

addresses of the devisees and any pretermitted children, and the birth dates of any who are minors.

(6) If the decedent died wholly or partially intestate, the names, relationship to decedent, and postoffice addresses of the heirs, and the birth dates of any who are minors.

(7) A statement of the extent and nature of estate assets to enable the court to set the amount of bond of the personal representative.

Section 5. Establishing foreign wills. (1) The written will of a testator who died domiciled outside this state, which upon probate may operate upon property in this state, may be admitted to probate, upon petition therefor, by filing a certified copy of the will and a certified copy of the order admitting the will to probate or evidencing its establishment in the jurisdiction where the testator died domiciled.

(2) A will offered for probate under this section may be contested for a cause which would be grounds for rejection of a will of a testator who died domiciled in this state.

Section 6. Filing objections to petition for appointment of personal representative. Any interested person may file written objections to a petition for probate of a will or for appointment of a personal representative at any time before the court admits the will to probate or makes an appointment pursuant to the petition.

Section 7. Testimony of attesting witnesses to will. (1) Upon the hearing of a petition for the appointment of a personal

representative, if the hearing is ex parte, before contest is filed, and involves the proof of a will, an affidavit of an attesting witness and may be used instead of the personal presence of the witness in court. The witness may give evidence of the execution of the will by attaching to his affidavit a photographic or photostatic copy of the will, and may identify the signature of the testator and witnesses to the will by use of the copy. The affidavit shall be received in evidence by the court and have the same weight as to matters contained in the affidavit as if the testimony were given by the witness in open court. The affidavit of the attesting witness may be made at the time of execution of the will or at any time thereafter.

(2) However, upon motion of any person interested in the estate filed within 30 days after the order admitting the will to probate is made, the court may require that the witness making the affidavit be brought before the court. If the witness is outside the reach of a subpoena, the court may order that the deposition of the witness be taken in the manner provided by ORS chapter 45.

(3) If the evidence of none of the attesting witnesses

to intestate estates, ORS 115.320 contains rather complicated provisions specifying the time in which preferred classes of persons may petition for administration of the estate. Although the following section preserves the preference rights, it was the unanimous decision of the two committees that the provision that any person may file the petition would eliminate many of the problems involved in the present statute. The 1967 Draft Uniform Probate Code (Section 3-205) provides that the petition may be filed by any person interested. The 1965 Washington Probate Code (section 11.28.110) does not specify who should petition for the appointment. Your committees considered that any person who paid the fees and filed a petition complying with this section would of necessity be an interested person.

The proposed section is more specific than ORS 115.020. Subsections (1) and (6) require that additional facts be included in the petition. The utility of this additional information to the court is obvious.

Section 5. Establishing foreign wills. This section would replace ORS 115.160. Reference is made to Section 13 of the chapter on Powers and Jurisdiction of the Probate Court, covering certification of documents from foreign jurisdictions. Subsection (1) is adapted from Section 1 and subsection (2) is adapted from Section 5, Uniform Probate of Foreign Wills Act. Subsection (2) replaces ORS 115.180(2). The proposed section

avoids the difficulty in complying with ORS 115.160 which requires "copies of such will and of the probate thereof". The question arises how much of the probate proceeding must be authenticated and filed with the copy of the will. The proposed section provides that a certified copy of the will and of the order of the foreign jurisdiction admitting it to probate is sufficient evidence that the will has been probated in such jurisdiction.

Section 583, Oregon Probate Law and Practice, Jaureguy and Love, states, in discussing the ORS section: "There is, however, no express provision in the Code for admitting any such foreign will to probate. In fact, there is no provision for ancillary administration in the Code, although such administration is had, as a matter of course."

The proposed Code provides that a certified copy of the will and of the order admitting it to probate may be presented for probate in this state by petition in the same manner as an original will, and the foreign will may be admitted to probate in the same manner as a local will. The section provides that it may be contested on the same grounds as a local will.

In this connection, Section 10 of the chapter on Accounting and Distribution provides for distribution to a foreign personal representative where the Oregon proceeding is an ancillary probate.

Section 6. Filing objections to petition for appointment of personal representative. This language is adapted from Section 1-208 of the 1967 Draft Uniform Code. It supplements Section 12 of the chapter on Powers and Jurisdiction of the Probate Court. It provides suitable opportunity to file objection to an ex parte petition for probate.

Section 7. Testimony of attesting witnesses to will. Section 5 is a revision of ORS 115.170, with minor editorial changes. However, the last sentence of subsection (1) is new. This points out that the affidavit of the attesting witness may be made at the time of execution of the will or at any time thereafter. The present ORS section does not specify when the affidavit should be made. Since the memory of the attesting witness is fresher at the time of the execution of the will,

Section 11. Removal of personal representative. (1) When a personal representative ceases to be qualified as provided in ORS _____, or becomes incapable of discharging his duties, the court shall remove him. When a personal representative has been unfaithful to or neglectful of his trust, the court may remove him. When grounds of removal appear to exist, the court on its own motion or on the petition of any person interested, shall order the personal representative to appear and show cause why he should not be removed. A copy of the order to show cause and of the petition, if any, shall be served upon the personal representative and upon his surety, or, if the personal representative after due diligence cannot be found within the state, service may be made on his attorney and his surety.

Section 12. Powers of surviving personal representative. Every power exercisable by copersonal representatives may be exercised by the survivors or survivor of them when the appointment of one is terminated, unless the terms of the will provide otherwise. Where one of two or more nominated as coexecutors is not appointed, those appointed may exercise all the powers incident to the office unless the will otherwise provides.

Section 13. Appointment of successor personal representative. (1) When a personal representative dies, is removed by the court, or resigns and his resignation is accepted by the court, the court may appoint, and, if he was the sole or the

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last surviving personal representative and administration
is not completed, the court shall appoint another personal
representative in his place.

(2) If, after a will has been proven and letters

The language in the suggested forms of letters has been somewhat simplified from the present suggested forms.

Section 11. Removal of Personal Representative. This section would replace ORS 115.470 and 115.480. The language is generally taken from Section 857.15 of the 1967 Wisconsin Probate Code. It covers the situations where the personal representative ceases to be qualified, as provided in Section 7, or becomes incapable of discharging his duties, when the court has the affirmative duty to remove him, and also where there has been neglect of duty or a breach of trust, in which case the court requires a hearing upon either its own motion or upon petition filed with the court. However, when a petition is filed with the court, it is not required to cite the personal representative to appear and show cause unless it feels that grounds of a removal appear to exist.

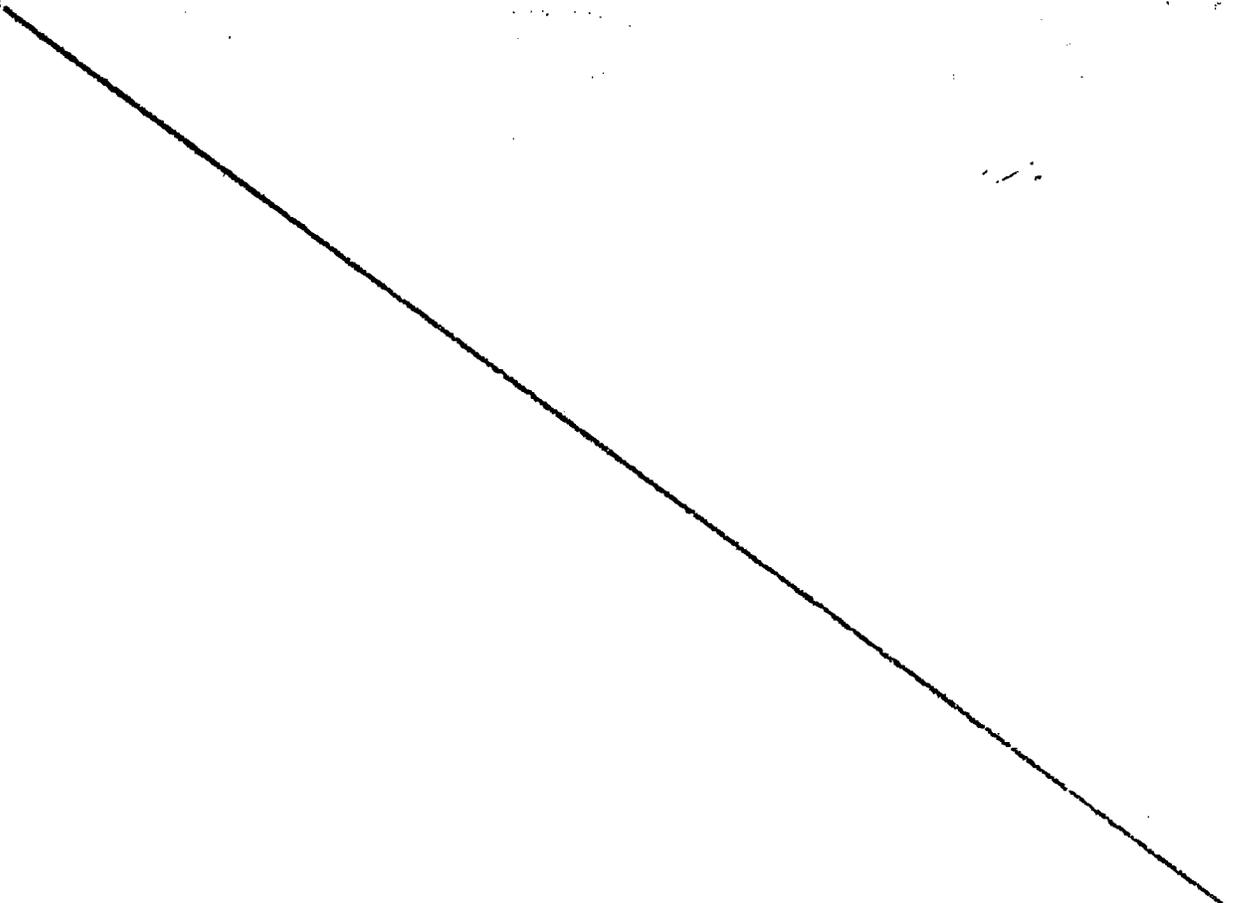
Section 12. Powers of surviving personal representative. This is taken verbatim from Section 3-419, 1967 Draft Uniform Probate Code. It replaces similar provisions in ORS 115.500, subsection (1), and ORS 115.510.

Section 13. Appointment of successor personal representative. Subsections (1) and (4) have been drafted from the 1967 Wisconsin Probate Code (sections 857.21 and 857.23) which in turn are based upon the Model Probate Code (sections 98, 99 and 100). Subsections (2) and (3) are the same as ORS

115.200 and 115.340.

Section 14. Notice by successor personal representative.

This is a new section which spells out when a successor personal representative is required to publish a notice of his appointment. The present code contains no guidelines for the procedure by a successor personal representative. There has been uncertainty as to whether the new administrator or administrator with the will annexed is required to republish a notice to creditors and whether in such case the time under the original publication is extended. The section makes clear that if the successor personal representative is appointed during the four month period for creditors to file their claims, he must republish the



danger of loss, injury or deterioration pending the appointment of a personal representative.

(3) Upon the appointment and qualification of a personal representative the powers of the special administrator shall cease and he shall make and file his account and deliver to the personal representative assets of the estate in his possession. If the personal representative objects to the account of the special administrator, the court shall hear the objections, and, whether or not objections are made, shall examine the account. To the extent approved by the court, the compensation of the special administrator and expenses properly incurred by him, including a reasonable fee of his attorney, shall be paid as expenses of his administration.

Section 4. Petition for appointment of personal representative. Any interested person may petition for the appointment of a personal representative. The petition shall include the following information, so far as known:

- (1) The name, age, domicile, postoffice, date and place of death, and Social Security account number or Treasurer's identification number of decedent.
- (2) Whether the decedent died testate or intestate.
- (3) The facts relied upon to establish venue.
- (4) The name and postoffice address of the person nominated as personal representative and the facts which show that he is qualified to act.
- (5) If the decedent died testate, the names and postoffice

addresses of the devisees and any pretermitted children, and the birth dates of any who are minors.

(6) If the decedent died wholly or partially intestate, the names, relationship to decedent, and postoffice addresses of the heirs, and the birth dates of any who are minors.

(7) A statement of the extent and nature of estate assets to enable the court to set the amount of bond of the personal representative.

Section 5. Testimony of attesting witnesses to will. (1)

Upon the hearing of a petition for the appointment of a personal representative, if the hearing is ex parte, before contest is filed, and involves the proof of a will, an affidavit of an attesting witness may be used instead of the personal presence of the witness in court. The witness may give evidence of the execution of the will by attaching to his affidavit a photographic or photostatic copy of the will, and may identify the signature of the testator and witnesses to the will by use of the copy. The affidavit shall be received in evidence by the court and have the same weight as to matters contained in the affidavit as if the testimony were given by the witness in open court. The affidavit of the attesting witness may be made at the time of execution of the will or at any time thereafter.

(2) However, upon motion of any person interested in the estate filed within 30 days after the order admitting the will to probate is made, the court may require that the witness making the affidavit be brought before the court. If the witness is outside

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the reach of a subpoena, the court may order that the deposition of the witness be taken in the manner provided by ORS chapter 45.

(3) If the evidence of none of the attesting witnesses

Section 11. Notice to State Land Board. If it appears from the petition for appointment of a personal representative that there is no known person to take by descent the net intestate estate, the personal representative shall mail to the Clerk of the State Land Board a copy of the petition and a copy of the published notice to creditors.

Section 12. Removal of personal representative. (1) When a personal representative ceases to be qualified as provided in ORS _____, or becomes incapable of discharging his duties, the court shall remove him. When a personal representative has been unfaithful to or neglectful of his trust, the court may remove him. When grounds of removal appear to exist, the court on its own motion or on the petition of any person interested, shall order the personal representative to appear and show cause why he should not be removed. A copy of the order to show cause and of the petition, if any, shall be served upon the personal representative and upon his surety, or, if the personal representative after due diligence cannot be found within the state, service may be made on his attorney and his surety.

Section 12(a). Powers of surviving personal representative. Every power exercisable by copersonal representatives may be exercised by the survivors or survivor of them when the appointment of one is terminated, unless the terms of the will provide otherwise. Where one of two or more nominated as

coexecutors is not appointed, those appointed may exercise all the powers incident to the office unless the will otherwise provides.

Section 13. Appointment of successor personal representative. (1) When a personal representative dies, is removed by the court, or resigns and his resignation is accepted by the court, the court may appoint, and, if he was the sole or the last surviving personal representative and administration is not completed, the court shall appoint another personal representative in his place.

(2) If, after a will has been proven and letters

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COMMENT

Section 12(a). Powers of surviving personal representative. This is taken verbatim from Section 3-419, 1967 Draft Uniform Probate Code. It replaces similar provisions in ORS 115.500, subsection (1), and ORS 115.510.

INITIATION OF PROBATE OR ADMINISTRATION

Section 1. Venue. (1) The venue for a proceeding seeking the appointment of a personal representative and for a proceeding to probate a will is:

(a) In the county where the decedent had his domicile or where he had his place of abode at the time of his death;

(b) In any county where property of the decedent was located at the time of his death; or

(c) In the county in which the decedent died.

(2) Filing a proceeding in a county other than specified in subsection (1) of this section does not constitute a jurisdictional defect.

Section 2. Proceedings commenced in more than one county.

(1) If proceedings seeking the appointment of a personal representative of the same estate or proceedings to probate a will of the same decedent are commenced in more than one county, they shall be stayed, except in the county where first commenced, until final determination there of venue. A proceeding is deemed commenced by the filing of a petition. In determining venue, if the court finds that transfer to another county where a proceeding has been commenced is for the best interest of the estate, it may in its discretion order such transfer.

(2) If the proper venue is determined to be in another county, the clerk of the court shall transmit to the clerk of

the court of the other county a transcript of the proceeding with all the original papers filed therein, and the court thereupon shall acquire exclusive jurisdiction of the proceeding to the same extent and with like effect as though the proceeding were in the court on original jurisdiction.

Section 3. Special administrators. (1) If, prior to appointment and qualification of a personal representative, property of decedent is in danger of loss, injury or deterioration, or disposition of the remains of a decedent is required, the court may appoint a special administrator to take charge of the property or the remains. The petition for appointment shall state the reasons for special administration and specify the property, so far as known, requiring administration, and the danger to which it is subject. The special administrator shall qualify by filing bond in the amount ordered by the court, conditioned upon the faithful performance of his trust. The special administrator may:

(a) Incur expenses for the funeral, burial, or other disposition of the remains of decedent in a manner suitable to his condition in life; and

(b) Incur expenses for the protection of the property of the estate; and

(c) Sell perishable property of the estate, whether or not listed in the petition, if necessary to prevent loss to the estate.

(2) The special administrator shall not approve or reject claims of creditors or pay claims or expenses of administration or take possession of assets of the estate other than those in

danger of loss, injury or deterioration pending the appointment of a personal representative.

(3) Upon the appointment and qualification of a personal representative the powers of the special administrator shall cease and he shall make and file his account and deliver to the personal representative assets of the estate in his possession. If the personal representative objects to the account of the special administrator, the court shall hear the objections, and, whether or not objections are made, shall examine the account. To the extent approved by the court, the compensation of the special administrator and expenses properly incurred by him, including a reasonable fee of his attorney, shall be paid as expenses of his administration.

Section 4. Petition for appointment of personal representative. Any person may petition for the appointment of a personal representative. The petition shall include the following information, so far as known:

(1) The name, age, domicile, postoffice address, date and place of death, and Social Security account number or Treasurer's identification number of decedent.

(2) Whether the decedent died testate or intestate.

(3) The facts relied upon to establish venue.

(4) The name, residence and postoffice address of the person nominated as personal representative and the facts which show his eligibility for appointment as personal representative.

(5) The names, relationship to decedent, residence and postoffice address of heirs, devisees and legatees of the decedent,

and the birth dates of any who are minors.

(6) A statement of the extent and nature of estate assets to enable the court to set the amount of bond of the personal representative.

Section 5. Testimony of attesting witnesses to will. (1)

Upon the hearing of a petition for the appointment of a personal representative, if the hearing is ex parte, before contest is filed, and involves the proof of a will, an affidavit of an attesting witness may be used instead of the personal presence of the witness in court. The witness may give evidence of the execution of the will by attaching to his affidavit a photographic or photostatic copy of the will, and may identify the signature of the testator and witnesses to the will by use of the copy. The affidavit shall be received in evidence by the court and have the same weight as to matters contained in the affidavit as if the testimony were given by the witness in open court. The affidavit of the attesting witness may be made at the time of execution of the will or at any time thereafter.

(2) However, upon motion of any person interested in the estate filed within 30 days after the order admitting the will to probate is made the court may require that the witness making the affidavit be brought before the court. If the witness is outside the reach of a subpoena, the court may order that the deposition of the witness be taken in the manner provided by ORS chapter 45.

(3) If the evidence of none of the attesting witnesses

is available, the court may allow proof of the will be testimony or other evidence that the signature of the testator or at least one of the witnesses is genuine.

(4) In the event of contest of the will, or of probate thereof in solemn form, proof of any facts shall be made in the same manner as in a suit in equity.

Section 6. Preference in appointing personal representative.

Upon the filing of the petition, if there is no will, or, if a will, when the will has been proved, the court shall appoint a qualified person it finds suitable as personal representative, giving preference as follows:

- (1) To the executor named in the will.
- (2) To the surviving spouse or his nominee.
- (3) To the nearest of kin or his nominee.

Section 7. Persons not qualified to act. A person is

not qualified to act as personal representative who is:

- (1) An incompetent.
- (2) A minor.
- (3) A person who has been convicted of a felony.
- (4) A person suspended for misconduct or disbarred from

the practice of law, during the period of suspension or disbarment.

(5) A person who has resigned from the Oregon State Bar when charges of professional misconduct are under investigation or when disciplinary proceedings are pending against him, until he is reinstated.

- (6) A nonresident of this state, except that a nonresident

named executor in the will may qualify if he appoints a resident agent to accept service of summons and process in all actions affecting the estate, files the appointment in the probate proceeding, and files a bond as provided in ORS _____.

(7) A judge of the district court, circuit court, tax court or Supreme Court of the State of Oregon.

Section 8. Necessity and amount of bond; bond notwithstanding will. (1) Unless a testator declares that no bond shall be required of his executor, the personal representative shall not act or shall letters be issued to him until he files with the clerk a bond executed by a surety company authorized to transact surety business in the State of Oregon. The court may, in its discretion, require a bond notwithstanding any provision in a will that no bond is required, and shall require a nonresident executor to give bond. The bond shall be for the security and benefit of all persons interested and shall be conditioned upon the personal representative faithfully performing the duties of his trust.

(2) The amount of the bond set by the court shall be adequate to protect interested parties but in no event shall it be less than \$1,000. In setting the amount of the bond the court shall consider:

(a) The nature, liquidity and apparent value of the assets.

(b) The anticipated income during administration.

(c) The probable indebtedness and taxes.

(3) Nothing in this section shall affect the provisions

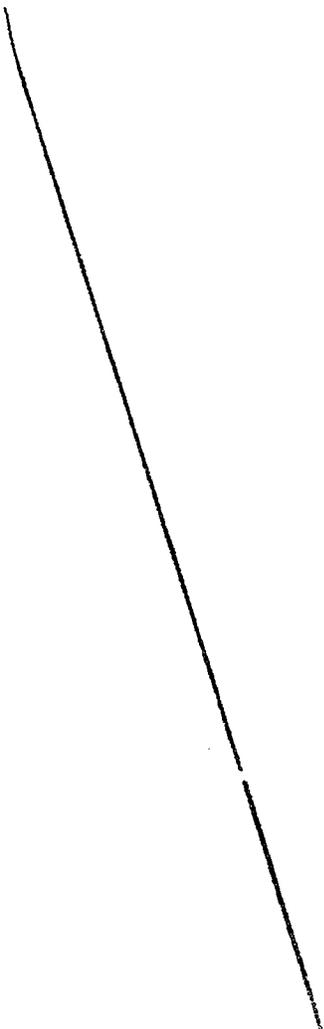
of ORS 709.230 and 709.240, relating to a trust company acting as personal representative.

Section 9. Increasing, decreasing or requiring new bond.

The court may increase or reduce the amount of bond, or require a new bond, if it appears to the court that the bond was inadequate or excessive or a new bond is necessary. The surety may be discharged from liability by an order made pursuant to ORS 33.510 and 33.520.

Section 10. Letters testamentary or of administration.

Letters testamentary or letters of administration shall be issued to the personal representative appointed by the court upon his filing with the clerk the bond, if any, required by the court. The letters may be in the following form:



(1)

LETTERS TESTAMENTARY

No. _____

THIS CERTIFIES that the will of _____
deceased, has been proved and _____ has
(have) been appointed and is (are) at the date hereof the duly
appointed, qualified and acting _____
(Executor(s) or Administrator(s)
_____ of the will and estate of said decedent.
with the Will Annexed)

IN WITNESS WHEREOF, I, as Clerk of the Circuit Court of
the State of Oregon for the County of _____, in which pro-
ceedings for administration upon said estate are pending, do
hereto subscribe my name and affix the seal of the said court this
_____ day of _____, 19 ____.

Clerk of the Court

By _____
Deputy

(Seal)

(2)

LETTERS OF ADMINISTRATION

No. _____

THIS CERTIFIES that _____ has
(have) been appointed and is (are) the duly appointed, qualified
and acting administrator(s) of the estate of _____,
deceased, and that no will of said decedent has been proved in
this court.

IN WITNESS WHEREOF, I, as Clerk of the Circuit Court of
the State of Oregon for the County of _____
in which proceedings for administration upon said estate are
pending, do hereto subscribe my name and affix the seal of the
said court this _____ day of _____, 19____.

Clerk of the Court

By _____
Deputy

(Seal)

Section 11. Notice to State Land Board. If it appears from the petition for appointment of a personal representative that there is no known person to take by descent the net intestate estate, the personal representative shall mail to the Clerk of the State Land Board a copy of the petition and a copy of the published notice to creditors.

Section 12. Removal of Personal Representative. When a personal representative ceases to be qualified as provided in ORS _____, or becomes incapable of discharging his duties, the court shall remove him. When a personal representative has been unfaithful to or neglectful of his trust, the court may remove him. When grounds of removal appear to exist, the court on its own motion or on the petition of any person interested, shall order the personal representative to appear and show cause why he should not be removed. A copy of the order to show cause and of the petition, if any, shall be served upon the personal representative and upon his surety, or, if the personal representative after due diligence cannot be found within the state, service may be made on his attorney and his surety.

Section 13. Appointment of successor personal representative.(1) When a personal representative dies, is removed by the court, or resigns and his resignation is accepted by the court, the court may appoint, and, if he was the sole or the last surviving personal representative and administration is not completed, the court shall appoint another personal representative in his place.

(2) If, after a will has been proven and letters

testamentary or of administration with the will annexed have been issued thereof, such will is set aside, declared void or inoperative, such letters shall be revoked, and letters of administration issued.

(3) If, after administration has been granted, a will of the deceased is found and proven, the letters of administration shall be revoked and letters testamentary or of administration with the will annexed shall be issued.

(4) When a successor personal representative is appointed, he has all the rights and powers of his predecessor or of the executor designated in the will, except that he shall not exercise powers given in the will which by its terms are personal to the personal representative therein designated.

Section 14. Notice by successor personal representative.

(1) If the personal representative dies, is removed by the court, or resigns after the notice of appointment required by ORS _____ has been published but before the time for presenting claims required by the notice has expired, the successor personal representative shall cause notice of his appointment to be published as if he were the original personal representative. The republished notice shall state that the original personal representative died, was removed by the court, or resigned, the date of death, removal or resignation, and the date of appointment of the new personal representative. The period of time between the death, removal or resignation and the date of the first republication of the notice shall be added to the period required for presentation of claims by the original notice of

appointment.

(2) No such notice by the successor personal representative shall be required if the period for filing claims expired prior to the death, removal, or resignation of the original personal representative.

Section 15. Designation of attorney to be filed. If the personal representative has employed an attorney to represent him in the administration of the estate he shall file in the estate proceedings the name and postoffice address of the attorney.

Section 16. Contest of will. When a will has been admitted to probate, any person interested may, at any time within four months after the date of the entry in the court journal of the order of court admitting the will to probate, contest the probate of the will or the validity of the will.

Section 17. ORS 93.190 is amended to read:

93.190. (1) Every conveyance, deed of trust, mortgage or devise of an interest in or lien [in or] upon real or personal property to two or more persons as trustees or [executors] personal representatives, creates a joint tenancy in such interest or lien in the trustees or [executors] personal representatives unless it is expressly declared in the conveyance, deed of trust, mortgage or devise that the trustees or [executors] personal representatives shall take or hold the property as tenants in common or otherwise.

(2) If the conveyance, deed of trust, mortgage or devise

provides for filling any vacancy in the office of trustee or [executor] personal representative, it may be filled as therein provided excepting that a court of competent jurisdiction may fill a vacancy in the trusteeship according to the established rules and principles of equity. In whichever way the vacancy is filled, the new trustee shall hold the property with all powers, rights, and duties of an original trustee unless otherwise directed by conveyance, deed of trust, mortgage or devise, or order or decree of the court. [No vacancy in an executorship shall be filled without an order therefor by a county court sitting in probate as in the case of an original appointment of an executor.]

Section 18. Repeal of existing statutes. ORS 115.010, 115.020, 115.110, 115.120, 115.130, 115.140, 115.150, 115.160, 115.170, 115.180, 115.190, 115.200, 115.210, 115.220, 115.310, 115.330, 115.330, 115.340, 115.350, 115.410, 115.410, 115.430, 115.440, 115.450, 115.460, 115.470, 115.480, 115.490, 115.500, 115.510, 115.520 and 115.990 are repealed.

Proposed revised Oregon probate code
INITIATION OF PROBATE OR ADMINISTRATION
3rd Draft
November 21, 1967

Prepared by
Stanton Allison

COMMENTS

Section 1. Venue. The present provisions for venue are contained in ORS 115.140 and 115.310. These sections are discussed in 2 Jaureguy & Love, Oregon Probate Law and Practice §573 (1958). There the authors suggest that these two sections might better be combined in a single section governing the particular county in which the probate court has jurisdiction to probate a will or grant letters of administration. The authors also criticize the use of the word "inhabitant" rather than "domicile." They point out that domicile is not synonymous with residence and that inhabitant "has a narrower and more limited significance than domicile." The litigation arising out of the present statutory language is commented on by the authors. They call attention to decisions where administration proceedings had been held void through failure to comply with the provisions of these statutes. They state:

"It is of course clear that an estate can only be administered in one county. If there be an attempt to administer it in a second county, the proceedings there, unless the letters of administration in the first proceedings were providently granted and are revoked, are a nullity." (Citing Slate's Estate, 40 Or. 349; Oh Chow v. Brockway, 21 Or. 440)

In this connection, your committee has considered the proposed 1967 Uniform Probate Code (section 3-204); the 1963 Iowa Probate Code (section 12); the Model Probate Code, which has been adopted in the 1967 Wisconsin Probate Code (section 856.01);

and the 1965 Washington Probate Code (section 11.16.050).

The proposed section has been drafted to eliminate the problems inherent in our present code. It has eliminated different venue for a person not domiciled in the state at time of death and a person domiciled in this state. It has eliminated difference in treatment between real property, personal property and intangible property. It has eliminated the use of the word "inhabitant." It gives the petitioner the choice of probating the estate in the county of domicile, in the county where the decedent has his place of abode, in the county where he left assets or in the county in which he died. The section provides that filing a proceeding in the wrong county does not constitute a jurisdictional defect which might result in the probate proceeding being subsequently held void. Provision is made for the court to transfer the proceedings for the best interest of the estate where two or more proceedings are instituted in different counties, or to retain jurisdiction where originally filed.

Thus, the proposed revision would meet the proper convenience of the interested parties in choosing the place of administration and give the court the power to determine the place of administration for the better interest of the estate when a conflict develops by filings in different counties.

Section 2. Proceedings commenced in more than one county. This section would give the probate court of the county to which the proceeding had been transferred the same status and jurisdiction as if the proceeding had been completed in the original jurisdiction. The language is taken from

ORS 109.345. Our present code does not contain specific language providing for and regulating the transfer to another county, although there are adequate sections dealing with the transfer of causes and the effect thereof. In view of the fact that the court is given discretion to determine the venue on the basis of the best interests of the estate, it seems essential that such a provision be included.

Section 3. Special administrators. This section is a revision of ORS 115.330. The only substantive change is to provide for appointment of a special administrator when it is necessary to handle the burial of unclaimed bodies in the possession of the coroner and necessary other details in connection with the disposal of the body. Judge Dickson explained to the committees the very real problem involved when the coroner was holding unclaimed bodies. The only other substantive change from the present statute is the inclusion of provisions for accounting by the special administrator and for payment of the expenses he has incurred, his compensation and attorney's fee.

Section 4. Petition for appointment of personal representative. This section replaces ORS 115.020 and 115.120 of the present code. It will be noticed that the present law is changed materially in that the proposed section provides that any person may file a petition for the appointment of a personal representative. ORS 115.120 now provides that "Any executor, devisee, or legatee named in any will, or any other person interested in the estate" may petition. In regard

to intestate estates, ORS 115.320 contains rather complicated provisions specifying the time in which preferred classes of persons may petition for administration of the estate. Although the following section preserves the preference rights, it was the unanimous decision of the two committees that the provision that any person may file the petition would eliminate many of the problems involved in the present statute. The 1967 Draft Uniform Probate Code (section 3-205) provides that the petition may be filed by any person interested. The 1965 Washington Probate Code (section 11.28.110) does not specify who should petition for the appointment. Your committees considered that any person who paid the fees and filed a petition complying with this section would of necessity be an interested person.

The proposed section is more specific than ORS 115.020. Subsections (1) and (6) require that additional facts be included in the petition. The utility of this additional information to the court is obvious.

Section 5. Testimony of attesting witnesses to will.
Section 5 is a revision of ORS 115.170, with minor editorial changes. However, the last sentence of subsection (1) is new. This points out that the affidavit of the attesting witness may be made at the time of execution of the will or at any time thereafter. The present ORS section does not specify when the affidavit should be made. Since the memory of the attesting witness is fresher at the time of the execution of the will,

it seems helpful that this matter be brought to attention.

Subsection (3) is also new. In the opinion of the two committees it seemed unwise, in an ex parte proceeding particularly, to allow a will to fail because the evidence of attesting witnesses is not available. It seemed necessary that means be provided, when the instrument is admitted to be the last will and testament of the deceased, so that it will not be denied probate through a technical failure of proof by reason of the death or unavailability of the attesting witnesses.

Section 6. Preference in appointing personal representative. This would replace ORS sections 115.190 and 115.310. Your committee felt that the first requirement in appointment must be that no unqualified persons be appointed and that no unsuitable persons be appointed. The right of the court to use its discretion in all cases is not clearly indicated or provided by the present statute. However, subject to this proper and essential discretion in the court, the preference provisions of the present statute are generally preserved. One element, however, has been added. Provision is made for a surviving spouse to nominate another person to be appointed and the next of kin is given the same right of nomination. This would be useful in an intestate estate with substantial assets where the widow does not wish to serve as administrator. In this case, she could nominate another person or a bank to be appointed in her place. Your committees believe that this provision will provide a flexibility not now present in Oregon Revised Statutes.

Section 7. Persons not qualified to act. This section would rewrite and replace ORS 115.410. The only substantive changes from the present statute are found in subsections (5) and (6). Subsection (5) is required by the present rules on disciplinary proceedings of the Oregon State Bar which permit a resignation by an attorney when disciplinary proceedings are pending. The circumstances requiring disqualification under subsection (4) would similarly apply where an attorney had resigned from the bar "under fire." The other substantive change is the exception which would permit a nonresident executor named in a will to serve if he appoints a resident agent in the same manner as provided for nonresident corporations under the general law. A typical case would be where a testator had nominated a Vancouver, Washington, resident as executor where the estate had extensive property in both Washington and Oregon. Another situation would be where a Portland resident nominated as executor a close relative living in Washington. It was felt that this provision would in many cases carry out the wishes of the testator and provide more efficient administration of the testate estate.

The present statute disqualifies "judicial officers, other than Justices of the Peace." The proposed language is predicated on the assumption that probate jurisdiction will be vested in the circuit court. The proposed section would disqualify only those judicial officers who are given jurisdiction in probate matters.

Section 8. Necessity and amount of bond; bond notwithstanding will. This section replaces and changes materially ORS 115.430. The principal change is that the revised section eliminates any provision for the personal surety, and requires a surety company bond in all cases except where the bond requirement has been waived by the will. It also provides that in all cases the bond be not less than \$1,000. Your committees agree that the protection afforded in a defalcation situation by a bond with personal sureties is completely illusory. In view of the nominal cost of a surety bond of \$1,000, it was felt that actual protection should be afforded innocent heirs at law and families of the deceased by a required surety bond. The expense where larger estates are involved can be avoided by provisions of the will.

The section also indicates guidelines for the court in setting the amount of the bond and within these guidelines gives the court more discretion in fixing of the necessary amount of the bond than is provided by the present ORS 115.430.

Section 9. Increasing, decreasing or requiring new bond. Section 9 replaces the present provisions of subsection (4) of ORS 115.430, 115.450, and 115.460. Rather than include the somewhat complicated language of these sections, the provisions of ORS 33.510 and 33.520, covering the general subject of discharge of surety, are incorporated by reference.

Section 10. Letters testamentary or of administration. This section will replace ORS 115.190, 115.210, and 115.350.

The language in the suggested forms of letters has been somewhat simplified from the present suggested forms.

Section 11. Notice to State Land Board. Section 11 replaces and changes subsection (2) of ORS 115.310. ORS 115.310 provides that no order appointing a personal representative can be granted by the court in an escheat situation until there has been filed proof of service of the possible escheat upon the State Land Board. The proposed section merely provides for mailing notice to the State Land Board by the personal representative. Under this code no notice is required to be given to heirs, devisees, and legatees prior to the appointment of the personal representative. Since, in the case of escheated property, the State of Oregon is in the position of the heirs at law, it does not seem appropriate that a different procedure should be set up in such a case than if there were living heirs. Your committees felt that there is every advantage in having a prompt appointment of a personal representative who would give due notification to the State Land Board and with whom the State Land Board would be able to communicate. The change in this section would obligate the personal representative to send the State Land Board a copy of the petition, as now required, and also a copy of the notice to creditors.

Section 12. Removal of Personal Representative. This section would replace ORS 115.470 and 115.480. The language is generally taken from Section 857.15 of the 1967 Wisconsin Probate Code. It covers the situations where the personal representative ceases to be qualified, as provided in section 7,

or becomes incapable of discharging his duties, when the court has the affirmative duty to remove him, and also where there has been neglect of duty or a breach of trust, in which case the court requires a hearing upon either its own motion or upon petition filed with the court. However, when a petition is filed with the court, it is not required to cite the personal representative to appear and show cause unless it feels that grounds of a removal appear to exist.

Section 13. Appointment of successor personal representative. Subsections (1) and (4) have been drafted from the 1967 Wisconsin Probate Code (sections 857.21 and 857.23) which in turn are based upon the Model Probate Code (sections 98, 99 and 100). Subsections (2) and (3) are the same as ORS 115.200 and 115.340.

Section 14. Notice by successor personal representative. This is a new section which spells out when a successor personal representative is required to publish a notice of his appointment. The present code contains no guidelines for the procedure by a successor personal representative. There has been uncertainty as to whether the new administrator or administrator with the will annexed is required to republish a notice to creditors and whether in such case the time under the original publication is extended. The section makes clear that if the successor personal representative is appointed during the four month period for creditors to file their claims, he must republish the

notice, together with information which would advise the creditors not only the name of the new personal representative, but the information about the circumstances requiring the appointment of the replacement. In such case, the initial period for filing claims is extended to cover the period between the death, resignation, or removal of the previous personal representative and the first republication of the notice by the replacement. The section further provides that a successor personal representative appointed after the expiration of the four month period for presentation of claims under the original notice does not have to publish notice of his appointment. This provision is taken from the 1963 Washington Probate Code (section 11.40.010).

Section 15. Designation of attorney to be filed. This is a new section which requires the personal representative to file in the estate proceedings the name and address of the attorney for the estate. This section will be useful not only to furnish information to the clerk and the probate judge, but to give necessary information in case of litigation with the estate and the personal representative. The section is taken from the 1963 Iowa Probate Code, (section 82). The Iowa Bar Committee comment is as follows:

"New. In other provisions of the Code, notices may be served upon the attorney for the fiduciary in certain circumstances. This section is necessary in order to facilitate the use of such provisions."

Section 16. Contest of Will. This section is the same

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as ORS 115.180, except that the time for the will contest has been shortened from six months to four months to conform to the shortening of the period of the notice to creditors from six months to four months.

Proposed revised Oregon probate code
INITIATION OF PROBATE OR ADMINISTRATION
3rd Draft
November 21, 1967

Prepared by
Stanton Allison

COMPARATIVE SECTION TABLE

<u>Draft Sections</u>	<u>ORS Sections</u>
1	115.140, 115.310
2	115.140, 126.116
3	115.330
4	115.020, 115.120
5	115.170
6	115.190, 115.310, 115.320
7	115.410, 115.420
8	115.430, 115.440
9	115.430, 115.450, 115.460
10	115.190, 115.210, 115.350
11	115.310
12	115.470, 115.480, 115.490
13	115.200, 115.340, 115.500, 115.510, 115.520
14	
15	
16	115.180
17	93.190
18	Repealer

INITIATION OF PROBATE OR ADMINISTRATION

Section 1. Venue. (1) The venue for a proceeding seeking the appointment of a personal representative and for a proceeding to probate a will is:

- (a) In the county where the decedent had his domicile or where he had his place of abode at the time of his death;
- (b) In any county in which the decedent left assets; or
- (c) In the county in which the decedent died.

(2) Filing a proceeding in a county other than specified in subsection (1) of this section does not constitute a jurisdictional defect.

References: Advisory Committee Minutes:
1/14,15/66, pp. 25 to 27
6/16,17/67, pp. 12 and 13

Gilley Report, 1/14/66

ORS 115.140
115.310

Section 2. Proceedings commenced in more than one county.

(1) If proceedings seeking the appointment of a personal representative of the same estate or proceedings to probate a will of the same decedent are commenced in more than one county, they shall be stayed, except in the county where first commenced, until final determination there of venue. A proceeding is deemed commenced by the filing of a petition. In determining venue the court, in its discretion, may find that transfer to another county where a proceeding has been commenced is for

the best interest of the estate.

(2) If the proper venue is determined to be in another county, the clerk of the court shall transmit to the clerk of the court of the other county a transcript of the proceeding with all the original papers filed therein.

References: Advisory Committee Minutes:
1/14,15/66, pp. 25 to 27
6/16,17/67, pp. 12 and 13

Gilley Report
1/14/66

ORS 115.140
126.116

Section 3. Pleadings and mode of procedure. No particular pleadings or forms thereof are required in the exercise of jurisdiction of probate courts. The mode of procedure in the exercise of jurisdiction is in the nature of a suit in equity except as otherwise provided by statute. The proceedings shall be in writing and upon the petition of a party in interest or the order of the court. All petitions, reports and accounts shall be verified by at least one of the persons making them or his attorney, or in case of a corporation by its agent. The court exercises its powers by means of:

- (1) A petition of a party in interest.
- (2) A citation to a party.
- (3) A subpoena to a witness.
- (4) Orders and decrees.
- (5) An execution or warrant to enforce its orders and decrees.

References: Advisory Committee Minutes:
1/14,15/66, pp. 18 and 19
6/16,17/67, p. 14

Gilley Report
1/14/66

ORS 115.010

[Draftsman's Note: In final form it is intended to place section 3 in the chapter headed "Jurisdiction and Powers of Probate Courts."]

Section 4. Special administrators. (1) If, prior to appointment and qualification of a personal representative, property of decedent is in danger of loss, injury or deterioration, or disposition of the remains of a decedent is required, the court may appoint a special administrator to take charge of the property or the remains. The petition for appointment shall state the reasons for special administration and specify the property, so far as known, requiring administration, and the danger to which it is subject. The special administrator shall qualify by filing bond in the amount ordered by the court, conditioned upon the faithful performance of his trust. The special administrator may:

(a) Incur expenses for the funeral, burial, or other disposition of the remains of decedent in a manner suitable to his condition in life; and

(b) Incur expenses for the protection of the property of the estate; and

(c) Sell perishable property of the estate, whether or not listed in the petition, if necessary to prevent loss to the estate.

(2) The special administrator shall not approve or reject claims of creditors or pay claims or expenses of administration or take possession of assets of the estate other than those in danger of loss, injury or deterioration pending the appointment of a personal representative.

(3) Upon the appointment and qualification of a personal representative the powers of the special administrator shall cease and he shall make and file his account and deliver to the personal representative assets of the estate in his possession. If the personal representative objects to the account of the special administrator, the court shall hear the objections, and, whether or not objections are made, shall examine the account. To the extent approved by the court, the compensation of the special administrator and expenses properly incurred by him, including a reasonable fee of his attorney, shall be paid as expenses of his administration.

References: Advisory Committee Minutes:
2/18/66, pp. 19 to 22
3/18,19/66, pp. 18 to 20
6/16,17/67, p. 14

Gilley Report
1/14/66

ORS 115.330

Section 5. Contents of petition for appointment of personal representative. Any person may petition for the appointment of a personal representative. The petition shall include the following information, so far as known:

(1) The name, age, domicile, postoffice address, date and place of death, and Social Security account number or Treasurer's

identification number of decedent.

(2) Whether the decedent died testate or intestate.

(3) The facts relied upon to establish venue.

(4) The name, residence and postoffice address of the person nominated as personal representative and facts showing his qualification to serve.

(5) The names, relationship to decedent, residence and postoffice address of heirs, devisees and legatees of the decedent, and the birth dates of any who are minors.

(6) A statement of the extent and nature of estate assets to enable the court to set the amount of bond of the personal representative.

References: Advisory Committee Minutes:
1/14,15/66, pp. 19 to 21
6/16,17/67, pp. 15 and 16

Gilley Report
1/14/66

ORS 115.120
115.020

Section 6. Testimony of attesting witnesses to will. (1)

Upon the hearing of a petition for the appointment of a personal representative, if the hearing is ex-parte, before contest is filed, and involves the proof of a will, an affidavit of an attesting witness may be used instead of the personal presence of the witness in court. The witness may give evidence of the execution of the will by attaching to his affidavit a photographic or photostatic copy of the will, and may identify the signature of the testator and witnesses to the will by use of the copy. The affidavit shall be received in evidence by the

court and have the same weight as to matters contained in the affidavit as if the testimony were given by the witness in open court. The affidavit of the attesting witness may be made at the time of execution of the will or any time thereafter.

(2) However, upon motion of any person interested in the estate filed within 30 days after the order admitting the will to probate is made the court may require that the witness making the affidavit be brought before the court. If the witness is outside the reach of a subpoena, the court may order that the deposition of the witness be taken in the manner provided by ORS chapter 45.

(3) If the evidence of none of the attesting witnesses is available, the court may allow proof of the will by testimony or other evidence that the signature of the testator or at least one of the witnesses is genuine.

(4) In the event of contest of the will, or of probate thereof in solemn form, proof of any facts shall be made in the same manner as in a suit in equity.

References: Advisory Committee Minutes:
2/18,19/66, p. 9
6/16,17/67, pp. 17 and 18

Gilley Report
1/14/66

ORS 115.170

Section 7. Preference in appointing personal representative.

Upon the filing of the petition, if there is no will, or, if a will, when the will has been proved, the court shall appoint a qualified person it finds suitable as personal representative,

giving preference as follows:

- (1) To the executor named in the will.
- (2) To the surviving spouse or his nominee.
- (3) To the nearest of kin or his nominee.

References: Advisory Committee Minutes:
1/14,15/66, pp. 21 to 24

Gilley Report
1/14/66

ORS 115.190
115.310

Section 8. Persons not qualified to act. A person is not qualified to act as personal representative who is:

- (1) An incompetent.
- (2) A minor.
- (3) A person who has been convicted of a felony.
- (4) A person suspended for misconduct or disbarred

from the practice of law, during the period of suspension or disbarment.

(5) A person who has resigned from the Oregon State Bar when charges of professional misconduct are under investigation or when disciplinary proceedings are pending against him, until he is reinstated.

(6) A nonresident of this state, except that a nonresident named executor in the will may qualify if he appoints a resident agent to accept service of summons and process in all actions affecting the estate, files the appointment in the probate proceeding, and files a bond as provided in section 9 of this draft.

(7) A judge of the district court, circuit court, tax

court or Supreme Court of the State of Oregon.

References: Advisory Committee Minutes:
1/14,15/66, pp. 23 to 25
2/18,19/66, pp. 28 and 29
3/18,19/66, pp. 31 to 33; and Appendix
4/15,16/66, p. 19
6/16,17/67, p. 17

Gilley Report
1/14/66

ORS 115.410
115.420

Section 9. Necessity and amount of bond; bond notwithstanding will. (1) Unless a testator declares that no bond shall be required of his executor, the personal representative shall not act nor shall letters be issued to him until he files with the clerk a bond executed by a surety company authorized to transact surety business in the State of Oregon. The court may, in its discretion, require a bond notwithstanding any provision in a will that no bond is required, and shall require a nonresident executor to give bond. The bond shall be for the security and benefit of all persons interested and shall be conditioned upon the personal representative faithfully performing the duties of his trust.

(2) The amount of the bond set by the court shall be adequate to protect interested parties but in no event shall it be less than \$1,000. In setting the amount of the bond the court shall consider:

(a) The nature, liquidity and apparent value of the assets.

(b) The anticipated income during administration.

(c) The probable indebtedness and taxes.

(3) Nothing in this section shall affect the provisions of ORS 709.230 and 709.240, relating to a trust company acting as personal representative.

References: Advisory Committee Minutes:
2/18,19/66, pp. 29 to 33; and Appendix
3/18,19/66, pp. 33 to 35; and Appendix
6/16,17/67, pp. 18 and 19

Gilley Report
1/14/66

ORS 115.430

Section 10. Increasing, decreasing or requiring new bond.

The court may increase or reduce the amount of bond, or require a new bond, if it appears to the court that the bond was inadequate or excessive or a new bond is necessary. The surety may be discharged from liability by an order made pursuant to ORS 33.510 and 33.520.

References: Advisory Committee Minutes:
2/18,19/66, pp. 29 to 35
3/18,19/66, pp. 33 to 35; and Appendix
6/16,17/67, p. 19

Gilley Report
1/14/66

ORS 115.430
115.440
115.450
115.460

(Confer ORS 33.510, 33.520)

Section 11. Letters testamentary or of administration.

Letters testamentary or letters of administration shall be issued to the personal representative appointed by the court upon his filing with the clerk the bond, if any, required by the court. The letters may be in the following form:

(1)

LETTERS TESTAMENTARY

No. _____

THIS CERTIFIES that the will of _____
deceased, has been proved and _____ has (have)
been appointed and is (are) at the date hereof the duly
appointed, qualified and acting _____
(Executor(s) or

Administrator(s) with The Will Annexed)
of the will and
estate of said decedent.

IN WITNESS WHEREOF, I, as Clerk of the _____
Court of the State of Oregon for the County of _____,
in which proceedings for administration upon said estate are
pending, do hereto subscribe my name and affix the seal of
the said court this _____ day of _____, 19____.

Clerk of the Court

By _____
Deputy

(Seal)

(2)

LETTERS OF ADMINISTRATION

No. _____

THIS CERTIFIES that _____ has (have) been appointed and is (are) the duly appointed, qualified and acting administrator(s) of the estate of _____, deceased, and that no will of said decedent has been proved in this court.

IN WITNESS WHEREOF, I, as Clerk of the _____ Court of the State of Oregon for the County of _____, in which proceedings for administration upon said estate are pending, do hereto subscribe my name and affix the seal of the said court this _____ day of _____, 19__.

Clerk of the Court

By _____
Deputy

References: Advisory Committee Minutes:
2/18,19/66, pp. 10 to 12
4/15,16/66, pp. 7 and 8
6/16,17/67, p. 20

Gilley Report
1/14/66

ORS 115.210

Section 11A. Publication of notice by personal representative.

(1) Promptly after his appointment a personal representative shall cause a notice of his appointment to be published once in each of two successive weeks in:

(a) A newspaper published in the county in which the proceeding is pending; or

(b) If no newspaper is published in the county where the proceeding is pending, a newspaper designated by the court.

(2) The notice shall include:

(a) The name of the decedent; and

(b) Whether a will of the decedent has been admitted to probate; and

(c) A statement requiring all persons having claims against the estate to present them, within four months from the date of first publication of the notice, to the personal representative at the address designated in the notice for the presentation of claims; and

(d) The date of the first publication of the notice.

(3) A personal representative shall file in the probate proceeding proof by an affidavit of the publication of notice required by this section. The affidavit shall include a copy of the published notice.

References: Advisory Committee Minutes:
3/18,19/66, pp. 20 to 30; and Appendix
6/16,17/67, pp. 20 and 21

Gilley Report
1/14/66

ORS 116.505

[Draftsman's Note: It is my intention to transfer section 11A from "Initiation of Probate or Administration" to become section of "Claims."]

Section 12. Notice to State Land Board. If it appears from the petition for appointment of a personal representative that there is no known person to take by descent the net intestate estate, the personal representative shall mail to the Clerk of the State Land Board a copy of the petition and a copy of the published notice to creditors.

References: Advisory Committee Minutes:
3/18,19/66, pp. 21 to 28
2/19,19/66, p. 14
6/16,17/67, pp. 20 and 21

Gilley Report
1/14/66

ORS 115.310

Section 13. Removal of Personal Representative. When a personal representative ceases to be qualified as provided in section 8 of this draft, or becomes incapable of discharging his duties, the court shall remove him. When a personal representative has been unfaithful to or neglectful of his trust, the court may remove him. When grounds of removal appear to exist, the court on its own motion or on the petition of any person interested, shall order the personal representative to appear and show cause why he should not be removed. A copy of the order to show cause and of the petition, if any, shall be served upon the personal representative and upon his surety, or, if the personal representative after due diligence cannot be found within the state, service may be made on his attorney

and his surety.

References: Advisory Committee Minutes:
2/18,19/66, pp. 12 to 16
3/18,19/66, pp. 35 to 37
6/16,17/67, p. 22

Gilley Report
1/14/66

ORS 115.470
115.480

Section 14. Appointment of successor personal representative. (1) When a personal representative dies, is removed by the court, or resigns and his resignation is accepted by the court, the court may appoint, and if he was the sole or the last surviving personal representative and administration is not completed, the court shall appoint another personal representative in his place.

(2) If, after a will has been proven and letters testamentary or of administration with the will annexed have been issued thereon, such will is set aside, declared void or inoperative, such letters shall be revoked, and letters of administration issued.

(3) If, after administration has been granted, a will of the deceased is found and proven, the letters of administration shall be revoked and letters testamentary or of administration with the will annexed shall be issued.

(4) When a successor personal representative is appointed, he has all the rights and powers of his predecessor or of the executor designated in the will, except that he shall not exercise powers given in the will which by its terms are

personal to the personal representative therein designated.

References: Advisory Committee Minutes;
2/18,19/66, pp. 10, 11 and 17
3/18,19/66, p. 19
3/18,19/66, pp. 35 to 39; and Appendix
6/15,17/67, p. 22

Gilley Report
1/14/66

ORS 115.500
115.510
115.520

Section 15. Notice by successor personal representative.

(1) If the personal representative dies, is removed by the court, or resigns after the notice of appointment required by section 11A of this draft has been published but before the time for presenting claims required by the notice has expired, the successor personal representative shall cause notice of his appointment to be published as if he were the original personal representative. The republished notice shall state that the original personal representative died, was removed by the court, or resigned, the date of death, removal or resignation, and the date of appointment of the new personal representative. The period of time between the death, removal or resignation and the date of the first republication of the notice shall be added to the period required for presentation of claims by the original notice of appointment.

(2) No such notice by the successor personal representative shall be required if the period for filing claims expired prior to the death, removal, or resignation of the original personal

representative.

References: Advisory Committee Minutes:
3/18,19/66, pp. 28 to 30
6/16,17/67, pp. 16 and 17

Section 16. Designation of attorney to be filed. If the personal representative has employed an attorney to represent him in the administration of the estate he shall file in the estate proceedings the name and postoffice address of the attorney.

Section 17. Contest of will. When a will has been admitted to probate, any person interested may, at any time within four months after the date of the entry in the court journal of the order of court admitting the will to probate, contest the probate of the will or the validity of the will.

References: Advisory Committee Minutes:
2/18,19/66, pp. 9 and 10

ORS 115.180

Section 18. ORS 93.190 is amended to read:

93.190. (1) Every conveyance, deed of trust, mortgage or devise of an interest in or lien [in or] upon real or personal property to two or more persons as trustees or [executors] personal representatives creates a joint tenancy in such interest or lien in the trustees or [executors] personal representatives unless it is expressly declared in the conveyance, deed of trust, mortgage or devise that the trustees or [executors] personal representatives shall take

or hold the property as tenants in common or otherwise.

(2) If the conveyance, deed of trust, mortgage or devise provides for filling any vacancy in the office of trustee or [executor] personal representative, it may be filled as therein provided excepting that a court of competent jurisdiction may fill a vacancy in the trusteeship according to the established rules and principles of equity. In whichever way the vacancy is filled the new trustee shall hold the property with all powers, rights and duties of an original trustee unless otherwise directed by conveyance, deed of trust, mortgage or devise, or order or decree of the court. [No vacancy in an executorship shall be filled without an order therefor by a county court sitting in probate as in the case of an original appointment of an executor.]

References: Advisory Committee Minutes:
6/16,17/67, p. 24

Section 19. Power of court to control conduct of personal representative. The court has discretionary power to direct and control the conduct of personal representatives and settle their accounts.

[Draftsman's Note: Section 19 is included at this place for information only. It will be incorporated as part of the chapter headed "Jurisdiction and Powers of Probate Courts."]

See ORS 115.490 and 5.040.

Section 20. Repeal of existing statutes. ORS 115.010,

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115.020, 115.110, 115.120, 115.130, 115.140, 115.150, 115.160,
115.170, 115.180, 115.190, 115.200, 115.210, 115.220, 115.310,
115.320, 115.330, 115.340, 115.350, 115.410, 115.420, 115.430,
115.440, 115.450, 115.460, 115.470, 115.480, 115.490, 115.500,
115.510, 115.520 and 115.990 are repealed.

Proposed revised Oregon probate code
INITIATION OF PROBATE OR ADMINISTRATION
2nd Draft
July 5, 1967

Prepared by
Stanton W. Allison

COMMENTS

Section 1. Venue. (July 12, 1967)

The present provisions for venue are ORS 115.140 and 115.310. These sections are discussed in 2 Jauregui & Love, Oregon Probate Law and Practice § 373 (1958). There the authors suggest that these two sections might better be combined in a single section governing the particular county in which the probate court has jurisdiction to probate a will or grant letters of administration. The authors also criticize the language which uses the word "inhabitant" rather than "domicile." The authors point out that domicile is not synonymous with residence, but that inhabitant "has a narrower and more limited significance than domicile." The litigation arising out of interpretations of the present language is described and listed by the authors. The authors also call attention to the various decisions where administration proceedings had been held void through failure to comply with the various provisions of these statutes. They state:

"It is of course clear that an estate can only be administered in one county. If there be an attempt to administer it in a second county, the proceedings there, unless the letters of administration in the first proceedings were improvidently granted and are revoked, are a nullity." (Citing Slate's Estate, 40 Or. 349; Oh Chew v. Brockway, 21 Or. 440)

In this connection, your committee has considered the proposed Uniform Probate Code (section 323); the 1963 Iowa

Probate Code (section 12); the Model Probate Code, which has been adopted in the proposed Wisconsin Probate Code (section 856.01); and the 1965 Washington Probate Code (section 11.16.050).

The proposed section has been drafted for the purpose of eliminating the criticisms referred to of our present statutes. It has eliminated any different venue for a person not domiciled in the state at time of death and a person domiciled in this state. It has eliminated any difference in treatment between real property, personal property and intangible property. It has eliminated the use of the word "inhabitant." It gives a choice to the petitioner to probate the estate in the county of domicile, in the county where the decedent has his place of abode, in the county where he left assets or in the county in which he died. The section also provides specifically that filing a proceeding in the wrong county does not constitute a jurisdictional defect which would result in the probate proceeding being subsequently held void. In the next section a specific provision is made for the court to transfer the proceedings for the best interest of the estate where two or more proceedings are instituted in different counties or to retain jurisdiction where originally filed. This would eliminate the problem of voiding the proceedings in the second county referred to by the decisions referred to above.

Thus, the general effect of the proposed revision would be to meet the proper convenience of the interested parties in choosing the place of administration and to also give the

court the power to determine the place of administration for the better interest of the estate where a conflict develops by filings in different counties.

Section 2. Proceedings commenced in more than one county.
(July 11, 1967)

It was necessary to redraft section 2, headed "Proceedings commenced in more than one county," to embody the changes in the Venue section voted by the joint meeting on June 16, 1967. That meeting voted that either for a domiciliary or non-domiciliary proceeding, the petitioner would have the choice of the county of domicile, the county of abode, the county in which assets were located, or the county of death. In view of this it became necessary to give the court where the original petition was filed the discretion to transfer the proceeding to another county which would meet the venue requirement if for the best interest of the estate.

It should be noted that the March 27 draft made clear that a proceeding can only be transferred to another county in which another petition had been filed. I assume it was not desired to give the court arbitrary power to transfer a proceeding to "another county" unless a petition had already been filed in that other county.

I have omitted the last sentence of the proposed March 27th draft. The previous language would give the court the power to transfer the proceeding even though the original petition was "legally commenced." The Model Probate Code states: "Probate

proceedings concerning a particular decedent shall not be maintained in more than one county." This proposition seems inherent in the general language of section 2 as does the proposition that the probate proceeding can be carried on in only one county. It seemed advisable to include in this section language which would give to the probate court of the county to which the proceeding had been transferred the same status and jurisdiction as if the proceeding had been completed in the original jurisdiction. I have therefore adopted the language from ORS 109.345 to accomplish this purpose and supplement subsection (2) of section 1.

The whole venue and transfer section is generally based on the proposed Wisconsin Probate Code (section 856.01(2) and 856.01(3)). Our present code does not contain specific language providing for and regulating the transfer to another county, although, as noted, there are adequate sections dealing with the transfer of causes and the effect thereof. In view of the fact that the court is given discretion to determine the venue on the basis of the best interests of the estate, it seems essential that such a provision be included.

Section 3. Pleading and mode of procedure. (July 25, 1967)

Section 3 is identical with ORS 115.010 with minor editorial changes. The only actual change from the ORS section is that the proposed section 3 provides for a verification by an attorney for a petitioner or by the agent of a corporation.

Section 4. Special administrator. (July 18, 1967)

I found it necessary to redraft the first subsection of this matter. By reference to page 16 of the minutes of February 18, 1966, it will be noted that Judge Dickson stressed the frequent need for a special administrator to handle burial and other details involved when the coroner has the unclaimed body of a decedent. To cover this situation, paragraph (a) was added to the section. However, the present draft in subsection (1) calls for the appointment only in the case of danger of property. It was therefore necessary to provide for appointment either in the case of danger to property of the estate or the necessity of taking care of the body. The other changes are verbal.

This section is a revision of ORS 115.330. The only substantive change in the new section is to provide for appointment of a special administrator when it is necessary to handle the burial of unclaimed bodies in the possession of the coroner and necessary other details in connection with the disposal of the body. Judge Dickson explained to the committees the very real problem involved when the coroner was holding unclaimed bodies. The only other substantive change from the present statute is the inclusion of provisions for accounting by the special administrator and for payment of the expenses he has incurred, and his compensation and attorney's fee.

Section 5. Contents of petition for appointment of personal representative. (July 18, 1967)

This section replaces ORS 115.020 and 115.120 of the present code. It will be noticed that the present law is changed materially in that the proposed section provides that any person may file a petition for the appointment of a personal representative. ORS 115.120 now provides that "Any executor, devisee, or legatee named in any will, or any other person interested in the estate" may petition. In regard to intestate estates, ORS 115.320 provides rather complicated provisions specifying the time in which preferred classes of persons may petition for administration of the estate. Although as will be noted the next section preserves the preference rights, it was the unanimous decision of the two committees that the general provision providing that any person may file the petition would eliminate many of the problems involved in the present statute. For reference, Model Probate Code (section 64), provides that the petition may be filed by any interested person. The 1965 Washington Probate Code (section 11.28.110) does not specify who should petition for the appointment. Your committee has agreed that the term "interested person" obviously raises the question as to who might be an interested person. Your committees considered that any person who paid the fees and filed a petition complying with this section would of necessity be an interested person.

The proposed section is more specific than ORS 115.020. Certain additional facts are required in the petition by subsection (1) and (6). The practical utility of this additional information to the court is obvious.

Section 6. Testimony of attesting witnesses to will.

(July 12, 1967)

Section 6 is a revision of ORS 115.170. Except as hereinafter noted, the language of this section is identical to the present ORS section, with minor editorial changes. However, the last sentence of subsection (1) is new. This points out that the affidavit of the attesting witness may be made at the time of execution of the will or any time thereafter. The present ORS section does not specify when the affidavit should be made. Since obviously the knowledge and memory of the attesting witness is fresher at the time of the execution of the will, it seems helpful that this matter be brought to attention.

Subsection (3) is also new. In the opinion of the two committees it seemed unwise, in an ex parte proceeding particularly, to allow a will to fail because the evidence of attesting witnesses is not available. It seemed essential that means be provided, where in fact the instrument is admitted to be the last will and testament of the deceased, that it not be denied probate through a purely technical failure of proof by reason of the death or unavailability of the attesting witnesses.

Section 7. Preference in appointing personal representative.

(July 18, 1967)

The above simple provision would replace ORS sections

115.190 and 115.310. Your committee felt that the first requirement in appointment must be that no unqualified persons be appointed and that no unsuitable persons be appointed. An examination of the present replaced sections will indicate that the right of the court to use its discretion in all cases is not clearly indicated or provided by the present statute. However, subject to this proper and essential discretion in the court, the preference provisions of the present statute are generally preserved. One essential element, however, has been added. Note that specific provision is made for a surviving spouse to nominate another person to be appointed and the next of kin is given the same right of nomination. The obvious situation will occur in an intestate situation of substantial assets where the widow does not wish to serve as administrator. In this case, she could nominate another person or a bank to be appointed in her place. Your committees believe that this provision will provide a flexibility which is not present in our present statute.

With reference to subsection (2) of ORS 115.190, this provision as well as subsection (2) of ORS 115.500 is now covered by ORS 709.330 with particular reference to subsection (4) of that section.

Section 8. Persons not qualified to act. (July 18, 1967)

This section would rewrite and replace ORS 115.410. The only substantive changes from the present statute are found in subsections (5) and (6). Subsection (5) is required by

the present Rules on Disciplinary Proceedings of the Oregon State Bar which permit a resignation when disciplinary proceedings are pending. It is felt the circumstances giving rise to the last provision of the present statute, subsection (4) of the rewritten section, would apply where an attorney had resigned from the bar "under fire" until he had been reinstated. The other substantive change is the exception to the nonresident rule which would permit a nonresident executor named in a will to serve if he appoints a resident agent in the same manner as provided for nonresident corporations under the general law. A typical case would be where a testator had nominated a Vancouver, Washington, resident as executor where extensive property might have been located in both Washington and Oregon. Another situation would be where a Portland resident had a close relative nominated by the will who was living in Washington. It was felt that this provision would in many cases carry out the obvious wishes of the testator and might provide much more efficient administration of the testate estate.

The present statute disqualifies "judicial officers, other than Justices of the Peace." The proposed language is predicated on the assumption that probate jurisdiction will be removed from the county court and vested in the circuit court. The proposed language would exclude municipal judges

who obviously would never have conflict of interests since they are not involved in probate proceedings. The proposed section, in the opinion of your committees, would disqualify only those judicial officers who are given jurisdiction in probate matters.

Section 9. Necessity and amount of bond; bond notwithstanding will. (July 12, 1967)

This section replaces and changes materially ORS 115.430. The principal change is that the revised section entirely eliminates any provision for the personal surety, and requires a surety company bond in all cases except where the bond requirement has been waived by the will. It also provides that in all cases the bond be not less than \$1,000. Your committees agree that the protection afforded in a defalcation situation by a bond with personal sureties is completely illusory. In view of the nominal cost of a surety bond of \$1,000, it was felt that actual practical protection should be afforded innocent heirs at law and families of the deceased by a required surety bond. The expense in the cases where larger estates are involved can always be avoided by provisions of the will.

The section also indicates some practical guidelines for the court in setting the amount of the bond and within these guidelines gives the court a great deal more discretion in fixing of the necessary amount of the bond than is provided by the present ORS 115.430.

Section 10. Increasing, decreasing or requiring new bond. (July 12, 1967)

Section 10 replaces the present provisions of subsection (4) of ORS 115.430, and ORS 115.450 and ORS 115.460. Rather than incorporate the somewhat complicated language of these sections, ORS 33.510 and 33.520, covering the general subject of discharge of surety, are incorporated by reference. It is considered sensible that the procedure in these ORS sections be applied to the release of surety in the probate code.

Section 11. Letters testamentary or of administration. (July 14, 1967)

Section 11, covering issuance and form of letters of administration and letters testamentary will replace ORS 115.190, 115.210, and 115.350. The language in the suggested forms of letters has been somewhat simplified from the present ORS suggested forms.

Section 12. Notice to State Land Board. (July 14, 1967)

Section 12 replaces and changes subsection (2) of ORS 115.310. The change from the present statute is that, whereas ORS 115.310 provides that no order appointing a personal representative can be granted by the court until there has been filed proof of service of the possible escheat upon the State Land Board. The proposed section provides for notice by the personal representative. It should be noted that in

the usual estate proceeding in common form provided in these sections, no notice is given to heirs, devisees, and legatees prior to the appointment of the personal representative. Since in the case of escheated property, the State of Oregon is in the position of the heirs at law, it does not seem appropriate that a different procedure should be set up in such a case than if we had living heirs. Your committee felt that there was every advantage in having a personal representative appointed who could be placed upon the duty of giving due notification to the State Land Board and with whom the State Land Board would be able to communicate and check upon. The change in this section therefore would make it obligatory upon the personal representative to notify the State Land Board by mail by sending them a copy of the petition as now required and also for the information of the State Land Board to send them a copy of the notice to creditors.

I have found it necessary to redraft Section 12. It was voted at the June meeting to eliminate the first part of the former Section 14, providing for copies of the published notice to be mailed to the heirs, devisees, and legatees. I found it necessary to redraft the provision for service on the State Land Board for the following reasons. In 1 Jaureguy and Love, Oregon Probate Law and Practice § 201 two problems are noted which I do not think were covered by the present language of the first draft. The authors call attention to

to the fact that there is an important qualification to the death of an intestate with no known heirs, namely that what is meant is heirs competent to take, and if the heir is disqualified by alienage or because he was guilty of murder of the decedent, the property would still escheat. The authors also call attention to the fact that total intestacy is not a prerequisite because escheat can take place in the case of partial intestacy. I also was concerned about the broad language "there are no known heirs of the decedent." I felt it very important that the jurisdiction of the State Land Board should attach as it now spelled out in ORS 115.310 upon the filing of the petition and based upon the allegations of the petition. I felt it important therefore that the present jurisdictional arrangement be preserved and that the service on the State Land Board should be contingent on the allegations of the petition and not as to whether or not there were in actuality any known heirs. (For example, unknown to whom or by whom). The same criticism would apply to the requirement that a statement be made that "There are no known heirs of the decedent." I also think the State Land Board would be better advised if it was in possession of the copy of the petition for appointment of the representative and I have therefore adopted the present requirement of sending a copy of the petition.

Section 13. Appointment of successor personal representative. (July 14, 1967)

I have redrafted former subsection (4) of former section 14 to make it a separate section. The former draft contained some awkward language which did not make clear the right of the court to act upon its own motion. I decided it would be better to redraft this section from the Wisconsin Code (section 857.15) which is itself based upon the Model Probate Code (section 98). The Wisconsin Probate Code seems to cover the material in a clean draft.

This section would replace ORS 115.470 and ORS 115.480. The Wisconsin Probate Code covers both situations, first where the personal representative ceases to be qualified as provided in section 8 or becomes incapable of discharging his duties when the court has the affirmative duty to remove him, and the second situation where there has been neglect of duty or a breach of trust where the court requires a hearing upon either its own motion or upon petition filed with the court. However, upon petition filed with the court, it does not need to cite the personal representative to appear and show cause, unless the court feels that grounds of a removal appear to exist. The other language in the two ORS sections replaced is taken care of by the language in the proposed section: "When a personal representative ceases to be qualified" with a reference to the previous section.

Section 14. Issuance of letters of administration.

(July 14, 1967)

Section 14, subsections (1) and (4) have been drafted from the Wisconsin Probate Code (section 857.21 and section 857.23) which in turn are based upon the Model Probate Code (sections 98, 99 and 100). Subsections (2) and (3) of section 14 are verbatim copies of ORS 115.200 and 115.340.

Section 15. Notice by successor personal representative.
(July 14, 1967)

Section 15 is a new section which spells out when a successor personal representative has to publish a new notice to creditors. The present code contains no guidelines for the procedure by a successor personal representative and there has been a great deal of uncertainty as to whether the new administrator or administrator with the will annexed is required to republish a notice to creditors and whether the time under the original publication is extended in such case. The proposed section 15 makes clear first that if the successor personal representative is appointed during the four month period permitted to creditors to file their claims, he must republish the notice, together with information which would advise the creditors not only the name of the new personal representative, but the information about the circumstances requiring the appointment of the replacement. In such case, the period for filing claims is extended to cover the period between the death, resignation, or removal of the previous executor or administrator and the first

republication of the notice by the replacement. The section further spells out that after the four month period for presentation of claims under the original notice has expired, a replaced personal representative appointed after such time does not have to republish notice to creditors. This general provision is taken from the Washington Probate Code (section 11.40.010)

Section 16. Designation of attorney to be filed. (July 14, 1967)

Section 16 is a new section which requires the personal representative to file in the estate proceedings the name and address of the attorney for the estate. This section seems useful not only for the information of the clerk and the probate judge, but is necessary information for a third party suit may have to deal with the estate and the personal representative. The section is taken from the 1963 Iowa Probate Code, (section 82), and the Bar Committee comment under this section reads as follows:

"New. In other provisions of the Code, notices may be served upon the attorney for the fiduciary in certain circumstances. This section is necessary in order to facilitate the use of such provisions."

Section 17. Contest of will. (July 14, 1967)

Section 17, "Contest of Will," is the same as ORS 115.180, except that the time for the will contest has been shortened from six months to four months to comply with the shortening of the period of the notice to creditors from 6 months to 4 months.

Section 19. Power of court to control conduct of personal representative; duty of court to supervise. (July 14, 1967)

At the July meeting I was directed to check the cases appearing in the ORS annotations under the last sentence of ORS 115.490. A check of these sections would indicate that the following language which follows closely the present provisions of ORS 5.040 would be more consistent with the reported cases: "The court has discretionary power to direct and control the conduct of personal representatives and settle their accounts." I think that this section properly should belong in the chapter under Powers of Court in Probate, draft #2 in the present book. The cases to which I was referred seemed to interpret ORS 115.490 as granting to the court a discretionary power rather than pinning a duty of supervision on the court.

Proposed revised Oregon probate code
INITIATION OF PROBATE OR ADMINISTRATION
2nd Draft
July 5, 1967

Prepared by
Stanton W. Allison

COMPARATIVE SECTION TABLE

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7	115.190, 115.310, 115.320
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Proposed revised Oregon probate code
INITIATION OF PROBATE OR ADMINISTRATION
1st Draft
March 27, 1967

INITIATION OF PROBATE OR ADMINISTRATION

Section 1. Venue. The venue for the appointment of a personal representative shall be:

(1) In the county of domicile of the decedent or other place of abode if the decedent was domiciled in this state; or

(2) In the county where decedent died or where any of his assets are situated if decedent was not domiciled in this state.

References: Advisory Committee Minutes
1/14,15/66 pp. 25 to 27; and Appendix

ORS 115.140
126.116

Section 2. Proceedings commenced in more than one county. If proceedings for the appointment of a personal representative for the same estate are commenced in more than one county, they shall be stayed except in the county where first commenced until final determination of venue in the county where first commenced. If the proper venue is finally determined to be in another county, the court shall cause a transcript of the proceedings and all original papers filed therein, all certified by the clerk of the court, to be sent

INITIATION OF PROBATE OR ADMINISTRATION

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to the clerk of the court of the proper county. A proceeding is considered commenced by the filing of a petition. The proceeding first legally commenced for the appointment of a personal representative of an estate extends to all the property of the estate in this state.

References: Advisory Committee Minutes
1/14,15/66 pp. 25 to 27; and Appendix

ORS 115.140
126.116

Section 3. Pleadings and mode of procedure. No particular pleadings or forms thereof are required in the exercise of jurisdiction of probate courts. The mode of procedure in the exercise of jurisdiction is in the nature of a suit in equity except as otherwise provided by statute. The proceedings shall be in writing and upon the petition of a party in interest or the order of the court. All petitions, reports and accounts shall be verified by at least one of the persons making them or his agent or attorney.

The court exercises its powers by means of:

- (1) A citation to a party.
- (2) A verified petition of a party in interest.
- (3) A Subpena to a witness.
- (4) Orders and decrees.
- (5) An execution or warrant to enforce its orders and decrees.

References: Advisory Committee Minutes
1/14,15/66 pp. 18 and 19; and Appendix

ORS 115.010

Section 4. Appointment of special administrator. (1) If any property of a decedent is in danger of being lost, injured or deteriorating before the appointment and qualification of a personal representative of the estate of the decedent, the court may appoint a special administrator to take charge of that property. The petition for appointment shall specify the property, so far as known, subject to danger and the danger to which it is subject. The personal representative shall qualify by filing bond in the amount ordered by the court, conditioned upon the faithful performance of his trust. The special administrator may:

(a) Incur expenses for the funeral, burial, or other disposition of the remains of decedent in a manner suitable to the condition of life of the decedent.

(b) Incur expenses for the protection of any property of the estate of the decedent against danger of loss or injury.

(c) Sell any perishable property of the estate of the decedent, whether or not listed in the petition, to prevent loss, injury or deterioration.

(2) A special administrator shall not approve or reject claims of creditors or pay claims or expenses of administration or take possession of assets of the estate of the decedent other than those which are in danger of being lost, injured or deteriorated pending the appointment and qualification of a personal representative.

(3) Upon the appointment and qualification of a personal representative of the decedent the powers of the special administrator shall cease and he shall make and file his account and deliver to the personal representative assets of the estate in his possession. If the personal representative objects to the final account of the special administrator, the court shall hear the objections, and whether or not objections are made, the court shall examine the final account. To the extent approved by the court, the reasonable fees of the special administrator and all expenses properly incurred by him, including reasonable fees of his attorneys, shall be paid to the special administrator as expenses of his administration.

References: Advisory Committee Minutes
1/14,15/66 Appendix
2/18/66 pp. 19 to 22
3/18,19/66 pp. 18 to 20; and Appendix

Section 5. Petition for appointment of personal representative. Any person may file a petition for the appointment of a personal representative. The petition shall include, so far as known, [by petitioner,] the following information:

(1) The name, age, domicile, post-office address, date of death, place of death, and wage earner Social Security number or Treasurer's identification number of decedent.

(2) The name, residence and post-office address of the petitioner, and that the petitioner is qualified to serve.

(3) The facts relied upon to [give the court jurisdiction and] establish venue.

Comment: Are bracketed portions necessary?

(4) The facts relied upon to give the petitioner the right to petition.

(5) The names, relationships to decedent, ages, residence and post-office address of decedent's heirs, devisees and legatees.

(6) The estimated value of the property belonging to the decedent and any other information that would be of assistance to the court in fixing the amount of the bond of the personal representative.

References: Advisory Committee Minutes
1/14,15/66 pp. 19 to 21; and Appendix

ORS 115.020
115.470

Section 6. Qualification of personal representative.

Any qualified person whom the court finds suitable may serve as personal representative. A person is not qualified to serve as personal representative who is:

- (1) An incompetent.
- (2) A minor.
- (3) A person who has been convicted of a felony.
- (4) A person suspended for misconduct or disbarred from the practice of law, during the period of suspension or disbarment.
- (5) A person who has resigned from the Oregon State Bar when charges of professional misconduct are under investigation or when disciplinary proceedings are pending against him, until he is reinstated.
- (6) A nonresident of this state who has not appointed a resident agent to accept service of summons and process in all actions, suits and proceedings with respect to the estate and has caused the appointment to be filed in the probate proceedings.

References: Advisory Committee Minutes
1/14,15/66 Appendix
2/18,19/66 pp. 28 and 29
3/18,19/66 pp. 31 to 33; and Appendix

ORS 115.410
115.420

Section 7. Preference in appointing personal representative. In appointing a personal representative the court shall give preference as follows:

- (1) The person named in the will.
- (2) The surviving spouse of decedent.
- (3) The nearest of kin.
- (4) The nominee of the nearest of kin.

References: Advisory Committee Minutes
1/14,15/66 pp. 21 to 24; and Appendix

ORS 115.190
115.310

Section 8. Testimony of attesting witnesses to will. (1)

Upon the hearing of a petition for the appointment of a personal representative if the hearing is ex-parte, before contest is filed, and involves the proof of a will, an affidavit of an attesting witness may be used instead of the personal presence of the witness in court. The witness may give evidence of the execution of the will by attaching to his affidavit a photographic or photostatic copy of the will, and may identify the signature of the testator and witnesses to the will by use of the copy. The affidavit shall be received in evidence by the court and have the same weight as to matters contained in the affidavit as if the testimony were given by the witness in open court. The affidavit of the attesting witness may be made at the time of execution of the will or any time thereafter.

(2) However, upon motion of any person interested in the estate, filed within 30 days after the order admitting the will to probate is made [, or in the discretion of the court within that time,] the court may require that the witness making the affidavit be brought before the court.

[for further examination.] If the witness is outside the reach of a subpoena, the court may order that the deposition of the witness may be taken in the manner provided by ORS chapter 45. [for the taking of a deposition.] [and upon notice to the proponent or his attorney.]

Comment: Are bracketed portions necessary?

(3) In the event of contest of the will or a petition that the probate be conducted in solemn form, proof of any facts shall not be made by affidavit and proof shall be made in the same manner as facts in a suit in equity.

(4) If the evidence of none of the attesting witnesses is available, by affidavit, deposition or testimony, the court may allow proof of the will by testimony or other evidence that the signatures of the testator and at least one of the witnesses are genuine.

References: Advisory Committee Minutes
1/14,15/66 Appendix
2/18,19/66 p. 9

ORS 115.170

Section 9. Hearing when no will. If there is no will the court shall hold a hearing on the petition of the personal representative and appoint a qualified person to act in that capacity.

Comment: Added by Legislative Counsel.

Section 10. Necessity and amount of bond; bond notwithstanding will. The personal representative shall not act in

that capacity until he files with the clerk of court a bond executed by a surety company authorized to transact surety business in the State of Oregon. [and approved by the endorsement thereon of the Judge.] The bond shall be in favor of all interested parties and conditioned upon the personal representative faithfully performing the duties of his trust. The court shall have the discretion of setting the amount of the bond notwithstanding any provision in a will that no bond be required. The bond shall be in an amount adequate to protect interested parties. In no event shall the amount of the bond be set at less than \$1,000. In setting the amount of the bond the court shall take into consideration:

- (1) The size of the estate.
- (2) The anticipated income during administration.
- (3) The character and liquidity of the assets.
- (4) The probable indebtedness and taxes.

References: Advisory Committee Minutes
2/18,19/66 pp. 29 to 33; and Appendix
3/18,19/66 pp. 33 to 35; and Appendix

ORS 115.430

Section 11. Increasing, decreasing or requiring new bond.

The court may increase, reduce the amount of bond, or require new bond, if it appears to the court that the bond was inadequate or excessive or new bond is necessary. When a new bond has been [approved and] filed the court may order the surety on the former bond be discharged from any future acts or

omissions by the personal representative. *

References: Advisory Committee Minutes
2/18.19/66 pp. 29 to 35; and Appendix
3/18.19/66 pp. 33 to 35; and Appendix

ORS 115.430
115.440
115.450
115.460

* (Confer ORS 33.510, 33.520)

Section 12. Letters testamentary or of administration.

(1) When a will is proved letters testamentary shall be issued to the persons therein named or to those of them that give notice of their acceptance of the trust and are otherwise qualified. If the persons named in the will are disqualified or decline to accept their trust, or in the event there is no will, letters of administration shall be issued to the person or persons qualified.

(2) When a bank or trust company is named in a will as personal representative, or is the petitioner for letters of administration, and the company has converted, consolidated with another bank or has sold its trust and fiduciary business or department to another bank or trust company, pursuant to law, letters may be issued to the converted, consolidated or purchasing company if otherwise qualified.

References: Advisory Committee Minutes
3/18,19/66 pp. 34,35,39 and 40

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Section 12a. Forms of letters of testamentary and of administration. Letters testamentary and letters of administration may be issued to the personal representative in the following form:

"LETTERS TESTAMENTARY"

No. _____

"THIS CERTIFIES that the will of _____ deceased, has been proved and _____ has (have) been appointed and is (are) at the date hereof the duly appointed, qualified and acting _____
(Executor (s) or Administrator (s) with The Will Annexed)
of the will and estate of said decedent.

"IN WITNESS WHEREOF, I, as Clerk of the _____ Court of the State of Oregon for the County of _____, in which proceedings for administration upon said estate are pending, do hereto subscribe my name and affix the seal of the said court this _____ day of _____, 19____.

Clerk of the Court
By _____
Deputy"

(Seal)

References: Advisory Committee Minutes
4/15,16/66 p. 7

ORS 115.210

"LETTERS OF ADMINISTRATION"

No. _____

"THIS CERTIFIES that _____ has (have) been appointed and is (are) the duly appointed, qualified and acting administrator (s) of the estate of _____, deceased, and that no will of said decedent has been proved in this court.

"IN WITNESS WHEREOF, I, as Clerk of the _____ Court of the State of Oregon for the County of _____, in which proceedings for administration upon said estate are pending, do hereto subscribe my name and affix the seal of the said court this _____ day of _____, 19____.

(Seal) _____ Clerk of the Court
By _____ Deputy"

References: Advisory Committee Minutes
1/14,15/66 Appendix
2/18,19/66 pp. 10 to 12
4/15,16/66 pp. 7 and 8

ORS 115.210

Section 13. Publication of notice by personal representative. (1) Promptly after his appointment a personal representative shall cause a notice of his appointment to be published once in each of two successive weeks in:

(a) A newspaper published in the county in which the probate proceeding is pending; or

(b) If no newspaper is published in the county where the probate proceeding is pending, in a newspaper designated by the court.

(2) The notice as provided in subsection (1) of this section shall include:

(a) The name of the decedent.

(b) The names and post-office address of the personal representative and his attorneys, if any.

(c) Whether a will of the decedent has been admitted to probate.

(d) A statement requiring all persons having claims against the estate of the decedent to present their verified claims to the personal representative at the address stated in the notice within four months from the date of first publication of notice.

(e) The date of the first publication of the notice.

(3) A personal representative shall file in the probate proceeding proof by an affidavit of the publication of notice required by this section. The affidavit shall include a copy of the published notice.

References: Advisory Committee Minutes
1/14,15/66 Appendix
3/18,19/66 pp. 20 to 30; and Appendix

Section 14. Notice to heirs, devisees and legatees.

(1) A personal representative shall cause a copy of the published notice provided for in section ____ to be mailed to each known heir of the decedent at his last known address, if the decedent died intestate. If the decedent died testate the personal representative shall cause a copy of the published notice provided for in section ____ to be mailed to the spouse and lineal heirs of the testator who are not provided for by the will and to each devisee and legatee named therein at their last known address. If the personal representative is an heir, devisee or legatee, no mailing to him is required. If the personal representative is not able to ascertain the address of any of the parties to whom notice is to be given, the mailing of notice to those parties is excused.

(2) If the decedent died intestate and there are no known heirs of the decedent, the personal representative shall cause a copy of the published notice provided for in section ____ and a statement that there are no known heirs of the decedent to be mailed to the clerk of the State Land Board.

References: Advisory Committee Minutes
1/14,15/66 Appendix
3/18,19/66 pp. 21 to 28

ORS 115.220

(4) Any person interested in the estate may file a petition for the removal of the personal representative on the grounds that he has become disqualified for appointment

or has been unfaithful to or neglectful of his trust. Upon the petition being filed the court shall issue an order directing the personal representative to appear and show cause why he should not be removed as personal representative. A copy of the petition and order to show cause shall be served upon the personal representative and his surety, or, if the personal representative after due diligence cannot be found within the state, service may be made on the attorney and surety of the personal representative. Upon the hearing the court may order removal of the personal representative and revocation of his letters.

References: Advisory Committee Minutes
1/14,15/66 Appendix
2/18,19/66 pp. 12 to 16
3/18,19/66 pp. 35 to 37

ORS 115.470
115.480

Section 15. Appointment of successor personal representative. (1) When a personal representative ceases to qualify, dies, is removed by the court, or resigns and the resignation is accepted by the court, the court shall appoint a new personal representative.

(2) When one or more joint personal representatives ceases to qualify, dies, is removed by the court, or resigns and the resignation is accepted by the court, the remaining

personal representative or representatives shall continue to administer the estate.

(3) Every power exercisable by a former personal representative shall be exercisable by a new personal representative appointed as provided in subsection (1) of this section or by the remaining personal representative or representatives of joint personal representatives referred to in subsection (2) of this section. However, when the terms of a will clearly indicate that powers given by the will are to be the personal powers of a particular person or persons, those powers shall not be exercised by anyone but that person or persons.

References: Advisory Committee Minutes
3/18,19/66 pp. 35 to 39; and Appendix
ORS 115.500 115.520
115.510

Section 16. Notice by new personal representative. When a new personal representative is appointed as provided in ORS _____, and the original personal representative gave the notice required by ORS _____, and the time for filing claims has expired, the new personal representative does not have to give notice as required by ORS _____. However, if notice was not given or the time had not expired for filing claims, the new personal representative shall give notice as if he was the original personal representative as provided by ORS _____. In addition the notice shall provide that the original personal representative ceased to qualify, died, was

removed by the court or resigned, the date of death, removal or resignation and the date of appointment of the new personal representative. Proof of notice shall be made as provided in ORS _____.

References: Advisory Committee Minutes
3/18,19/66 pp. 28 to 30

Section 17. Proceedings when will found after administration granted. If, after administration has been granted upon an estate, a will of the deceased is found and proven, the letters of administration shall be revoked and letters testamentary issued.

References: Advisory Committee Minutes
1/14,15/66 Appendix
2/18,19/66 page 17

ORS 115.340

Section 18. Designation of attorney to be filed. The designation of the attorney or attorneys employed by the personal representative, if any, to assist him in the administration of the estate, shall be filed in the probate proceedings and shall include the name and post-office address of the attorney or attorneys.

Section 19. Duty of court to supervise. It is the duty of the court to exercise supervisory control over a personal representative to insure that he faithfully and diligently performs the duties of his trust.

*draft
10-21-67*

ORS 115.490

Section 20. Contest of will. When a will has been admitted to probate, any person interested may, at any time within six months after the date of the entry in the court journal of the order of court admitting the will to probate, contest probate or the validity of the will.

References: Advisory Committee Minutes
1/14,15/66 Appendix
2/18,19/66 pp. 9 and 10

ORS 115.180

Section 21. ORS 93.190 is amended to read:

93.190. (1) Every conveyance, deed of trust, mortgage or devise of an interest or lien in or upon real or personal property to two or more persons as trustees or [executors] personal representatives creates a joint tenancy in such interest or lien in the trustees or [executors] personal representatives unless it is expressly declared in the conveyance, deed of trust, mortgage or devise that the trustees or [executors] personal representatives shall take or hold the property as tenants in common or otherwise.

(2) If the conveyance, deed of trust, mortgage or devise provides for filling any vacancy in the office of trustee or [executor] personal representative, it may be filled as therein provided excepting that a court of competent jurisdiction may fill a vacancy in the trusteeship

according to the established rules and principles of equity. In whichever way the vacancy is filled the new trustee shall hold the property with all powers, rights and duties of an original trustee unless otherwise directed by conveyance, deed of trust, mortgage or devise, or order or decree of the court. [No vacancy in an executorship shall be filled without an order therefor by a county court sitting in probate as in the case of an original appointment of an executor.]

Section 22. Repeal of existing statutes. ORS 115.010, 115.110, 115.120, 115.130, 115.140, 115.150, 115.160, 115.170, 115.180, 115.190, 115.200, 115.210, 115.220, 115.310, 115.320, 115.330, 115.340, 115.350, 115.410, 115.420, 115.430, 115.440, 115.450, 115.460, 115.470, 115.480, 115.490, 115.500, 115.510, 115.520 and 115.990 are repealed.