

Section 1. Contents of petition for administration of estate of an absentee. Administration may be had upon the estate of an absentee. A petition for administration shall state, in addition to the information required by ORS \_\_\_\_\_;

(1) Whether the absentee, when last heard from, was a resident or nonresident of this state;

(2) The address of the absentee at his last known domicile;

(3) That, to the best knowledge of the petitioner, and after diligent search, the whereabouts of the absentee is and has been unknown for the period shown by the petitioner of not less than one year, and that the petitioner has reason to believe and believes the absentee to be dead; or

(4) That the death of the absentee at the time, location and circumstance stated in the petition is probable, and that the fact of his death is in doubt solely by reason of the failure to find or identify his remains.

Section 2. Setting date of hearing on petition; notice of hearing. (1) Upon filing the petition for administration the clerk of court shall set a day for hearing not less than 30 days from the date of filing the petition unless the court shall set an earlier day. A copy of the notice of the hearing shall be sent:

(a) To the absentee at his last known address by registered

mail and by postage prepaid letter to be forwarded through the United States Social Security Administration to his last address available to that agency;

(b) By ordinary mail to the devisees and heirs named in the petition.

(2) The court may order that additional notice of the hearing be given by publication or by other means. Proof of mailing may be made by the petitioner by affidavit.

Section 3. Appointment of person to represent absentee: directing manner of search. The court may appoint some disinterested person as guardian ad litem to appear at the hearing for the absentee. The court may direct the petitioner or the guardian ad litem to make search for the absentee in any manner which the court may deem advisable, including any or all of the following methods:

(1) By inserting in one or more suitable publications a notice requesting information from any person having knowledge of the whereabouts of the absentee;

(2) By notifying officers of justice and public welfare agencies in appropriate locations of the disappearance of the absentee;

(3) By engaging the services of an investigation agency.

Section 4. Hearing. Upon the hearing the court shall determine whether the absentee has died and if so, the date of his death and whether he died testate or intestate. Upon a

finding that the absentee has died the court shall grant letters accordingly, or, in the absence of such finding, may deny the petition. An appeal may be made from such an order.

Section 5. Effect of finding fact of death. The finding of the fact of death shall be conclusive as to the estate of the absentee only if:

(1) Notice of the hearing on the petition for administration was given as required by section 2.

(2) The court finds that diligent search was made.

Section 6. Mode of procedure. Upon the entry of the order establishing death of the absentee, administration of the estate of such absentee, whether testate or intestate, shall proceed as provided for the estates of other decedents except as otherwise provided in this chapter.

Section 7. Revocation of letters; settlement of account upon revocation. Upon proof that the absentee is alive, letters theretofore granted shall be revoked. Acts of a personal representative prior to revocation of letters shall be valid for all purposes, but after revocation the personal representative shall have no further power in the capacity of personal representative except as hereinafter provided. He shall pay claims allowed and proved and shall file an account of his administration for the period of time preceding revocation and shall transfer any property in his hands to the person for whose estate he acted or to the duly authorized agent of that person.

Section 8. Rights of absentee. (1) In the event a sale of property has been conducted by the personal representative, the absentee shall have no right, title, or interest in or to the property sold but only to the proceeds realized therefrom or so much thereof as may remain in the hands of the personal representative upon the closing of the estate.

(2) The absentee shall have, for a period of five years after distribution of the estate, a right to recover from the distributees any estate or proceeds of any estate of the absentee that remains in their hands, but there shall be no right of recovery from purchasers of property sold by the distributees.

Section 9. Substitution of parties. After revocation of letters the absentee may be substituted as plaintiff in actions and suits brought by the personal representative. The absentee may be substituted as defendant upon his application or application of the plaintiff in actions and suits brought against the personal representative. If the absentee is substituted as defendant he shall not be compelled to go to trial within less than three months from the date of the substitution.

Section 10. Costs. The costs, expenses and charges attending the issuance of letters or their revocation shall be paid out of the estate of the absentee. If the petition for letters is not granted the applicant shall pay the costs, expenses and charges.

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2nd Draft, 1/18/68  
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Section 11. Repeal of existing statutes. ORS 120.310,  
120.320, 120.330, 120.340, 120.350, 120.360, 120.370, 120.380,  
120.390 and 120.400 are repealed.

COMMENTS  
Estates of Absentees  
2nd Draft  
January 18, 1968

Prepared by  
Stanton W. Allison

COMMENTS

The proposed chapter would replace and supersede ORS 120.310 to 120.400. The committees considered that the present ORS requirement that disappearance or absence must continue for seven years before estate proceedings could be commenced was unduly restrictive and rigid. It was also felt that special provision should be made where an accidental death in a missing airplane or fishing boat or loss at sea seemed certain, but could not be confirmed by the finding or identification of the body. It was considered that more effective notice and search requirements should be written into the chapter, so the court would have every opportunity to satisfy itself that the search was thorough and that the absentee was dead in fact. The basic difference between the approaches to the problem is that in Oregon Revised Statutes the court merely finds a legal presumption of death based on an arbitrary period of absence for seven years, whereas the proposed chapter requires the court to make a finding that the absentee has died, based on such actual search for the absentee as the court may require.

The ORS sections on estates of persons presumed to be dead are discussed in Section 862 of Jaureguy and Love, Oregon Probate Law and Practice, which refers to the general rule expressed, among other authorities, in Cunnius v. Reading School District, 198 U.S. 458, 25 S.Ct. 721, 49 L.Ed.1125, that two criteria are

necessary for assurance of due process: (1) Adequate notice to the absentee of the pending proceedings; and (2) adequate protection to the absentee in the event he is found alive within a reasonable time provided by the statute. Your committees consider that these criteria are met in the proposed chapter.

It should be noted that the proposed code provides for appointment of guardians for the estates of missing persons. Thus where there is reasonable doubt of the fact of death of an absentee, recourse may be had to the guardianship code to administer and protect his property.

Detailed comments follow.

Section 1. Contents of petition for administration of estate of an absentee. Except for subsection (4), this section is based on Section 510 of the 1963 Iowa Probate Code. However, the committees felt a minimum period of one year's absence would be adequate in view of the provisions for notice, search and court findings in the chapter. The section also provides for administration where the death in a specific time place and circumstance is probable but cannot be proved by failure to find or identify the body.

Section 2. Setting the date of hearing on petition; notice of hearing. Section 2 is taken from Sections 511, 512 and 513 of the 1963 Iowa Probate Code. The requirement for forwarding a letter through the Social Security Administration should make

notification possible if there is in existence an address of the absentee. See Section 69(b) Model Probate Code.

Section 3. Appointment of person to represent absentee: directing manner of search. The provision for appointment of a guardian ad litem is taken from Section 514 of the Iowa Probate Code. Since the petitioner will be in many cases an heir, devisee or creditor, the provision for providing a disinterested person to make the search for the missing person seems of value. The remainder of the section follows Section 71 of the Model Probate Code and Section 3-222(b) of the 1967 Uniform Probate Code. The thrust of the section is to substitute an active effective search of the missing person for a legal presumption of death.

Section 4. Hearing. The comment on the corresponding Section 514 of the 1963 Iowa Probate Code reads:

"Adapted from 634.5 (1962 Code), with the additional provision that the order establishes the death of the absentee as a matter of law. This addition is desirable to establish the rights of the survivors where property is held in joint tenancy. It would also establish the death of the absentee for purposes of social security benefits and claims under life insurance policies."

As noted, this section requires an affirmative finding of fact of death by the court, based upon an adequate search.

Section 5. Effect of finding fact of death. This section is adapted from the Model Probate Code, Section 81. We quote the editorial comment of the Model Probate Code.

"The third exception to the conclusiveness of these

orders is with respect to the fact of death. According to the decision in the case of Scott v. McNeal, 154 U.S. 34, 14 S.Ct. 1108 (1894), an ordinary probate proceeding in which the alleged decedent is not made a party and is not given notice does not bind him, and he may attack the whole proceeding collaterally. This is because due process requirements have not been complied with. But if reasonable notice is given to the alleged decedent, and he is made a party to the proceeding, he is bound. The form of notice provided for in this Code makes the alleged decedent a party; and if the steps referred to in exception (c) hereof are taken, he would receive reasonable notice. This simply means that he is bound by the proceeding and cannot attack it collaterally. But, according to the provisions of this section, he can recover his property back to the extent that it is in the hands of the personal representative or distributees. He cannot recover it back from creditors, and the personal representative is protected to the extent that he acted in good faith."

Section 6. Mode of procedure. This section is adapted from Section 515 of the 1963 Iowa Probate Code.

Section 7. Revocation of letters; settlement of account upon revocation. This is a rewritten form of ORS 120.380.

Section 8. Rights of absentee. This is a paraphrase of ORS 120.370 and 120.380. The right of the absentee to recover the proceeds of the estate from the distributees is limited to five years after the distribution of the estate as now provided in ORS 120.370.

Section 9. Substitution of parties. This covers the substance of ORS 120.390.

Section 10. Costs. This is ORS 120.400 with editorial changes.

**ESTATES OF ABSENTEES**  
**2nd Draft**  
**January 18, 1968**

Comparative Section Table

<u>Draft Sections</u>	<u>ORS Sections</u>
1	120.310, 120.320, 120.330
2	120.310
3	
4	120.340, 120,350
5	
6	120.360
7	120.370, 120.380
8	120.380
9	120.390
10	129,400

Proposed revised Oregon probate code  
ESTATES OF ABSENTEES  
1st Draft (as amended at April 1967 meeting)  
April 21, 1967

This draft is based primarily on a draft by Stanton Allison distributed at the March 1967 meeting and the action by the committees at the February 17, 18, 1967 and March 17, 18, 1967 meeting.

Section 1. Contents of petition for administration of estate of an absentee. Administration may be had upon the estate of an absentee. A petition for administration shall state, in addition to the applicable facts required by ORS \_\_\_\_\_;

(1) Whether the absentee, when last heard from, was a resident or nonresident of this state;

(2) The address of the absentee at his last known domicile;

(3) That, to the best knowledge of the petitioner, and after diligent search, the whereabouts of the absentee is and has been unknown for a period not less than one year, and the petitioner believes the absentee to be dead.

Section 2. Administration when circumstances indicate death probable. Administration may be had at any time upon the estate of an absentee when the petition therefor alleges, in addition to the applicable facts required by ORS \_\_\_\_\_, that his death at a stated time, location and circumstance is probable but the fact of the death may be in doubt solely by reason of failure to find or identify the remains of the absentee.

Section 3. Hearing on petition; notice to absentee. (1)

Upon filing the petition for administration the clerk of court shall set a day for hearing not less than 30 days from the date of filing the petition unless the court shall set an earlier day. A copy of the notice of the hearing shall be sent:

(a) To the absentee at his last known address by registered mail and by postage prepaid letter to be forwarded through the United States Social Security Administration to his last address available to that agency;

(b) To the heirs named in the petition.

(2) The court may order that additional notice of the hearing be given by publication or by other means. Proof of mailing may be made by the petitioner by affidavit.

Section 4. Appointment of person to represent absentee.

The court may appoint some disinterested person as guardian ad litem to appear at the hearing for the absentee. The court may direct the petitioner or the guardian ad litem to make search for the absentee in any manner which the court may deem advisable, including any or all of the following methods:

(1) By inserting in one or more suitable publications a notice requesting information from any person having knowledge of the whereabouts of the alleged decedent;

(2) By notifying officers of justice and public welfare agencies in appropriate locations of the disappearance of the absentee;

(3) By engaging the services of an investigation agency.

Section 5. Hearing; findings of court conclusive-exceptions. (1) Upon the hearing the court shall determine whether the absentee died and if so, the date of his death and whether he died testate or intestate upon the finding that the absentee has died, the court shall grant letters accordingly, or, in the absence of such finding, may deny the petition. An appeal may be made from such an order.

(2) The finding of the fact of death shall be conclusive as to the estate of the absentee only if:

(a) The notice of the hearing on the petition for probate or for the appointment of a personal representative is sent by registered mail addressed to the absentee at his last known address; and that notice is given by postage prepaid letters to be forwarded through the United States Social Security Administration to his last address available to that agency.

(b) The court finds that diligent search was made.

Section 6. Mode of procedure, generally. Upon the entry of the order establishing death of the absentee, administration of the estate of such absentee, whether testate or intestate, shall proceed as provided for the estates of other decedents except as otherwise provided in this chapter.

Section 7. Revocation of letters; settlement of account upon revocation. Upon proof that the absentee is

alive, letters theretofore granted shall be revoked. Acts of a personal representative taken prior to revocation of letters shall be valid for all purposes, but after revocation the personal representative shall have no further power in the capacity of personal representative. The personal representative shall pay claims allowed and proved and shall settle an account of his administration for the period of time preceding revocation and shall transfer any property in his hands to the person for whose estate he acted or to the duly authorized agent of that person. In the event a sale of property has been conducted by the personal representative, the absentee shall have no right, title, or interest in or to the property sold but only to the proceeds realized therefrom or so much thereof as may remain in the hands of the personal representative upon the closing of the estate of the absentee. The absentee shall have, for a period of five years after distribution of the estate, a right to recover from the distributees any estate or proceeds of any estate of the absentee that remains in their hands but there shall be no right of recovery from purchasers of property sold by the distributees.

Section 8. Substitution of parties--absentee for personal representative. After revocation of letters the absentee may be substituted as plaintiff in actions and suits brought by the personal representative. The absentee

may be substituted as defendant upon his own application or that of the plaintiff in actions and suits brought against the personal representative. If the absentee is substituted as defendant he shall not be compelled to go to trial within less than three months from the date of the substitution.

Section 9. Costs when letters granted. The costs, expenses and charges attending the issuance of letters or their revocation shall be paid out of the estate of the absentee.

Section 10. Costs when letters not issued. If the petition for letters is not granted the applicant shall pay the costs, expenses and charges.