon State Bar and has been assigned the problem of studying this matter. I would appreciate very much your comments on the problem. * * *"

24

Source: Mrs. E. C. Lane, Eugene, letter to William P. Riddlesbarger, Attorney, Eugene, 1/31/64.

Descent and distribution; from stepparents to stepchildren.

"I was very glad to hear that a committee has been named to look into some of the antiquated Probate laws of the State.

I recently went thru the affect of this law. My step-father of 51 years died recently. He and my mother were married in 1912. He died intestate. My husband and I tho't he had made a will, as he always told me that when he passed on, I was to get his estate. When I went to have his estate settled, I was told that I would get nothing, that the state would take everything. * * * Mr. Lind had no living relatives, as his folks passed-away before he came to this country. I just wanted to write this letter as perhaps you and the members of your committee could look into this law, as I am sure there are others that have gone thru the same grief and heartache that I have. I am sure that the estate would have done me more good, now that I'm on a pension, than it would do for the State of Oregon. * * * " [Note: See ORS 111.020 and 111.030.]

25

Source: Otto J. Frohnmayer, Attorney, Medford, letter from John P. Bledsoe, Attorney, Portland, to Judge William L. Dickson, Circuit Court, Multnomah County, Portland, and enclosure, 3/27/64.

Appraisal of estates of decedents; waiver of requirement.

"Enclosed is a copy of Otto J. Frohnmayer's Report to Committee on Probate Law and Procedure dated March 21, 1962.

"This Report deals with empowering the probate court to waive appraisal.

"I have been asked to report further upon this matter, and I should appreciate having your views. * * * "

Enclosure: Otto J. Frohnmayer, Report to Committee on Probate Law and Procedure, 3/21/62.

"Subject: Shall the court have the right to waive appraisal in proper cases? [Note: See also Comment and Suggestion No. 2.]

" * * * The answer to the question posed is yes.

"In a number of probates a formal appraisal is a useless, time consuming and expensive procedure. Several examples are:

"a. In a wrongful death action, or

"b. Where the assets consist of cash, listed securities, U. S. bonds and the like, or

"c. Where shortly prior to his death decedent sold property in an arm's length transaction and this with other property essentially equivalent to cash comprise the estate.

"This subject has been discussed by the writer with the Honorable Orval J. Millard, circuit judge at Grants Pass and the Honorable E. C. Kelly and the Honorable James M. Main, circuit judges at Medford. All agree that a personal representative should be required in every case to file an inventory. However, in proper cases, the court should have the right to waive the making of an appraisal of the property listed in the inventory.

"ORS 116.405 requires the personal representative to file an inventory with the clerk.

"ORS 116.420 requires, before the inventory is filed, the property to be appraised by three persons, except the court may, in its discretion, appoint but one appraiser if the probable value of the estate does not exceed \$10,000.00 exclusive of cash and securities of the United States Government.

"It is suggested that ORS 116.420 be amended to give the court the right, in its discretion, to waive the appraisal of the property if no useful purpose is to be served thereby.

"ORS 116.420 might be amended to read:

"116.420 Appraisement; appointment of appraisers; waiver of appraisal. (1) Before the inventory is filed, the property therein described shall be appraised at its true cash value by three disinterested and competent persons, who shall be appointed by the court; provided, that the court may, in its discretion, appoint but one appraiser if the probable value of the estate does not exceed \$10,000, exclusive of cash and securities of the United States Government and provided further, that the court, in its discretion, may waive the appointment of any appraisers if in its judgment the value of the property may be definitely ascertained and entered in the inventory by the personal representative and no useful purpose will be served by the appraisal. (new matter underscored)

"(2) If any part of the property is in a county other than that wherein the administration is granted, the appraiser or appraisers thereof may be appointed by such court, or the court of the county in which the property is located. In the latter case, a certified copy of the order of appointment shall be filed with the inventory.

"(3) Nothing contained herein shall limit the power of the court to require the filing of an inventory and the making of an appraisal as provided in ORS 118.005 to ORS 118.840." (new matter underscored)

"ORS 118.610 (Found under Inheritance Tax section of the Probate Code) provides for the filing of an inventory by the executor, administrator or trustee of every estate and for the appraisal of property as by law required.

"ORS 118.620 provides for the extension of time for filing the appraisal.

"ORS 118.630 provides that if no inventory or appraisal has been made or if the court deems it for any cause insufficient or inadequate, either on its motion or on application of any interested party, including the state treasurer, may appoint one or more persons to appraise the property embraced in any inheritance, devise, bequest or legacy subject to the payment of a tax imposed by ORS 118.005 to 118.850.

"Other sections follow which are in the interest of collecting inheritance taxes due to the state of Oregon.

"In view of the foregoing provisions it is suggested that the new subsection (3) be added to ORS 116.420 as set forth above."

26

Source: Donald E. Walters, Vice President and Legal Counsel, Oregon Title Insurance Company, Portland, letter 4/16/64.

Dower and curtesy; proceedings for release.

"It has been suggested that I call your attention to a provision in ORS 113.620 which I believe is unnecessary and which in some instances places a burden on the petitioner. The section covers a portion of the proceedings for release of dower and curtesy of an incompetent or a missing person. The proceedings are covered in full under ORS 113.610 to 113.690 inclusive.

"ORS 113.620 states that the return date for the show-cause order provided for therein shall be 'not less than four nor more than eight weeks from the time of making the order.' ORS 113.630 provides for a personal service of designated people at least 10 days before the hearing of the petition. Substitute service on non-residents may be had by publication for four successive weeks.

"Several of our customers who are attorneys have been unduly inconvenienced by this provision. We have had two very recent examples, where the property had been purchased prior to the adjudication and commitment of the incompetent spouse. Both incompetents had independent estates which would very

adequately care for them for the remainder of their life. Parties in interest and next of kin had no objections to the sale of the competent spouse's property. However, because of the noted provision in ORS 113.620 one party lost the sale of her property and the other was put to an unnecessary wait.

"ORS 113.620 adequately protects the incompetent without requiring this period of waiting. This section provides that the court must find that it would not be detrimental to the incompetent person that a deed be given relinquishing or conveying his or her curtesy or dower interest in the land. Waiting four weeks would seem to be unnecessary to hold the hearing on this order. I would, therefore, suggest the following language be deleted from ORS 113.620:

"Not less than four nor more than eight weeks from the time of making the order,"

"This would make the section read as follows:

"If it appears to the court from the petition that it is necessary or would not be detrimental to the incompetent person that a deed be given relinquishing or conveying his or her curtesy or dower interest in the land, the court shall make an order directing the guardian and next of kin of the incompetent person and all persons interested in the land to appear before such court at a time and place to be therein specified to show cause why such deed should not be directed to be made by the court.

"While the average attorney may not face this problem once in five or six years, I have seen this problem before different attorneys in Multnomah County at least 15 times in the last year. I hasten to add that the portion of the statute set forth above is no particular inconvenience to this company. All we can do is require that this portion of the statute be followed. However, we do realize that there are many people unnecessarily inconvenienced by this provision in the statute." [Note: See also Comment and Suggestion Nos. 3 and 17.]

27

Source: Judge Ralph M. Holman, Circuit Court, Clackamas County, Oregon City, letter 5/13/64, response to form letter to probate judges.

Probate jurisdiction; courts which exercise.

"I have only one suggestion for the Probate Advisory Committee, and that is wherever possible move probate out of the county court to the circuit court, preferably." [Note: See ORS 3.130, 5.040, 5.050, 5.070, 5.080 and 46.092; see also Comment and Suggestion No. 38.]

Source: Leo F. Young, Attorney, Eugene, memorandum to William P. Riddlesbarger, Attorney, Eugene, 5/16/64.

Executors and administrators; residence qualification.

"It has come to my attention that in certain cases the provisions of ORS 115.410, requiring that persons appointed as executors and administrators must be residents of the state of Oregon, creates a difficulty in having a person with a personal interest in the proper administration of the estate appointed to administer it. It would appear that with our modern means of communication a change in this section should be considered so that in some instances, non-residents could be appointed. In order for a court to exercise adequate jurisdiction and enforce the appointed individuals to perform their duties, non-residents could be required to file a bond or other undertaking and consent to the jurisdiction of the court. I believe that as long as a resident attorney is appointed to act for the estate, that it should be permissible, at least under specified circumstances, to appoint a nonresident administrator." [Note: See ORS 126.161.]

Source: H. E. Green, Group Supervisor, Internal Revenue Service, memorandum forwarded by Arthur G. Erickson, District Director of Internal Revenue, Portland, letter 5/18/64, response to form letter to Erickson.

Federal estate tax; estate assets liable; apportionment.

"1. In computing the Federal estate tax, the problem arises as to what assets of the probate estate are liable for the Federal tax when nothing is said in the will, or when the widow elects against the will [Note: See ORS 113.050.], or where the decedent died intestate. For example, is the personal property exhausted first and then real property, or are they both immediately and equally liable so that the beneficiaries are liable in proportion to their inheritances? Present practice is to exhaust the personal property first and often brings grave injustice.

"2. The present State law provides that State inheritance taxes are apportioned [Note: See ORS 118.110 and 118.290.], but it does not have a similar provision covering the Federal estate tax. The recent Oregon Supreme Court decision in the case of Beatty v. Cake [Note: (1963) [77 Adv. 509] Or. , 387 P.(2d) 355.] allowed apportionment in that particular set of facts, but many areas still remain undecided. This should be a matter of statutory determination rather than legislation by court decision."

30

Source: Edwin P. Morgan, County Clerk, Gilliam County,
Condon, letter 5/15/64, response to form letter to
county clerks.

Conservatorship; inventory and appraisal of estates of wards.

"One question that comes to my mind at this time is with regard to conservatorships. As you are aware, the fee for filing estates is based on the value of the estate. Under the conservatorship law, it is not clear whether or not inventory and appraisal must be filed. When no inventory is filed it is impossible to determine the value of the estate and filing fee cannot be established. It would appear equally important to the person administering the conservatorship to know as nearly as possible the true value of the estate for purposes of accounting to the court." [Note: See ORS 126.636 and 126.230.]

31

Source: Edwin P. Morgan, County Clerk, Gilliam County,
Condon, letter 5/15/64, response to form letter to
county clerks.

Closing inactive estates of decedents.

"I also have a suggestion with regard to closing estates which have been inactive for a long period of time. As you know, under the present law it requires considerable effort to close an estate which has been inactive. My suggestion would be that in cases where the estate of a deceased person has been inactive for a period of one year, and it appears that the estate is in a condition to be closed and no closing order has been made, that the Judge of the Probate Court be authorized to notify the attorney for the estate, at his last known address, that the estate will be closed. Since the Supreme Court requires reports of pending estates, this would help to clear this backlog of old cases. In many cases, a closing order is all that is needed. Too, an estate can always be opened if necessary."

32

Source: R. Thomas Gooding, Attorney, La Grande, letter 5/18/64.

Executors and administrators; terminology.

"We use the terms: 'administrator', 'administrators', 'administratrix', 'administratrices', 'executor', 'executors', 'executrix', 'executrices'. Then, add to these labels 'with

will annexed', and occasionally 'ancillary', and possibly there are more. The use of the word 'executor' is unfortunate and is not commonly understood, and I feel that one term, such as 'administrator', could be used to designate all persons appointed by the court to administer the estates of intestate decedents, and testate decedents. The distinctions do not appear to serve any useful purpose."

33

Source: R. Thomas Gooding, Attorney, La Grande, letter 5/18/64.

Letters testamentary and of administration.

"Similarly, we have letters of administration and letters testamentary, depending upon the situation. One form of letters of administration covering all areas would suffice."
[Note: See ORS 115.210 and 115.350.]

34

Source: R. Thomas Gooding, Attorney, La Grande, letter 5/18/64.

Notices in administration of estates of decedents.

"Notice to creditors can take any number of variable forms and each attorney may have his own opinion on what meets the statute. [Note: See ORS 116.505.] A simple concise form of notice specified by statute could be drafted so that publication costs are at a minimum. Likewise with other notices that may be given by publication including sales of real property." [Note: See, for example, ORS 116.186, 116.760 and 117.610.]

35

Source: R. Thomas Gooding, Attorney, La Grande, letter 5/18/64.

Copy of will and order admitting to probate to intestate heirs.

"ORS 115.220 provides that upon the entry of an order admitting the will to probate, the representative shall mail a copy of the will to each legatee and devisee. (Oregon Laws, 1963, Chapter 447, Sec. 1). I assume the purpose to be to give notice of the terms of the will to the heirs so they can inquire, and possibly ascertain the nature and extent of their inheritance. I suggest that a petition for admission to probate contain the names and addresses of the heirs that would inherit in the case of intestacy, and that they also be mailed a copy of the will. Some experience indicates that wills may be changed at the last minute when there may be serious questions

of testamentary capacity and undue influence. I have understood that an unnatural disposition has some evidentiary weight, possibly minimal, on the question of influence. It would appear that those disinherited are entitled to notice of the contents of the will. This would also eliminate a possible harsh result of ORS 115.180, the six-month statute of limitations on a will contest, where the disinherited live a great distance and there is no communication prior to death between them and the decedent and those close to the decedent. I also suggest that a copy of the order admitting the will to probate be mailed as well." [Note: See also Comment and Suggestion No. 21.]

36

Source: R. Thomas Gooding, Attorney, La Grande, letter 5/18/64.

Temporary provision for surviving spouse of decedents.

"I have also encountered difficulty reconciling ORS 113.070 'widow may remain in dwelling and have sustenance one year', and ORS 116.015 'further order for support,' and noted that it was adequately covered in Volume 1, Oregon Probate Law and Practice Section 161. Possibly, some attention could be given."

37

Source: R. Thomas Gooding, Attorney, La Grande, letter 5/18/64.

Wills; pretermitted children.

"Another matter I have encountered has been the pretermitted children statute (ORS 114.250) and because it has received much litigation and certainty, I would be hesitant to amend. The statute reads that if the testator leaves a child or its descendant 'not named or provided for', the testator dies intestate as to the child or descendant 'not provided for'. You will note that the underscored words are not preceded by the words 'not named or'. The contention has been made that the mere naming of the child is insufficient, and that he must be expressly disinherited or actual provision made. This is contrary to the Oregon cases. The contenders premise their claim upon a passage in Wadsworth v. Brigham, 125 Or. at 452: 'While the testator has a right to disinherit his children, or expressly give them a nominal sum, when he fails to do that and does not expressly disinherit the children or expressly give them a nominal sum, in order to exclude the children, under these circumstances, from inheriting under the statute, they must be actually and substantially 'provided for.'"

"My remembrance is that the Deady Code, page 937, Section 10, contained the words 'not named or' immediately preceding the underscored words. It appears that somewhere along the line and by the time of Hill's Code, Section 3075, (1888) the words 'not named' preceding the underscored phrase were eliminated, and the statute has remained the same ever since. Possibly, these words could be inserted."

38

Source: Judge Teunis J. Wyers, District Court, Hood River County, Hood River, letter 5/19/64, response to form letter to probate judges.

Compliance with statutes; probate courts; small estates of decedents.

"The area of the probate law which I think needs the most attention is the fact that the statutes in so many cases are simply ignored. At present there are, I think, nine Circuit Courts with probate jurisdiction and twelve District Courts with probate jurisdiction leaving fifteen non-lawyer probate courts. I doubt if many probate courts are accomplishing exact compliance with the statutes. It is only an opinion of course but I venture that there aren't more than two or three probate courts in Oregon which are achieving any compliance with the statutory provisions for semi-annual accountings or strict compliance with the requirements of filing vouchers, etc. An examination of the probate practice in this county prior to the institution of the District Court in January, 1961, indicates what to me was a shocking ignoring of the probate statutory requirements. In talking to other probate judges I have formed the opinion that very few are making the intimate studies of the probate files which would be necessary to achieve full compliance with the laws. Lawyers, it is my observation, bitterly resent being required to comply strictly with the statutes as they now exist. The probate fees have now been increased to a point where it would seem they could justify closer attention but of course no such result obtains. I would therefore recommend to your committee consideration of some self-operating penalties to achieve strict enforcement.

"On the subject of which courts should have probate jurisdiction I would like to offer a comment or two. Nine Circuit Courts and twelve District Courts (thirteen after next January) have probate jurisdiction. It appears that in the future there will be more District Courts installed in response to the announced position of the State Bar which calls for the elimination of the non-lawyer probate judge and Justices of the Peace. As this program develops there will be lawyer judges available in more and more counties. These counties generally are those with the least population (although Baker,

Columbia, Malheur, Tillamook and Union Counties have populations larger than Curry and Hood River which now have District Courts). These less populous counties will also have low work loads for their District Judges and consequently it is suggested that perhaps probate and juvenile jurisdiction be considered for District Courts hereafter organized. It is, of course, true that District Judges can do the probate work as Circuit Judges pro-tem. This has an advantage in that it avoids the rather absurd trial de novo (which is a relic of the County Judge system). [Note: See ORS 3.081 and 46.092; see also Comment and Suggestion No. 27.]

"I wish very much that there was some inexpensive way of probating an estate of less than \$1,000.00. My experience is that lawyers detest these small matters and their fees are almost out of proportion to the amount of the average of these small estates. I have wondered if a statute couldn't be written that would work something like the Small Claims Department in my Court. I suspect that the Bar would not object." [Note: See ORS 116.020.]

39

Source: Raymond J. Salisbury, Attorney, Grants Pass, letter 6/9/64

Small estates of decedents; insolvent estates; sale of real property.

"We have recently handled two small estates where the principal asset was a parcel of real property. In both of these cases the claim of the State Welfare exceeded substantially the total appraised value of the estate. Because the estate was insolvent, it was necessary to sell the real property in both cases and it was necessary to go through the expense of service of citation on the heirs including the cost of publication. Since both of these estates were totally insolvent, it was a meaningless act to give the heirs notice of the application for authority to sell. Perhaps a provision in substance that the judge could dispense with service of citation upon the heirs where the estate was insolvent would correct this problem. [Note: See ORS 116.765.]

"At any rate, perhaps the committee would have some opportunity to consider this particular problem."

40

Source: Judge Teunis J. Wyers, District Court, Hood River County, Hood River, letter to Judge William L. Dickson, Circuit Court, Multnomah County, Portland, 8/13/64.

Claims against estates of decedents; action on presented claims.

"I believe that you are a member of a committee considering a revision of the probate statutes.

"It seems to me that the system of handling claims against estates which are set forth in Sec. 116.520 and 116.525 should be changed. As it now stands a claimant serves a claim on the attorney for the legal representative and at the end of ninety days the claim has, in effect, been outlawed unless the claimant takes action. The administrator can file the claim without rejection or allowance and the time within which action may be taken for either a summary hearing or Circuit Court action runs out. Most claims are filed by laymen and they feel that once they have filed their claim it will be paid. It seems to me that instead of being rejected that the claim should be considered allowed unless the administrator gives notice of rejection and if the claim is rejected the Court should set it for hearing automatically. I'm afraid a good many claimants with valid claims are being defeated through not being informed that there are any objections to the claim.

"I was once asked to make any suggestions about the probate law which came to my attention and I am just making this as a suggestion."

41

Source: William F. Schulte, Attorney, Portland, letter to Committee on Revision of Laws, Oregon State Bar Association; 9/2/64, forwarded by Norman A. Stoll, Chairman, Oregon State Bar Committee on Law Revision.

Small estates of decedents; deceased minors with no surviving spouse or minor children.

"I should like to call to your attention a 'blank spot' in the Probate code in this State. ORS 126.555

provides that in the situation where there is an estate of not more than \$1,000.00, the Court may simply designate some one to receive the property of the person under legal disability, and ORS 126.516 provides that if, after the appointment of a guardian, the estate of a ward consists of personal **property** having a value not exceeding by more than \$1,000.00 the aggregate amount of unpaid expenses, the Court may order a peremptory closing of the estate, by payment of the claims and expenses and delivering **the** over-plus, if any, to a person designated by the Court.

"Generally this provision of the Oregon code comes into play in situations where minor children have small inheritances or claims of moderate value against other people. Generally the money is directed to be paid to the parents of such minor child to be held and used exclusively for the benefit of the minor child.

"ORS 117.315 provides that if a minor child is entitled to distribution of personal property of value less than \$1,000.00 from the estate of a decedent, and has no Guardian, the Executor or Administrator may with the approval of the Court pay or transfer such personal property to a parent of the child who is entitled to the custody of said child.

"ORS 116.020 provides that if it appears from the inventory that the value of the estate does not exceed \$1,000.00 over and above property exempt from execution, the Court or Judge thereof shall make an Order providing that the whole of the estate, after payment of funeral expenses and expenses of Administration be set apart for a surviving spouse or minor child of the deceased.

"It has been my misfortune quite recently to be involved in a wrongful death case representing the parents of a deceased five year old child. A settlement of \$1,000.00 was agreed upon for the wrongful death claim authorized by ORS 30.020. After payment of attorney's fees, and funeral expenses, and necessary disbursements there is less than \$100.00 in the Administratrix's account. Since the deceased was five years of age at the time of the death it appears to be an exercise in futility to advertise a notice to creditors. The only thing the deceased could have been legally liable to have to pay would be for his necessities, and his parents are liable for them, anyway. It would seem advisable that ORS 116.020 be amended to make proper provision for short order peremptory closing

of such small estates without requiring that the deceased die leaving a spouse, and/or minor children."

42

Source: Donald J. Morgan, Attorney, Portland, letter 11/18/64.

Appraisal of estates of decedents; securities.

"As you are aware, ORS 116.425 sets forth the compensation appraisers are to receive for their services in appraising the assets of an estate. Subsection (b) of that Section provides for payment at the rate of 25¢ per \$1,000.00 of appraised value of listed securities and subsection (c) provides for compensation at the rate of \$1.00 per \$1,000.00 of appraised value for unlisted securities traded over the counter.

"While I am not familiar with the practice in other counties, in Multnomah County the appraisers determine the value of the securities mentioned in subsections (b) and (c) respectively, by looking in the Wall Street Journal for the date of decedent's death and taking the difference between the high and the low price of the listed securities and the difference between the bid and the asked price of over the counter securities.

"When the Executor or Executrix, who is often the principal heir of the decedent, is advised a fee is to be paid the three appraisers who read the Wall Street Journal it creates hard will towards the courts and the probate laws. As many people have no other contact with courts and lawyers other than when a death occurs and an estate is probated, it seems to me desirable to avoid this animosity.

"The solution may be to waive appraisal when actively traded securities are involved, leaving valuation to the Executor, (the OSTC, after all, also subscribes to the Journal) except where a blockage problem exists, or to allow waiver upon petition and order of the Court. Whatever the remedy, it does seem to me the laws relating to appraisal as presently written do create a problem where none need exist." [Note: See also Comment and Suggestion Nos. 2 and 25.]