

OREGON PROBATE LAW REVISION

Rough Draft of Proposed Legislation
on
Guardianship and Conservatorship

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 guardianship and conservatorship. 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 new statute sections and amendments 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, in some cases, questions for consideration by the committee.

Following the draft (see page 17) is a report by the draftsman on his assignment to examine the two 1963 enactments relating to guardianship (i.e., investment by guardians in common trust funds without prior court approval, and lease of real property of wards for oil, gas and mineral purposes) and bring to the attention of the advisory committee any problems discovered.

Robert W. Lundy
Chief Deputy Legislative Counsel

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Section 1. ORS 126.250 is amended to read:

126.250. (1) A guardian of the estate may invest the property of the ward as provided in this section, ORS 128.020 and any other law applicable to investments by guardians. No investment shall be made without prior approval of the court by order in any property other than interest-bearing obligations of or fully guaranteed by the United States, or common trust funds, as defined in ORS 709.170, composed of investments in interest-bearing obligations of or fully guaranteed by the United States, and time or other deposits of cash, or interest-bearing obligations of this state or any county, city, port district or school district of this state, issued in compliance with law, and the issuer of which has not defaulted in the payment of either principal or interest of any general obligation bond within five years next preceding the date of the investment.

(2) Subject to subsection (1) of this section, a guardian of the estate for two or more wards may invest the property of two or more of the wards in property in which each ward whose property is so invested shall have an undivided interest. The guardian shall keep a separate record showing the interest of each ward in the investment and the income, profits or proceeds therefrom.

representative of the Veterans Administration may give to the guardian and file in the guardianship proceeding, written notice requesting that a copy of all accounts and petitions for court approval of any guardianship matter requiring court approval which are to be filed in the guardianship proceeding be given to a representative of the Veterans Administration designated in the notice. [Except as otherwise provided in ORS 126.250,] After such notice is given and filed the guardian shall give a copy of all such accounts and petitions to the designated representative of the Veterans Administration before they are filed in the guardianship proceeding, and, unless the notice is waived in writing, shall give written notice of the hearing by the court on each such account or petition to the designated representative of the Veterans Administration at least 10 days before the date of the hearing. A representative of the Veterans Administration may appear and be heard at any such hearing.

(2) If a guardian of the estate for a ward who is receiving moneys paid or payable by the United States through the Veterans Administration fails to file in the guardianship proceeding any account or report required by law, the court, upon the petition of a representative of the Veterans Administration, shall make an order requiring the guardian to file the account or report or to show cause why he should not be required to do so.

Comment: Section 2 amends ORS 126.346 by deleting that part of subsection (1) thereof which refers to the provisions of ORS 126.250. The pertinent provisions of ORS 126.250 so

referred to are all embodied in subsection (3) thereof, which is deleted by the amendment of ORS 126.250 by section 1. Thus, the reference in subsection (1) of ORS 126.346 is unnecessary and should be deleted.

Section 3. ORS 126.516 is amended to read:

126.516. Where, at the time of the appointment of the guardian or thereafter, the estate of a ward consists of personal property having a value not exceeding by more than \$1,000 the aggregate amount of unpaid expenses of administration of the guardianship estate and claims against the estate, the guardian of the estate, with prior approval of the court by order, may pay such expenses and claims from the estate and deliver all the remaining personal property to such person as the court may designate in the order, to be held, invested or used as ordered by the court. The recipient of the property so delivered shall give a receipt therefor to the guardian. The receipt is a release and acquittance to the guardian as to the property so delivered. The guardian shall file in the guardianship proceeding proper receipts or other evidence, satisfactory to the court showing such delivery. The guardianship is terminated by the order of the court, but the guardian is not subject to section 6 of this 1965 Act or ORS 126.530.

Comment: Section 3 amends ORS 126.516 by adding to the last sentence thereof a reference to section 6. The last sentence presently contains a reference to ORS 126.530. Section 6 is a new provision embodying that part of ORS 126.530 relating to winding up the affairs of a guardianship of the estate terminated other than by the death of the ward. See the comment under section 6. Section 7 amends ORS 126.530, in part, by making it applicable only to winding up the affairs

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of a guardianship of the estate terminated by the death of the ward. See the comment under section 7.

The amendment of ORS 126.516 by section 3 proceeds on the premise that ORS 126.516 may be applicable upon the death of the ward, and that therefore the last sentence thereof should specify that the guardian proceeding under ORS 126.516 is not subject to either section 6 or ORS 126.530, as amended by section 7. If this premise is false, and ORS 126.516 is not intended to be applicable upon the death of the ward, then the reference to ORS 126.530 should be deleted and perhaps some further specific clarification of the application of ORS 126.516 should be made.

Section 4. ORS 126.525 is amended to read:

126.525. Except as otherwise provided in ORS 126.336, section 6 of this 1965 Act, ORS 126.530 and 126.535, the authority and duties of a guardian terminate when the guardianship is terminated.

Comment: Section 4 amends ORS 126.525 by adding thereto a reference to section 6. ORS 126.525 presently contains a reference to 126.530. Section 6 is a new provision embodying that part of ORS 126.530 relating to winding up the affairs of a guardianship of the estate terminated other than by the death of the ward. See the comment under section 6. Section 7 amends ORS 126.530, in part, by making it applicable only to winding up the affairs of a guardianship of the estate terminated by the death of the ward. See the comment under section 7.

Section 5. Section 6 of this Act is added to and made a part of ORS 126.006 to 126.565.

Section 6. Within 90 days after the date of termination of a guardianship of the estate other than by the death of the ward, or, if necessary, such further time as the court by order may allow upon a petition filed in the guardianship proceeding by the guardian of the estate during or within a reasonable time after the 90-day period and upon such notice and

hearing as the court may order, the guardian of the estate shall wind up the affairs of the guardianship, and his authority and duties, including his right to possession of all property of the ward whether in the physical possession of the guardian or another, and the provisions of law applicable thereto shall continue for such purpose, as follows:

(1) The guardian shall pay from the guardianship estate:

(a) All expenses of administration of the guardianship estate, including expenses of winding up the affairs of the guardianship, allowed before or after the termination; and

(b) All claims against the estate allowed before or after the termination.

(2) Payment of expenses and claims under subsection (1) of this section shall be made first from money of the guardianship estate, and then, if there is not sufficient money, from any one or more of the following:

(a) Proceeds of the mortgage or pledge, or both, of any other property of the estate;

(b) Proceeds of the sale of any other personal property of the estate; or

(c) Proceeds of the sale of real property of the estate, if the petition for such sale was filed before the termination of the guardianship and the court by order authorizes the guardian to proceed with the sale.

(3) The guardian shall deliver to the ward all property of the ward in his possession after payment, if any, of expenses and claims under subsections (1) and (2) of this section.

The ward shall give a receipt therefor to the guardian. The receipt is a release and acquittance to the guardian as to the property so delivered. The guardian shall file in the guardianship proceeding proper receipts or other evidence satisfactory to the court showing such delivery.

Comment: Section 6 is a new provision embodying that part of ORS 126.530 relating to winding up the affairs of a guardianship of the estate terminated other than by the death of the ward. Section 7 amends ORS 126.530, in part, by making it applicable only to winding up the affairs of a guardianship of the estate terminated by the death of the ward. See comment under section 7. The division of the present provisions of ORS 126.530 into two separate statute sections is based upon action by the advisory committee at the May 16, 1964, meeting. See Minutes, 5/16/64, pages 9 and 10.

Section 6 permits the court to extend the present fixed 90-day winding up period upon application by the guardian during or after the 90-day period and upon such notice and hearing as the court may order. This provision for extension is based upon action by the advisory committee at the May 16, 1964, meeting. See Minutes, 5/16/64, pages 8 to 10; Appendix B, pages 4 to 6. Note that a petition for extension filed after the 90-day period must be filed "within a reasonable time." Is the quoted wording desirable? Note also that the notice and hearing on the extension is to be "as the court may order." Should some notice and hearing be required in every case, with the nature thereof left to the discretion of the court, or should the court have discretion to dispense with notice and hearing altogether in appropriate cases? This matter should be clarified.

Section 6 specifies that the continuing authority of the guardian in winding up the affairs of the guardianship includes his right to possession of the ward's property whether or not in the physical possession of the guardian. This specification is an effort to resolve a matter brought to the attention of the advisory committee involving the purported failure of banks to honor checks drawn by guardians in winding up the affairs of guardianships terminated by the death of the ward (see Comment & Suggestion No. 7), and is based upon action by the advisory committee at the May 16, 1964, meeting. See Minutes, 5/16/64, pages 9 and 10. The present wording of the continuing authority of the guardian in ORS 126.530 seems reasonably clear. The added wording (i.e., "including his right to possession of all property of the ward whether in the physical possession of the guardian or another") may be surplusage, but perhaps at the same time desirable reinforcement of the intended nature

of the guardian's continuing authority. There are probably better ways to resolve the matter than the added wording. The draftsman solicits suggestions.

Subsection (3) of section 6 requires the guardian to deliver property to the ward, and is based, of course, upon subsection (3) of ORS 126.530. Are there any possible circumstances under which, upon termination of the guardianship while the ward is living, the ward would not be competent to accept delivery of the property and give the required receipt to the guardian?

Section 7. ORS 126.530 is amended to read:

126.530. Within 90 days after the date of termination of a guardianship of the estate by the death of the ward, or, if necessary, such further time as the court by order may allow upon a petition filed in the guardianship proceeding by the guardian of the estate during or within a reasonable time after the 90-day period and upon such notice and hearing as the court may order, the guardian of the estate shall wind up the affairs of the guardianship, and his authority and duties, including his right to possession of all property of the ward whether in the physical possession of the guardian or another, and the provisions of law applicable thereto shall continue for such purpose, as follows:

(1) The guardian shall pay from the guardianship estate:

(a) All expenses of administration of the guardianship estate, including expenses of winding up the affairs of the guardianship, allowed before or after the termination;

(b) All claims against the estate allowed before or after the termination; and

(c) [If the guardianship is terminated by the death of the ward, and] If the estate of the ward is solvent, and with prior approval of the court by order, expenses for the proper care, maintenance and support of the ward's surviving spouse and minor children during the [90-day] winding up period.

(2) Payment of expenses and claims under subsection (1) of this section shall be made first from money of the guardianship estate, and then, if there is not sufficient money, from any one or more of the following:

(a) Proceeds of the mortgage or pledge, or both, of any other property of the estate;

(b) Proceeds of the sale of any other personal property of the estate; or

(c) Proceeds of the sale of real property of the estate, if the petition for such sale was filed before the termination of the guardianship and the court by order authorizes the guardian to proceed with the sale.

(3) Except as otherwise provided in subsection (5) of this section, the guardian shall deliver to [the ward or] the executor or administrator of the [deceased] ward's estate all property of the ward in his possession after payment, if any, of expenses and claims under subsections (1) and (2) of this section. At any time during the winding up period the court, upon a petition filed by the executor or administrator, may order the guardian to deliver to the executor or administrator any part of the property of the ward in his possession not necessary for such payment. The recipient of the property so

delivered shall give a receipt therefor to the guardian. The receipt is a release and acquittance to the guardian as to the property so delivered. The guardian shall file in the guardianship proceeding proper receipts or other evidence satisfactory to the court showing such delivery.

(4) Except as otherwise provided in subsection (5) of this section, [if the guardianship is terminated by the death of the ward, and] if the sale, mortgage or pledge of property of the guardianship estate is necessary for the payment of all expenses and claims referred to in paragraphs (a) and (b) of subsection (1) of this section, and if such sale, mortgage or pledge cannot be made and the proceeds used to pay all such expenses and claims within the [90-day] winding up period, the guardian shall pay none of such expenses and claims, but such expenses and claims are liens upon and shall be paid first from property delivered under subsection (3) of this section.

(5) If [the guardianship is terminated by the death of] the ward died intestate, and if the guardianship estate exceeds the aggregate amount of the expenses and claims referred to in subsection (1) of this section and the expenses of last sickness and funeral of the ward, but does not exceed such aggregate amount by more than \$1,000, the guardian may, after payment of such expenses and claims from the guardianship estate, deliver all property of the ward in his possession to:

(a) The ward's surviving spouse;

(b) If there is no surviving spouse, the ward's surviving children in equal shares;

(c) If there is no surviving spouse and no surviving children, the ward's surviving parent or parents in equal shares;

(d) If there is no surviving spouse, no surviving children and no surviving parent or parents, the ward's surviving brothers and sisters in equal shares; or

(e) If any person who may receive property under this subsection is under legal disability, the guardian of the estate, if any, for such person, and if none, the person designated by the court in a proceeding under ORS 126.555.

The guardian may rely upon proof by affidavit which he believes to be true to establish the fact of intestacy and the relationship of those surviving the ward who may receive property under this subsection. The recipient of the property so delivered shall give a receipt therefor to the guardian. The receipt is a release and acquittance to the guardian as to the property so delivered, but the recipient is accountable as to the property so delivered to an executor or administrator, if any, of the [deceased] ward's estate, and if none, to any person beneficially interested therein. The guardian shall file in the guardianship proceeding proper receipts or other evidence satisfactory to the court showing such delivery.

Comment: Section 7 amends ORS 126.530, in part, by making it applicable only to winding up the affairs of a guardianship of the estate terminated by the death of the ward. For disposition of that part of ORS 126.530 relating to winding up

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the affairs of a guardianship of the estate terminated other than by the death of the ward, see section 6 and comment thereunder.

Section 7 amends ORS 126.530, in part, by adding provisions permitting extension of the present fixed 90-day winding up period and specifying that the continuing authority of the guardian in winding up the affairs of the guardianship includes his right to possession of the ward's property. See comment on these matters under section 6.

Section 7 amends ORS 126.530, in part, by adding to subsection (3) thereof a new provision authorizing the court to order the guardian to deliver to the executor or administrator of the deceased ward's estate during the winding up period any property of the ward not necessary for winding up purposes. This new provision is based upon action by the advisory committee at the May 16, 1964, meeting. See Minutes, 5/16/64, pages 9 and 10.

Subsection (2) of ORS 126.530 authorizes the sale, mortgage or pledge of property of the guardianship estate for the purpose of paying expenses and claims during the winding up period. Would it be desirable and feasible to impose some limitation on this authority with respect to specific property devised or bequeathed by the will of the deceased ward or with respect to property exempt from execution? ORS 126.495 (transfer of ward's property not an ademption) does not appear to apply during the winding up period since it speaks of specifically devised or bequeathed property "not contained in the estate of the ward at the time of his death."

Subsection (4) of ORS 126.530 provides that when all expenses and claims cannot be paid within the winding up period, none of them shall be paid and they are liens upon property delivered under subsection (3). Are there any possible circumstances under which payment of expenses and claims might be commenced but not completed even where the winding up period is extended, and some expenses and claims remain unpaid at the time of delivery of property under subsection (3)?

Section 8. ORS 126.555 is amended to read:

126.555. Where it appears that a guardian of the estate for a person under legal disability has not been appointed and that the value of the [estate] personal property of such person, including debts and other choses in action due to such person, is not more than \$1,000, any court having probate

jurisdiction, upon petition therefor and with such notice as the court may order or without notice, and without the appointment of a guardian of the estate for such person, may make an order authorizing a person designated in the order to settle debts and other choses in action due to such person under legal disability and receive payment thereof, and to receive property of such person under legal disability. The person so designated in the order of the court may give a release and discharge for any such debt or other chose in action or for any such property, and shall hold, invest or use all funds or other property so received as ordered by the court.

Comment: Section 8 amends ORS 126.555 by changing the limitation upon its application from situations in which the value of the estate of the person under legal disability is not more than \$1,000 to situations in which the value of such person's personal property, including debts and other choses in action due to him, is not more than \$1,000, and is based upon action by the advisory committee at the May 16, 1964, meeting. See Minutes, 5/16/64, page 11; Appendix B, pages 11 and 12.

Should any consideration be given to expressing the limitation upon the application of ORS 126.555 in terms of the value of the debt or other chose in action to be settled and paid or the value of the property to be received, instead of the total value of the personal property of the person under legal disability?

Should any consideration be given to permitting a court other than one having probate jurisdiction to make an order under ORS 126.555?

Does a court order under ORS 126.555 constitute a continuing authority to settle and receive payment of debts and other choses in action and to receive property, or is it limited to particular debts or other choses in action or property? Is this matter in need of clarification?

Section 9, ORS 126.660 is amended to read:

126.660. (1) A conservatorship is terminated:

(a) By the death of the ward; or

(b) By the appointment and qualification of a guardian of the person and estate or a guardian of the estate for the ward.

(2) The court by order may terminate a conservatorship if the court determines that:

(a) The ward is competent and desires to terminate the conservatorship; or

(b) The conservatorship no longer is necessary.

[(3) Upon termination of a conservatorship as provided in this section, the conservator shall account to the ward, if competent, and otherwise to the ward's personal representative.]

Comment: Section 9 amends ORS 126.660 by deleting subsection (3) thereof. For disposition of subsection (3) of ORS 126.660, see section 11 and comment thereunder.

Section 10. Section 11 of this Act is added to and made a part of ORS 126.606 to 126.660.

Section 11. (1) Except as otherwise provided in subsection (2) of this section, the authority and duties of a conservator terminate when the conservatorship is terminated.

(2) If a conservatorship is terminated other than by the death of the ward, the conservator shall, if the ward is living and competent, account to the ward, or, if the ward is living and incompetent, account to the guardian of the person and estate or guardian of the estate for the ward. If a conservatorship is terminated by the death of the ward, the

conservator shall wind up the affairs of the conservatorship, and his authority and duties and the provisions of law applicable thereto shall continue for such purpose, as provided in ORS 126.336 and 126.530, and ORS 126.535 to 126.545 shall apply.

Comment: The advisory committee at the May 16, 1964, meeting adopted in principle the following amendment of subsection (3) of ORS 126.660:

"(3) Upon termination of a conservatorship as provided in this section, the conservator shall account to the ward, if living and competent, [and otherwise to the ward's personal representative] or, if living and incompetent, to the guardian of the estate of the ward, or, if the ward has died, the affairs of the conservatorship shall be wound up in the same manner as provided in ORS 126.530 to 126.545."

See Minutes, 5/16/64, page 8; Appendix B, page 4. Upon consideration of the matter, the draftsman determined upon an approach involving deletion of subsection (3) of ORS 126.660 and a new separate statute section containing the substance of subsection (3) as revised, instead of an approach involving amendment of subsection (3).

The wording of parts of section 11 follow, in so far as appropriate, the pattern of ORS 126.525 and the first clause of ORS 126.530, which relate to winding up the affairs of a guardianship of the estate. As in the case of the amendment of subsection (3) of ORS 126.660 adopted in principle by the advisory committee, that part of section 11 relating to a conservatorship terminated by the death of the ward adopts by reference the provisions of ORS 126.530 to 126.545, which relate to winding up the affairs of a guardianship of the estate terminated by the death of the ward. ORS 126.336 also is adopted by reference, in order to make applicable the provisions of that statute section relating to a final account.

That part of section 11 relating to the duty of the conservator to account where the ward is living and incompetent refers to the "guardian of the person and estate or guardian of the estate for the ward," in order to conform to the wording of paragraph (b) of subsection (1) of ORS 126.660.

The first sentence of subsection (2) of section 11 prescribes the duty of the conservator to account upon termination of the conservatorship other than by the death of the ward.

It appears that neither ORS 126.636 nor any other provision of the conservatorship statutes makes applicable the provisions of ORS 126.336 relating to a final account. Further, it does not appear that the provisions of ORS 126.540 and 126.545, relating to discharge of a guardian of the estate, are applicable in the conservatorship termination other than by the death of the ward situation. Should more detail be provided on what happens when a conservatorship is terminated other than by the death of the ward, particularly with respect to accounting and discharge?

Common Trust Funds; Mineral Leases

At the May 16, 1964, meeting of the advisory committee, the draftsman pointed out that since enactment of the present Oregon guardianship and conservatorship statutes in 1961 there had been two enactments that had changed those 1961 statutes (ORS 126.250, relating to investment by guardians in common trust funds without prior court approval; and ORS 116.890, 116.900, 126.436 and 126.490, relating to lease of real property of wards for purposes of exploring for or obtaining oil, gas and minerals). The committee agreed that the draftsman should examine the provisions of these two enactments and bring to the attention of the committee any problems discovered. See Minutes, 5/16/64, page 12.

ORS 126.250, which includes the common trust fund provision, is otherwise amended by section 1 of the rough draft of proposed legislation set forth above. At the time the committee considers section 1 of the rough draft the draftsman will comment orally on the common trust fund provision and his examination thereof. Also, Mr. Carson, the chairman of the Subcommittee on Guardianship and Conservatorship, has asked Mr. Zollinger to examine and comment orally on the common trust fund provision.

At an appropriate time the draftsman will comment orally on the mineral leases and his examination thereof. Also, Mr. Carson has indicated his intention to examine and comment orally on these provisions. For the purpose of facilitating this comment, the pertinent statute sections are set forth below. ORS 116.890 and 116.900 were new provisions in 1963 (sections 9 and 10, respectively, chapter 417, Oregon Laws 1963). ORS 126.436 and 126.490 were amended in 1963 by sections 1 and 2, respectively, chapter 417, Oregon Laws 1963, and are set forth in such a form as to show, by brackets and underscoring, the deletions and additions made by the 1963 amendments.

116.890. No lease executed by a guardian, executor, administrator or other fiduciary pursuant to the terms of ORS 116.745, 116.825, 116.840 to 116.900, 126.436 and 126.490 and the order of the court, including, without limitation, a lease granting the right to explore or prospect for and remove and dispose of oil, gas and other hydrocarbons, and all other minerals or substances, similar or dissimilar, which may be produced from a well drilled pursuant to such lease, shall be void or voidable because the term thereof may or will extend beyond the duration of such guardianship or estate proceeding.

116.900. ORS 116.745, 116.825, 116.840 to 116.900, 126.436 and 126.490 apply to guardianships, conservatorships and estate proceedings that are now or may hereafter be pending in the courts of this state.

126.436. If it appears to the court that the sale, mortgage or lease referred to in ORS 126.426 is necessary or proper for any purpose referred to in ORS 126.406, the court shall order the sale, mortgage or lease to be made. [The] A mortgage or surface lease ordered shall be made subject to such terms and conditions as the court may consider necessary or proper. An order authorizing the execution of a lease or other instrument for the purpose of exploring or prospecting for and extracting, removing and disposing of oil, gas and other hydrocarbons, and all other minerals or substances, similar or dissimilar, that may be produced from a well drilled by the lessee, shall require a minimum of one-eighth royalty and shall set

forth the annual rental, if any rental is required to be paid,
the period of the lease which shall be for a primary term of
10 years and so long thereafter as oil, gas, other hydrocar-
bons or other leased substances are produced in paying quan-
tities from the leased premises or lands pooled or unitized
therewith, or mining or drilling operations are conducted on
the leased premises or lands pooled or unitized therewith,
and may authorize such other terms and conditions as the court
may consider necessary or proper including, without limita-
tion, a provision empowering the lessee to enter into any
agreement authorized by ORS chapter 520 with respect to the
land covered by the lease, including provisions for pooling
or unitization by the lessee. [The] A sale ordered shall be
made as provided in ORS 126.441 to 126.466, and subject to
such additional terms and conditions as the court may consider
necessary or proper.

126.490. No proceedings for the sale, exchange, surren-
der, partition, mortgage, pledge or lease (including a lease
executed for the purposes of exploring or prospecting for and
extracting, removing and disposing of oil, gas, other hydro-
carbons and all other minerals or substances, similar or dis-
similar, that may be produced from a well drilled pursuant to
such lease) of any property of the ward by a guardian of the
estate are subject to collateral attack on account of any ir-
regularity in the proceedings if the court which ordered the
sale, exchange, surrender, partition, mortgage, pledge or
lease had jurisdiction to do so.