

OREGON PROBATE LAW REVISION

Rough Draft of Proposed Legislation
on
Changing Dower and Curtesy

August 4, 1964

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

This is a rough draft of proposed legislation designed to change the nature of dower and curtesy to which the surviving spouse of a decedent is entitled from the present life estate in one-half of the real property owned by the decedent during the marriage to a fee estate in an undivided one-fourth interest in the real property owned by the decedent at the time of his death.

This draft has been prepared pursuant to and is based upon action by the advisory committee at the June 13, 1964, meeting. See Minutes, 6/13/64, pages 3 to 5, 7 and 8. The subject matter of the draft also was discussed by the committee at the May 16 and July 18, 1964, meetings. See Minutes, 5/16/64, pages 3 to 6, and Appendix A; Minutes, 7/18/64, pages 4 and 5.

In preparing this draft pertinent portions of the Alaska statutes, Wisconsin preliminary draft, Missouri statutes and Model Probate Code reproduced in Staff Report No. 2 ("Materials on Family Rights in Decedents' Estates -- A Staff Report to the Advisory Committee on Probate Law Revision," dated June 1964) and the 1963 Iowa Probate Code were considered.

Mr. Allison and your draftsman collaborated in the preparation of this draft, selecting a general approach and supplying those details that appeared necessary or desirable to implement that approach. On July 14 your draftsman sent a preliminary draft to Mr. Allison, who, on July 22, responded with several proposals for changes in the preliminary draft. On July 31 Mr. Allison and your draftsman met and discussed and tentatively resolved certain problems with respect to details contained in the draft.

The general approach adopted by this draft is to abolish dower and curtesy, including the inchoate interest, but "save" interests already vested; and to give a surviving spouse, in lieu of dower or curtesy, a first priority right to an undivided one-fourth interest in real property of which the deceased spouse dies possessed if the decedent dies intestate

and leaves children or other lineal descendants, and a right to elect against the will of the deceased spouse and to take an undivided one-fourth interest in real property of which the decedent dies possessed.

This draft contains new statute sections, amendments of existing statute sections 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 this draft is followed by a Comment, in which your draftsman sets forth a brief description of the subject matter and purpose of the section and questions and other matters for consideration by the advisory committee.

Robert W. Lundy
Chief Deputy Legislative Counsel

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Section 1. ORS 111.020 is amended to read:

111.020. When any person dies seised of any real property, or entitled to any interest therein, in fee simple or for the life of another, not having lawfully devised the same, such real property shall descend, subject to his debts, expenses of administration and to being sold for the best interest of the estate or of the heirs, devisees or legatees or for the purpose of distribution, as follows:

(1) If the intestate leaves a surviving spouse and lineal descendants, an undivided one-fourth interest in such real property shall descend to the surviving spouse; and an undivided three-fourths interest in such real property shall descend in equal shares to [his or her] the children of the intestate, and to the issue of any deceased child by right of representation . [; and] If there is no child of the intestate living at the time of [his or her] the death of the intestate, such [real property] undivided three-fourths interest shall descend to all [his or her] the other lineal descendants of the intestate; and if all such descendants are in the same degree of kindred to the intestate, they shall take [such real property] equally, or otherwise they shall take according to the right of representation.

(2) If the intestate leaves a surviving spouse and no lineal descendants, such real property shall descend to the surviving spouse . [; and]

(3) If the intestate leaves no lineal descendants or surviving spouse, [then] such real property shall descend in equal [proportions] shares to [his or her] the father and mother of the intestate. [(3)] If the intestate leaves no lineal descendants, surviving spouse or father, such real property shall descend to [his or her] the mother of the intestate. [;] If the intestate leaves no lineal descendants, surviving spouse or mother, such real property shall descend to [his or her] the father of the intestate. [;]

(4) If the intestate leaves no lineal descendants, surviving spouse, father or mother, such real property shall descend in equal shares to the brothers and sisters of the intestate, and to the issue of any deceased brother or sister by right of representation.

[(4)] (5) If the intestate leaves no lineal descendants, surviving spouse, father, mother, brother or sister, such real property shall descend to [his or her] the next of kin of the intestate in equal degree, [excepting] except that when there are two or more collateral kindred in equal degree but claiming through different ancestors, those who claim through the nearest ancestor shall be preferred.

[(5)] (6) When any child dies under the age of 21 years and leaves no surviving spouse or children, any real [estate] property which descended to such child shall descend to the heirs of the ancestor from which such real property descended the same as if such child died before the death of such ancestor.

[(6)] (7) If the intestate leaves no lineal descendants, surviving spouse or kindred, such real property shall escheat to the State of Oregon.

Comment: Section 1 amends ORS 111.020, in part, by adding a new provision to subsection (1) thereof, the effect of which is that if a person dies intestate and leaves a surviving spouse and children or other lineal descendants, the surviving spouse is to receive, by descent, an undivided one-fourth interest in the real property of which the decedent dies seised, and the children and other lineal descendants are to receive the remaining undivided three-fourths interest. Presently, in such a situation, the children and other lineal descendants are entitled to receive all such real property, subject to the surviving spouse's dower or curtesy. The first priority right given to the surviving spouse by section 1 is the right so given in lieu of dower or curtesy in the intestate situation.

Section 1 also amends ORS 111.020 by rearranging and revising some of the wording in an attempt to clarify and improve such wording, while retaining the present meaning.

Further improvements in the wording of ORS 111.020 might be made. For example, note that the description of real property in the first clause of ORS 111.020 unnecessarily duplicates some of the definition of "real property" in subsection (2) of ORS 111.010. Also, no attempt has been made to examine the policy of the various provisions of ORS 111.020 or to suggest changes in such policy. For example, should the doctrine of ancestral estates, embodied in subsection (5) of ORS 111.020 (subsection (6) of ORS 111.020, as amended by section 1) be retained; and should the provisions for descent of real property and distribution of personal property be combined in one statute section and the distinctions abolished? The advisory committee may wish to consider further improvements in wording and examine policy at some time in the future when the matter of intestate succession generally is before the committee.

Section 2. ORS 113.050 is amended to read:

113.050. (1) The surviving spouse of a decedent [domiciled in this state at the time of death] shall have an election whether to take under the will of the decedent or to have and take by descent and upon distribution an undivided

one-fourth interest in all the real and personal property of which the decedent died possessed, which interest shall be in addition to, and not in lieu of, any right of [dower or curtesy or] homestead.

(2) Such undivided one-fourth interest in real and personal property shall be subject to the following:

(a) A proportionate share of the debts of the decedent, the expenses of last illness and administration, the inheritance tax computed under subsection (1) of ORS 118.100, and, if applicable, the inheritance tax of any other state.

(b) A proportionate share of the federal estate tax, if any, provided the total of all property passing to the surviving spouse of a type which qualifies for the marital deduction under the federal estate tax law exceeds the maximum marital deduction permitted under such law. Said proportionate share shall be determined by first multiplying the total federal estate tax by the lesser of:

(A) The total of all such property so passing to the surviving spouse less the maximum marital deduction allowable;
or

(B) The value of such undivided one-fourth interest;

and then dividing the product thereof by a sum equal to the value of the taxable estate for federal estate tax purposes plus the exemption allowable under the federal estate tax law.

(c) Being sold for the best interest of the estate or for purpose of distribution.

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Comment: Section 2 amends ORS 113.050, in part, by adding thereto words giving a right to the surviving spouse of a decedent to elect to take under the will of the decedent or to take by descent an undivided one-fourth interest in the real property of which the decedent dies possessed. Presently, ORS 113.050 applies only to the personal property of which the decedent dies possessed. The right to elect real property given to the surviving spouse by section 2 is the right so given in lieu of dower or curtesy in the testate situation.

Section 2 also amends ORS 113.050 by deleting from subsection (1) thereof the condition that the decedent be "domiciled in this state at the time of death" in order for the surviving spouse to be entitled to elect. Mr. Allison initially proposed that the new words "or leaving real property therein" be inserted after the existing words "domiciled in this state at the time of death," in order to accommodate the extension of the right to elect to real property. However, it appeared that the new words would be as applicable to election with respect to personal property as with respect to real property, and other problems arising from insertion of the new words occurred to Mr. Allison and your draftsman. Ultimately, both of us concluded that the new words should not be inserted and that "domiciled in this state at the time of death" should be deleted, leaving the matter of election in the case of a decedent not domiciled in this state at the time of death to be governed by the rules of conflict of laws, rather than by specific statutory provision.

No attempt has been made to improve the wording or examine the policy of the provisions of ORS 113.050. For example, the description of the "net estate" (i.e., the estate passing after deduction of certain items and subject to certain conditions) in ORS 113.050 appears to differ somewhat from such description applicable in the intestate situation (see ORS 111.020 and 111.030), and it may be appropriate to at least question the distinction. However, the advisory committee may wish to postpone consideration of such matters until some time in the future, and restrict itself at this time to consideration of the dower and curtesy matter only.

Section 3. ORS 113.060 is amended to read:

113.060. (1) The surviving spouse is deemed to have elected to take under the will unless, within six months after the date of the admission of the will to probate, [she or he] the surviving spouse makes, acknowledges, serves on the executor or his attorney and causes to be filed in the estate

proceedings a statement that [she or he] the surviving spouse elects to take the undivided one-fourth interest mentioned in ORS 113.050 instead of under the will. The clerk of the court shall record every such statement of election in the record of wills.

(2) The right of election of a surviving spouse under ORS 113.050 may be waived before or after marriage by a written contract, agreement or waiver signed by the person waiving the right, after full disclosure of the nature and extent of the right and if the thing or promise given to the person waiving the right is a fair consideration under all the circumstances.

Comment: Section 3 amends ORS 113.060, in part, by adding thereto a new provision (i.e., subsection (2)) on waiver of the right of election of a surviving spouse under ORS 113.050. The wording of this new provision is based upon the wording of section 39 of the Model Probate Code (see Staff Report No. 2, page 45). See also ORS 108.140 (relating to pre-nuptial property agreements); Alaska Stat. § 13.05.105 (Supp. 1963) (Staff Report No. 2, page 1); Wisconsin preliminary draft § 4 (Staff Report No. 2, page 13); Mo. Rev. Stat. § 474.220 (1959) (Staff Report No. 2, page 31).

Section 3 also amends ORS 113.060 by revising some of the wording in an attempt to clarify and improve such wording, while retaining the present meaning. Further improvements in such wording might be made.

Note that subsection (1) of ORS 113.060, as amended, requires that the election of a surviving spouse be served on the executor or his attorney. Should the manner of that service be specified?

ORS 126.300 authorizes a guardian of the estate, with prior approval of the court by order, to exercise for and on behalf of the ward the right of the ward to make an election under ORS 113.050. Should some provision be made for an election under ORS 113.050 for and on behalf of an incompetent surviving spouse for whom there is no guardian of the estate? See Alaska Stat. § 13.05.105 (Supp. 1963) (Staff Report No. 2, page 1); 1963 Iowa Probate Code § 244.

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Should some provision be made with respect to the nature of the right to make an election under ORS 113.050 (e.g., personal, not transferable and not exercisable after the death of the surviving spouse)? See Mo. Rev. Stat. § 474.200 (1959) (Staff Report No. 2, page 31); Model Probate Code § 37 (Staff Report No. 2, page 45); 1963 Iowa Probate Code § 242.

Should some provision be made with respect to whether an election under ORS 113.050 once made is binding and with respect to the effect of failure to exercise the right to elect? See Mo. Rev. Stat. §§ 474.210, 474.230 (1959) (Staff Report No. 2, pages 31 and 32); Model Probate Code §§ 38, 40 (Staff Report No. 2, pages 45 and 46); 1963 Iowa Probate Code § 246.

Should some provision be made for barring, denying or reducing an election under ORS 113.050 in other circumstances; for example, where other adequate provision has been made for the surviving spouse, or the decedent and the surviving spouse were living apart at the time of the decedent's death, or the surviving spouse has abandoned the decedent? See Wisconsin preliminary draft §§ 4, 5 (Staff Report No. 2, pages 13 and 14); Mo. Rev. Stat. § 474.140 (Staff Report No. 2, page 27).

Section 4. Dower and curtesy, including inchoate dower and curtesy, are abolished. That abolishment does not affect any right to or estate of dower or curtesy which became vested before the effective date of this Act, and any right or estate so vested is governed by the law in effect immediately before the effective date of this Act.

Comment: Section 4 is a new provision that expressly abolishes dower and curtesy, including inchoate dower and curtesy, and expressly "saves" dower and curtesy interests that have become vested, whether unassigned (i.e., dower or curtesy consummate) or assigned (i.e., admeasured; an estate) by specifying that such vested interests are not affected by the abolishment and are to be governed by the law in effect prior to the effective date of the proposed legislation, including the statute sections wholly or partially pertaining to dower and curtesy that are repealed or amended by the proposed legislation.

The "saving" provision might not be necessary, since in any event vested interests could not constitutionally be affected by the abolishment of dower and curtesy. Furthermore, a statement of the abolishment of dower and curtesy might not

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be necessary in view of deletion from the statutes, by repeal or amendment of statute sections, of all or most of the provisions pertaining to dower and curtesy. However, even if not necessary, the statement of the abolishment and the "saving" provision appear to serve a useful and desirable purpose.

Section 5. ORS 93.170, 105.065, 111.050, 113.010, 113.020, 113.030, 113.040, 113.080, 113.110, 113.120, 113.130, 113.140, 113.150, 113.160, 113.210, 113.220, 113.230, 113.240, 113.250, 113.260, 113.270, 113.280, 113.290, 113.410, 113.420, 113.430, 113.440, 113.450, 113.510, 113.520, 113.530, 113.540, 113.610, 113.620, 113.630, 113.640, 113.650, 113.660, 113.670, 113.680 and 113.690 are repealed.

Comment: Section 5 repeals a number of statute sections that appear to relate wholly to dower and curtesy. Note that in so far as these statute sections are applicable to dower and curtesy interests that have become vested, they are retained in force and effect by section 4. You will probably wish to examine each of the statute sections referred to in section 5 in order to determine the appropriateness of its repeal.

Section 5 does not repeal ORS 113.090, which reads as follows: "No action or suit shall be brought after 10 years from the death of a decedent to recover or reduce to possession curtesy or dower by the surviving spouse of such decedent." Apparently on the ground that this statute section is quite often referred to, Mr. Allison proposes that it not be repealed at this time, even though it would appear to have an effective life of only 10 years after the effective date of the proposed legislation.

Amendments of other statute sections that appear to relate partially to dower and curtesy for the purpose of deleting the pertinent portions thereof are not included in this draft because of the substantial bulk they would add thereto at this time. However, amendments of, for example, ORS 5.040, 68.420, 93.240, 94.105, 105.050, 105.330, 105.340, 107.280, 111.130 and 114.020 should be included in the proposed legislation in its final form. You will probably wish to examine each of these statute sections to determine the appropriateness and nature of the amendment thereof.

In spite of a fairly exhaustive search, your draftsman is not sure that he has found all the statute sections that appear

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to relate wholly or partially to dower and curtesy.

There are at least two possible approaches to the treatment of existing statutory provisions that relate to dower and curtesy abolished by this draft. The first of these approaches is to delete all such provisions by repeal or amendment, relying on the "saving" provision of section 4 to retain in force and effect such of those provisions as are applicable to vested interests. The second of these approaches is to delete by repeal or amendment only such of those provisions as are applicable to inchoate interests, retaining those provisions that pertain to vested interests or that otherwise would have some effect after the effective date of the proposed legislation. With the one exception of ORS 113.090 referred to above, this draft adopts the first of these approaches, which has the advantages of deleting statutory provisions which ultimately will become obsolete and of avoiding what in some cases may be the difficult problem of determining which statutory provisions will have some effect after the effective date of the proposed legislation.

OREGON PROBATE LAW REVISION

Rough Draft of Proposed Legislation
on
Protecting Property Right During Marriage

August 4, 1964

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

This is a rough draft of proposed legislation designed to protect a right of a surviving spouse to receive, upon the death of the other spouse, a fee estate in an undivided one-fourth interest in real property owned during the marriage by the other spouse in his sole right against an attempt by the owner spouse to convey or mortgage such real property without the joinder of the nonowner spouse in the conveyance or mortgage, and thus to defeat or diminish the right of the surviving spouse to receive such an interest in the real property by intestate succession or election against will under the provisions of the rough draft entitled "Changing Dower and Curtesy," dated August 4, 1964. A recorded declaration is the means to be employed for the purpose of protecting such right under this draft.

This draft has been prepared pursuant to and is based upon action by the advisory committee at the June 13, 1964, meeting. See Minutes, 6/13/64, pages 3 to 8. The subject matter of the draft also was discussed by the committee at the May 16 and July 18, 1964, meetings. See Minutes, 5/16/64, pages 5 and 6, and Appendix A; Minutes, 7/18/64, pages 4 and 5.

Mr. Allison and your draftsman collaborated in the preparation of this draft, selecting a general approach and supplying those details that appeared necessary or desirable to implement that approach. On July 14 your draftsman sent a preliminary draft to Mr. Allison, who, on July 22, responded with several proposals for changes in the preliminary draft. On July 31 Mr. Allison and your draftsman met and discussed and tentatively resolved certain problems with respect to details contained in the draft.

Each section of this draft is followed by a Comment, in which your draftsman sets forth a brief description of the subject matter and purpose of the section and questions and other matters for consideration by the advisory committee.

Robert W. Lundy
Chief Deputy Legislative Counsel

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Section 1. (1) A married person, referred to in this section as the declarant, may cause to be recorded in the record of deeds of any county in which real property owned by the spouse of the declarant in his sole right is situated a written, signed and acknowledged declaration claiming an inchoate marital right in and to an undivided one-fourth interest in the real property so owned by the spouse of the declarant and described in the declaration. The declaration shall include a description of the real property and a statement of the effect of the recording of the declaration as provided in subsection (2) of this section. Before causing the declaration to be recorded the declarant shall cause a copy of the declaration to be served personally on the spouse of the declarant, and the declaration shall include a statement of such service and the date thereof.

(2) If a declaration claiming an inchoate marital right has been recorded as provided in subsection (1) of this section, the spouse of the declarant may not, during the marriage and while the declaration remains unrevoked, convey or mortgage the real property described in the declaration free of the inchoate marital right of the declarant in and to an undivided one-fourth interest in the real property unless the declarant joins in the conveyance or mortgage to release or subordinate the inchoate marital right.

(3) If a declaration recorded as provided in subsection

(1) of this section is not sooner revoked, the inchoate marital right in and to an undivided one-fourth interest in the real property described in the declaration becomes vested in the declarant upon the death of the spouse of the declarant. The declaration so recorded is revoked by:

(a) Joinder by the declarant in a conveyance or mortgage of the real property described in the declaration as provided in subsection (2) of this section.

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

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

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

(e) A court order as provided in subsection (4) of this section.

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

(5) The declaration may be in the following form:

DECLARATION CLAIMING INCHOATE MARITAL RIGHT

Declarant, _____, the spouse of
(name of wife or husband)

_____, hereby claims an inchoate
(name of owner husband or wife)

marital right in and to the real property owned in sole right
by the spouse of the declarant and described as follows:

in the County of _____, State of Oregon.

The effect of the recording of this declaration, as provided in section 1, chapter _____, Oregon Laws 1965 (Enrolled Bill _____), is that the spouse of the declarant may not, during the marriage and while this declaration remains unrevoked, convey or mortgage the real property described in this declaration free of the inchoate marital right of the declarant in and to an undivided one-fourth interest in the real property unless the declarant joins in the conveyance or mortgage to release or subordinate the inchoate marital right.

A copy of this declaration was served personally on the spouse of the declarant on _____ .
(date)

(Acknowledgment)

Declarant

Comment: Section 1 is a new provision that would permit one spouse, by means of a recorded declaration, to claim an inchoate right to an undivided one-fourth interest in any real property owned by the other spouse in his sole right. The effect of the recorded declaration would be that

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a conveyance or mortgage of the real property by the owner spouse without the joinder of the nonowner spouse in the conveyance or mortgage would be subject to the inchoate right of the nonowner spouse.

The purpose of this new provision is to provide a means of protecting the ultimate right of a surviving spouse to receive an undivided one-fourth interest in real property owned by the deceased spouse by intestate succession or election against will against inter vivos conveyance or mortgage of the real property by the owner spouse without the joinder of the nonowner spouse, thereby defeating or diminishing that ultimate right. This new provision supplements the provisions of the rough draft entitled "Changing Dower and Curtesy," dated August 4, 1964, and the protection afforded thereby resembles somewhat that afforded by inchoate dower and curtesy.

The right which may be claimed under section 1 is referred to as an "inchoate marital right," for want of a better designation. It is probably accurate to characterize the right as "inchoate" in nature. In some of the advisory committee discussion on the matter and in the early drafting stages the right was referred to as a right of "inheritance." While the purpose of section 1 is to protect inheritance rights, the right described in section 1 is not, strictly speaking, an "inheritance" right, since the undivided one-fourth interest in real property that is reserved by that right and that may vest on the death of the deceased owner spouse is not a part of the estate of the decedent and does not pass to the surviving spouse under the usual rules of inheritance. Such vesting does not depend, for example, on exercise by the surviving spouse of an election against the will of the decedent. This nature of the right described in section 1 and the interest in real property arising therefrom that may vest, by the way, appears to raise a question as to the treatment of the interest upon vesting for purposes of federal estate tax and state inheritance tax.

Subsection (1) of section 1 authorizes a nonowner spouse to record in the deeds record a declaration claiming the inchoate marital right in real property owned by the other spouse in his sole right. Note that the declaration must describe the real property to which it is intended to be applicable and must describe the effect of the recording. An approach taken in the early drafting stages that a declaration would apply to all real property of the owner spouse situated in the county in which the declaration was recorded was abandoned in favor of application to particular real property described in the declaration. Before the declaration is recorded, a copy thereof must be served personally on the owner spouse.

Subsection (2) sets forth the effect of the recording of the declaration; that is, the owner spouse may not convey or

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mortgage the real property described in the declaration free of the inchoate marital right unless the nonowner spouse joins in the conveyance or mortgage. An approach taken in the early drafting stages that a conveyance or mortgage in which the nonowner spouse did not join would be invalid was abandoned in favor of the approach embodied in subsection (2).

Subsection (3), in part, describes the nature of the inchoate marital right and the vesting of the interest in real property arising therefrom. Some such description would appear to be necessary or desirable. However, this particular description represents merely a suggestion by your draftsman, which Mr. Allison did not previously review and for which he bears no responsibility.

Subsection (3) also specifies the several ways by which a recorded declaration is revoked. Should there be other grounds for revocation, such as prolonged absence of the nonowner spouse, abandonment of the owner spouse by the nonowner spouse or subsequent separate conveyance or release to a grantee or mortgagee of the owner spouse by the nonowner spouse?

Subsection (4) permits the owner spouse or his grantee or mortgagee to maintain an action in the circuit court to contest the validity and sufficiency of a recorded declaration within 10 years after the date of the recording. This 10-year statute of limitation provision compares with the present 10-year statute of limitation provision applicable to suits for the determination of a right, claim or interest in real property (see ORS 12.040 and 12.050).

Subsection (5) sets forth a nonmandatory form for a declaration claiming the inchoate marital right.

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

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

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Comment: Section 3, which is to be added to the present guardianship statutes, is a new provision authorizing a guardian of the estate, with prior approval of the court by order, to record a declaration claiming an inchoate marital right or a revocation thereof under section 1 for and on behalf of the ward. The wording of section 3 is patterned after the wording of ORS 126.300, which authorizes a guardian of the estate to exercise rights of the ward as to the estate of the deceased spouse of the ward.

An approach taken in the early drafting stages incorporating the authority of a guardian of the estate to record the declaration or a revocation thereof in section 1 was abandoned in favor of a separate statutory provision embodying this authority. Mr. Allison expressed a preference for the separate statutory provision approach, since the incorporation in section 1 approach complicated somewhat the drafting of section 1. The addition of the substance of section 3 to ORS 126.300 was considered, but your draftsman is of the opinion that it is preferable that this substance constitute a separate statute section. ORS 126.300 relates to rights as to the estate of a decedent, while the substance of section 3 relates to a right of a somewhat different nature.

Should some provision be made for the recording of a declaration and a revocation thereof for and on behalf of an incompetent nonowner spouse for whom there is no guardian of the estate?