

OREGON PROBATE LAW REVISION

Rough Draft of Proposed Legislation
on
Release of Incompetent's Dower or Curtesy

June 13, 1964

To the Members of the Advisory Committee on
Probate Law Revision:

This is a rough draft of proposed legislation designed to revise certain provisions of the Oregon statutes relating to release of dower and curtesy interests of incompetents. The draft has been prepared pursuant to and is based upon action by the advisory committee at the May 16, 1964, meeting. It is submitted for your consideration.

The draft consists of amendments and repeal of existing statute sections. In the case of amendments, matter underscored, like this, is new matter to be added, and matter in brackets, [like this], is existing matter to be deleted.

Each section of the draft is followed by a Comment, in which the draftsman sets forth a brief description of the revision proposed by the section, a reference to the advisory committee action upon which the revision is based, as recorded in the minutes of the May 16 meeting, or to some other reason for the revision and questions for consideration by the committee.

In the necessarily limited amount of time available, the draftsman experienced difficulty in producing a draft which would, in his opinion, satisfactorily implement the action by the advisory committee at the May 16 meeting, and he entertains some doubt as to the sufficiency of the draft submitted.

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Section 1. ORS 113.410 is amended to read:

113.410. A married woman may [bar] be barred of her right of dower in any estate conveyed by her husband, or by [his guardian if he is a minor] the guardian of the estate for him, by her, or, if she is an incompetent, by the guardian of the estate for her as provided in ORS 126.476, joining in the deed of conveyance with, or [by] executing a deed separately from, her husband or [such] his guardian, with or without mentioning the barring of dower therein. [; provided, that such] A separate deed, if barring an inchoate right of dower, shall not be executed to a stranger to the title, but shall be executed to the grantee of her husband or to such grantee's heirs or assigns.

Comment: Section 1 amends ORS 113.410, in part, by adding thereto a provision that the right of dower of a married woman who is an incompetent may be barred by her guardian joining in a conveyance by her husband or his guardian or executing a separate conveyance to her husband's grantee, and that her guardian is to proceed pursuant to ORS 126.476. This addition is based upon action by the advisory committee at the May 16, 1964, meeting. See Minutes, 5/16/64, page 4; Appendix A, page 2. The committee action was as follows:

"That the statute sections commented upon (ORS 93.170 and 113.610 to 113.670) be repealed, and that in their stead ORS 113.410 (bar of dower by conveyance) be amended to provide for bar by a conveyance executed by the guardian of an incompetent as provided in ORS 126.476, and that ORS 126.476 (exchange, partition, sale or surrender of ward's property) be amended to include, in subsection (2) thereof, cases where the interest of the ward is an inchoate dower or curtesy interest."

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ORS 113.410, while referring specifically only to barring the right of dower, also applies, of course, to barring the right of curtesy. See subsection (2) of ORS 113.020.

If a spouse is incompetent but a guardian of the estate for him has not been appointed, his right of dower or curtesy could not be barred under ORS 113.410, as amended by section 1, until such a guardian was appointed. Does this circumstance give rise to any problems? Note the approach to this circumstance taken by ORS 113.640, which is repealed by section 3.

If a spouse is a spendthrift for whom a guardian has been appointed, should the barring of his right of dower or curtesy be permitted under ORS 113.410, as amended by section 1, and 126.476, as amended by section 2, by the guardian? What about a spouse who is a ward under conservatorship?

Note that ORS 113.610 to 113.670, repealed by section 3, apply to relinquishment of rights of dower and curtesy in connection with mortgages as well as deeds of conveyance, while ORS 113.410, as amended by section 1, applies only in connection with deeds of conveyance. Is any provision for barring rights of dower and curtesy of incompetent spouses necessary in connection with mortgages? See ORS 113.120 to 113.150.

Section 1 also amends ORS 113.410 by substituting a reference to the guardian of the estate for the husband for "his guardian if he is a minor," thus expanding the application of ORS 113.410 to all situations in which the husband is under guardianship. Is this substitution desirable?

Section 1 also amends ORS 113.410 by making a separate sentence of that part thereof prohibiting execution of a separate deed barring inchoate right of dower to a stranger to the title. This prohibition would be applicable to both the spouse and, if the spouse were incompetent, the guardian. By referring to "inchoate" right of dower, this part of ORS 113.410 may be construed as implying that the preceding part applies to something other than the "inchoate" right. Would such a construction be valid? If not, should "inchoate" be deleted?

Section 2. ORS 126.476 is amended to read:

126.476. (1) A guardian of the estate, with prior

approval of the court by order, may accept an offer to exchange real or personal property, or both, of the ward for real or personal property, or both, of another, or to effect a voluntary partition of real or personal property, or both, in which the ward owns an undivided interest, where it appears from the petition therefor and the court determines that such exchange or partition is in the best interests of the ward.

(2) A guardian of the estate, with prior approval of the court by order, may accept an offer for the purchase or surrender of the interest or estate of the ward in real or personal property, or both, where it appears from the petition therefor and the court determines that:

(a) The interest or estate of the ward in such property is contingent or dubious;

(b) The interest or estate of the ward in such property is a servitude upon the property of the offeror;

(c) The interest or estate of the ward in such property is an undivided interest in property in which the offeror owns or is offering to purchase another or the other undivided interest or interests; [or]

(d) The ward is an incompetent and the interest or estate of the ward in such property is inchoate dower or curtesy; or

[(d)] (e) For any [other] reason other than those referred to in paragraphs (a) to (e) of this subsection, there is no market for the interest or estate of the ward in such property except by such sale or surrender to the offeror.

(3) A guardian of the estate may file in the guardianship proceeding a petition for authority to accept an offer under subsection (1) or (2) of this section. The petition shall include the following information, so far as known by the petitioner:

(a) The name, age, residence and post-office address of the ward.

(b) Whether the ward is an incompetent, minor or spendthrift.

(c) The name and address of any person or institution having the care, custody or control of a ward who is an incompetent or minor.

(d) The name and address of the offeror.

(e) A specific description of the property, interest or estate to be exchanged, partitioned, sold or surrendered, and the price or property to be received therefor.

(f) Such other information as the petitioner may consider necessary to enable the court to be fully informed in respect of the subject matter.

(4) If the property, interest or estate to be exchanged, partitioned, sold or surrendered consists solely of personal property or an interest or estate therein, the provisions of ORS 126.416 shall apply, except that no return of his proceedings need be made and filed by the guardian.

(5) If the property, interest or estate to be exchanged, partitioned, sold or surrendered consists in whole or in part of real property or an interest or estate therein, the provisions of ORS 126.426 and 126.431 and subsection (1) of ORS 126.471 shall apply, except that no return of his proceedings need be made and filed by the guardian.

(6) Upon the entry of an order of the court authorizing acceptance of an offer under subsection (1) or (2) of this section, the guardian may execute such instruments as are appropriate to effect such exchange, partition, sale or surrender. If the guardian executes a conveyance of real property or an interest or estate therein, the provisions of ORS 126.461 and 126.466 and subsections (3) and (4) of ORS 126.471 shall apply. ORS 113.410 applies to a conveyance executed by the guardian barring the right of dower or curtesy of a ward who is an incompetent.

(7) Except as otherwise provided in this section, the provisions of ORS 126.406 to 126.471 do not apply to exchanges, partitions, sales or surrenders under this section.

Comment: Section 2 amends ORS 126.476, in part, by adding to subsection (2) thereof a new paragraph (d), authorizing a guardian of the estate to accept an offer for the purchase or surrender of an interest or estate of the ward in property when the ward is an incompetent and the interest or estate is inchoate dower or curtesy. This new paragraph is based upon action by the advisory committee at the May 16, 1964, meeting. See Minutes, 5/16/64, page 4; Appendix A, page 2.

Is it proper to characterize inchoate dower and curtesy as an "interest or estate"? "Estate" is used in connection with dower and curtesy in ORS 93.170 and 113.020. "Right" is used in ORS 113.410, 113.610 and several other statute sections in ORS chapter 113. New paragraph (d) of subsection (2) of

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ORS 126.476 uses "interest or estate" in order to conform with existing terminology used in that subsection. As long as "inchoate dower or curtesy" is used, perhaps it is immaterial that the characterization "interest or estate" is also used.

Section 2 also amends ORS 126.476 by adding to subsection (6) thereof a provision that ORS 113.410 is applicable to a conveyance by a guardian under ORS 126.476 barring the right of dower or curtesy of a ward who is an incompetent. The primary purpose of this provision is to make clear that the prohibition in ORS 113.410 against execution of a separate deed barring the right of dower or curtesy applies to a conveyance under ORS 126.476. Is this provision necessary or desirable?

Section 2 also amends ORS 126.476 by redesignating paragraph (d) of subsection (2) thereof as paragraph (e), and by revising somewhat the wording of this paragraph. It appeared to the draftsman that the wording "for any other reason" in this paragraph might be construed to limit the preceding paragraphs of the subsection to situations in which there was no market for the interest or estate of the ward except by the sale or surrender to the offeror, and that such was not the intention. The purpose of the revision of the wording is to make clear that the provision of the paragraph is to stand alone and not condition the other paragraphs. Is the draftsman's premise correct, and is the revision of the wording necessary or desirable?

Do any problems arise out of the circumstance that the guardian of an incompetent whose right of dower or curtesy is to be barred is the spouse of that incompetent?

ORS 126.481 provides for the acquisition of a ward's property by his guardian, and adopts by reference the provisions of ORS 126.406 to 126.495, which, of course, include ORS 126.476, as amended by section 2. Does ORS 126.481 thus authorize a guardian to acquire the ward's right of dower or curtesy? ORS 126.481 refers to "property of the ward," and this may not include dower and curtesy rights. Furthermore, the guardian would be prohibited from acquiring if he were a "stranger to the title" (see ORS 113.410). The guardian also probably would be prohibited from acquiring if he were the husband of the incompetent. Is there any problem here worth considering?

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Should any specific statutory provision be made for protection of the interests and proper support of an incompetent spouse whose right of dower or curtesy is barred by conveyance by a guardian, or are the existing provisions of the guardianship statutes adequate for this purpose? Note the approach to this matter taken by ORS 113.660, which is repealed by section 3.

Section 3. ORS 93.170, 113.610, 113.620, 113.630, 113.640, 113.650, 113.660 and 113.670 are repealed.

Comment: Section 3 repeals ORS 93.170 (conveyance by spouse of insane person) and ORS 113.610 to 113.670 (proceedings for release of dower or curtesy of incompetent persons), and is based upon action by the advisory committee at the May 16, 1964, meeting. See Minutes, 5/16/64, page 4; Appendix A, page 2.

Is there any necessity or desirability for a provision that proceedings under the statute sections repealed by section 3 pending on the effective date of the proposed legislation, if enacted, be completed pursuant to those repealed statute sections or pursuant to the provisions of the proposed legislation? See, for example, ORS 126.011 and 126.611.