

Proposed revised Oregon probate code
TITLE TO PROPERTY
1st Draft
April 25, 1967

Title and Possession of Property. When a person dies intestate, title to his real and personal property passes at his death to his heirs; if a decedent dies testate, title to his real and personal property passes at his death to those to whom it is given by his Will. The title of the heirs or beneficiaries to the real or personal property of the deceased owner is subject to the rights of the surviving spouse and minor children and any claims for which the estate is liable. During administration the personal representative shall be entitled to possession of the real or personal property and shall have power to sell, mortgage, lease or otherwise dispose of the same as provided in this title.

References: Advisory Committee Minutes:
 9/18/65 p. 2

Section 7. Information to devisees and heirs; notice to State Land Board. (1) Upon the appointment of a personal representative he shall deliver or send by ordinary mail the following information to the devisees and heirs named in the petition for appointment of personal representative at the addresses there shown. The information shall include:

(a) The title of the court where the proceeding is pending and the clerk's file number;

(b) The name of decedent and the place and date of his death;

(c) Whether or not a will has been admitted to probate;

(d) The name and address of the personal representative and his attorney, and;

(e) The date of his appointment.

A personal representative may inform other persons of his appointment by delivery or ordinary mail.

(2) The personal representative's failure to give this information shall be a breach of his duty to the persons concerned but shall not affect the validity of his appointment, powers or duties.

(3) If it appears from the petition for appointment of the 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 the information required by subsection (1).

(4) A personal representative shall file in the probate proceeding proof by an affidavit of the mailing required by this section. The affidavit shall include a copy of the information mailed and the names of the persons to whom it was sent.

Section 8. Publication of notice to creditors. (1) Upon his appointment a personal representative shall cause a notice to creditors 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;

(b) The name and address of the personal representative and his attorney;

(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.

Section 9. Inventory and appraisement, when and how made.

Within 60 days after the date of his appointment, unless a longer time shall be granted by the court, the personal representative shall file an inventory of all the property of the decedent which has come into his possession or knowledge. The inventory shall show the estimates of the personal representative of the respective true cash values of the properties described in the inventory as of the date of the decedent's death.

the factual situation that much of the real and personal property of an estate should remain, and rightfully so, in the possession of those to whom it is left by will or intestacy who were in actual possession at the time of the decedent's death. The proposed section recognizes this situation and specifies that the personal representative may recognize such possession and is only required to take actual possession where it is required for purposes of administration.

Section 4. Time of accrual and duties and powers. This section is taken from Section 3-401 of the 1967 Uniform Probate Code. We do not find an equivalent of this most useful section in the present Oregon Revised Statutes. The obvious value of spelling out this provision is evident.

Section 5. Duties of personal representative. The language is taken from Section 3-403 of the 1967 Uniform Probate Code. The section would include the provisions of ORS 116.105.

Section 6. Personal representative to proceed without court order; application for authority, approval or instructions. This section is taken from Sections 1-207 and 3-404 of the 1967 Uniform Probate Code. The thrust of this section was commented on in the introduction. It gives full authority to the personal representative to proceed without court order unless he desires the authority, approval or instructions of the court in particular situations.

Section 7. Information to devisees and heirs; notice to State Land Board. Subsections (1) and (2) of this section are taken generally from Section 3-405 of the 1967 draft Uniform Probate Code. In the case of an intestate estate, no provision is now contained in the present code for notice to the heirs of the institution of the probate and the appointment of the personal administrator. ORS 115.220, passed in 1963 and amended in 1965 provides that in a testate proceeding a copy of the will shall be mailed to each legatee and devisee. Your committees agreed that in general it seemed advisable that an informal notice be given to the heirs at law in an intestate situation and to the devisees in a testate estate, notifying them of the institution of the probate and the necessary information contained in this section. This seemed a more sensible provision than the present one for mailing a copy of the will. It is obvious that upon notification any party properly interested can procure a copy of the will. Your committees believe that from the standpoint of due process alone the notice provision is sensible. In addition, since the proposed code gives the personal representative broad powers to operate without specific court approval, notice on the part of interested persons seems desirable.

The opposition in the past to a notice requirement of this type has been the fear that technical failure to give notice to some party could be held a jurisdictional defect in the probate proceeding. The provision is, therefore, spelled out that

failure to give the notice is not jurisdictional and does not affect the validity of the appointment or the powers or duties involved.

Subsection (3) 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 provides for mailing the same information to the State Land Board by the personal representative as is given to the heirs at law. 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 the information of his appointment otherwise required to be sent to heirs and devisees.

Section 8. Publication of notice by personal representative.
This is a redraft of ORS 116.505. The first basic change is that the number of publications is cut from five to two. The committees considered that the first publication is the one most

likely to be seen by those who systematically check such notices, and that two publications would be adequate. The second substantial change is that the statute designates the information which must appear in the published notice. The committees felt that the notice should be kept as simple as possible and that the four items required gave adequate notice. Finally, it was felt that, in view of the present state of the technology of communications, the period for filing claims could reasonably be cut from six to four months, to attempt to shorten the time of probate. Beyond this the new section merely clarifies the language of the present section.

Section 9. Inventory and appraisal, when and how made. The proposed sections covering inventory and appraisal would supersede and replace ORS 116.405 to 116.465 inclusive. The background for these sections is taken principally from Sections 361 to 365 of the 1963 Iowa Probate Code. For other comparable sections see Chapter 11.44, 1965 Washington Code, Chapter 858 of the State of Wisconsin 1967 Probate Code, and Sections 3-406, 3-407 and 3-408 of the 1967 draft of the Uniform Probate Code.

Section 9 includes much of the language of ORS 116.405, with the following differences. The initial period is changed from one month to 60 days, which your committee felt was a more realistic period. The requirement of the oath was

Section 17. Right to file notice of and perfect lien. This section is ORS 16.120 with editorial changes.

Section 18. Power of personal representative to sell, mortgage, lease and deal generally with property. As noted in the introductory comment, this section would give the personal representative power to sell, mortgage, lease or otherwise deal with property of the estate without petition, notice, hearing or court order except as indicated hereafter. It gives not only full power to the personal representative in this area, but it gives the widest protection to those dealing with the personal representative, against procedural irregularity or jurisdictional defect in the administration. This is a wide protection not extended by our present code.

The philosophy of the proposed section is described in the comment to Section 860.01 of the proposed Wisconsin Code (Assembly Bill 280, March 1, 1967):

"This section gives to all personal representatives the power that is given to executors in most wills. It is the power which all personal representatives have always had over personal property in Wisconsin. Though a personal representative is given unrestricted power to sell, mortgage or lease property he will be held financially responsible to the persons interested if he acts carelessly or unreasonably. He 'must act not only honestly or with good faith in the narrow sense but must also exercise the duty of loyalty toward the beneficiary for whose benefit the power of sale is to be exercised and with such care and skill as a man of ordinary prudence would exercise in dealing with his own property.'"

We call attention to the fact that this proposed short section

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would replace some thirty-three sections of the present code, ORS 116.705 to 116.890 inclusive, covering 6 1/2 pages of the present Oregon Revised Statutes, which probably caused more practical difficulties and problems to attorneys representing estates than all of the other sections of the code combined. Yet, with the broad power given, adequate protection is provided in succeeding provisions, both to the parties dealing with the personal representative and to the parties interested as heirs, devisees and creditors.

Subsection (2), however, contains certain limits and safeguards on the unrestricted power to sell property, in that it requires notice, hearing and court order where the sale is made in contravention of specific provisions in the will or where the property is specifically devised and the will does not authorize its sale by the executor. Notice, hearing and court order is also required where the bond has not been increased by the amount of cash to be realized on the sale in cases where the value of the property sold exceeds \$5,000. In the usual case the amount of the bond will probably be based upon the value of the liquid assets. If the bond is not made sufficient in amount to protect on the cash paid to the personal representative on the sale, such protection should be provided. The court in any case is given the right to direct what additional protection is required in this situation.

Section 19. Court order for sale, mortgage or lease.

This section is taken from Section 860.11 of the 1967 Wisconsin Code. It would permit any interested person to apply to the court for an order of sale, mortgage or lease which would protect and justify the personal representative in proceeding.

Section 20. Title conveyed free of claims of creditors.

This section is taken from Section 860.05 of the 1967 Wisconsin Probate Code. It is merely a statement of the present Oregon law, although its exact parallel is not now found in ORS.

Section 21. Non-liability of transfer agents. This section is taken from Section 860-01 of the 1967 Wisconsin Code. It may avoid some technical problems now raised by transfer agents in transferring securities sold by personal representatives.

Section 22. Persons dealing with personal representatives; protection. This section is a verbatim copy of Section 3-415 of the 1967 Uniform Probate Code. The effect of this section is to grant absolute protection to purchasers and other parties dealing with personal representatives. It is felt that such

Section 1. No distinction between real and personal property.

The provisions of this code shall apply without distinction between real and personal property.

Section 2. Devolution of estate at death; title to property.

(1) Upon the death of a decedent title to his property vests:

(a) In the absence of testamentary disposition, in his heirs, subject to family allowance, rights of creditors, administration, and to being sold by the personal representative; or

(b) In the persons to whom it is devised by his will, subject to family allowance, rights of creditors, right of the surviving spouse to elect against the will, administration, and to being sold by the personal representative.

(2) The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to his property, are subject to the restrictions and limitations expressed or implicit in this Code to facilitate the prompt settlement of estates.

Section 3. Duty of personal representative; possession of estate. A personal representative has a right to and shall take possession and control of the decedent's estate, except that he shall not be required to take possession of or be accountable for property in the possession of an heir or devisee unless in his opinion possession by the personal representative is reasonably required for purposes of administration.

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Section 4. Time of accrual of duties and powers. The duties and powers of a personal representative commence upon the issuance of his letters. The powers of a personal representative relate back in time to give his acts occurring prior to appointment the same effect as those occurring thereafter. A personal representative may ratify and accept acts on behalf of the estate done by others where such acts would have been proper for a personal representative.

Section 5. Duties of personal representative. A personal representative is a fiduciary who is under a general duty to and shall collect the income from property of the estate in his possession and preserve, settle and distribute the estate in accordance with the terms of the will and this code, as expeditiously and with as little sacrifice of value as is reasonable under the circumstances.

Section 6. Personal representative to proceed without court order; application for authority, approval or instructions. A personal representative shall proceed with the administration, settlement and distribution of the estate without adjudication, order or direction of the court, except as provided herein. However, he may apply to the court for authority, approval or instructions on any matter concerning the administration, settlement or distribution of the estate, and the court, without hearing or upon such hearing as it may prescribe, shall instruct the personal representative or rule on the matter as may be appropriate.

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Section 7. Information to devisees and heirs. (1) Upon the appointment of a personal representative he shall deliver or send by ordinary mail information of his appointment to the devisees and heirs named in the petition for appointment of personal representative at the addresses there shown. Mailing or delivery to the personal representative is not required. The information shall include the title of the court where the proceeding is pending, the clerk's file number, the name of decedent and the place and date of his death, whether or not a will has been admitted to probate, the name and address of the personal representative and his attorney, and the date of his appointment.

(2) The personal representative's failure to give this information shall be a breach of his duty to the persons concerned but shall not affect the validity of his appointment, powers or other duties. A personal representative may inform other persons of his appointment by delivery or ordinary mail.

Section 8. Publication of notice to creditors. (1) Upon his appointment a personal representative shall cause a notice to creditors 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:

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- (a) The name of the decedent;
 - (b) The name and address of the personal representative and his attorney;
 - (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.

Section 9. Inventory and appraisement, when and how made.
Within 60 days after the date of his appointment, unless a longer time shall be granted by the court, the personal representative shall file an inventory of all the property of the decedent which has come into his possession or knowledge. The inventory shall show the estimates of the personal representative of the respective true cash values of the properties described in the inventory as of the date of the decedent's death.

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Section 18. Power and authority of personal representative to sell, mortgage, lease and deal with property. (1) A personal representative has power to sell, mortgage, lease or otherwise deal with property of the estate without notice, hearing or court order.

(2) Exercise of the power of sale by the personal representative is improper, except after notice, hearing and order of the court, if:

(a) The sale is in contravention of the provisions of the will.

(b) The property is specifically devised and the will does not authorize its sale.

(c) The inventory value of the property to be sold exceeds \$5,000, the bond has not been increased by the amount of cash to be realized on the sale, and the court has not directed otherwise.

Section 19. Court order for sale, mortgage or lease. Upon proof satisfactory to the court by an interested party that a sale, mortgage or lease of property of the estate is required for paying claims, family allowance, elective share of surviving spouse or administration expenses, or for distribution, and that the personal representative has failed or declined to act, the court may order the personal representative to make the sale, mortgage or lease.

Section 20. Title conveyed free of claims of creditors. Property sold, mortgaged or leased by a personal representative shall be subject

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to liens and encumbrances against the decedent or his estate but shall not be subject to rights of creditors of the decedent or liens or encumbrances against his heirs or devisees. The filing and allowance of a claim in an estate does not make the claimant a secured creditor.

Section 21. Nonliability of transfer agents. A transfer agent or a corporation transferring its own securities incurs no liability to any person by making a transfer of securities in an estate as requested or directed by a personal representative.

Section 22. Persons dealing with personal representatives; protection. A person dealing with or assisting a personal representative without actual knowledge that the personal representative is improperly exercising his power is protected as if the personal representative properly exercised the power. The person is not bound to inquire whether the personal representative is properly exercising his power, and is not bound to inquire concerning the provisions of any will or any order of court that may affect the propriety of the acts of the personal representative. No provision in any will or order of court purporting to limit the power of a personal representative shall be effective except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative. The protection here expressed extends to instances where some procedural irregularity occurred in proceedings leading to the issuance of letters.

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Section 23. Sale or encumbrance to personal representative
voidable; exceptions. (1) Any sale or encumbrance to the per-
sonal representative, his spouse, agent or attorney, or any

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corporation or trust in which he has more than a one-third beneficial interest, is voidable unless:

(a) The transaction was consented to by all interested persons affected thereby except any who were under legal disability for whom no guardian had been appointed; or

(b) The will expressly authorizes the transaction by the personal representative with himself.

(2) The title of a purchaser for value without notice of the circumstances of the transaction with the personal representative is not affected unless the purchaser should have known of the defect in the title of his seller.

Section 23. Improper exercise of power; breach of fiduciary duty. If the exercise of power by the personal representative in the administration of the estate is improper he shall be liable for breach of his fiduciary duty to interested persons for resulting damage or loss to the same extent as a trustee of an express trust. Exercise of power in violation of a court order is a breach of duty. Exercise of power contrary to the provisions of the will may be a breach of duty.

Section 23(a). Corepresentatives; when joint action required. When two or more persons are appointed corepresentatives, the concurrence of all is required on all acts connected with the administration and distribution of the estate, except:

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(1) Any corepresentative may receive and receipt for property due the estate,

(2) When the concurrence of all cannot readily be obtained in the time reasonably available for emergency action,

(3) Where any others have delegated their power to act,

(4) Where the will provides otherwise, or

(5) Where the court shall otherwise direct.

Persons dealing with a corepresentative who are actually unaware that another has been appointed to serve with him shall be as fully protected as if the person with whom they dealt had been the sole personal representative.

Section 23(b). Personal liability of personal representative. (1) The personal liability of a personal representative to third parties, as distinguished from his fiduciary accountability to the estate, arising from the administration of the estate is that of an agent for a disclosed principal.

(2) A personal representative is not personally liable on contracts properly entered into in his fiduciary capacity in the course of administration of the estate unless he expressly agrees to be.

(3) A personal representative is not personally liable for obligations arising from possession or control of property of the estate or for torts committed in the course of administration of the estate unless he is personally at fault.

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(4) Claims based upon contracts, obligations and torts of the types described in (2) and (3) may be allowed against the estate whether or not the personal representative is individually liable therefor.

Section 24. ORS 97.130 is amended to read:

97.130. Right to control disposition of remains. The right to control the disposition of the remains of a decedent, unless other directions have been given by him, vests in his surviving spouse, his surviving children, his surviving parents

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Section 23(a). Corepresentatives; when joint action required. This is Section 3-418 of the 1967 Draft Uniform Probate Code with subsection (5) added. There is no corresponding section in Oregon Revised Statutes. For a general discussion, see 31 Am Jur2d, Executors and Administrators, Sec. 625, p. 268. The editors' note to the Uniform Probate Code section states:

"With certain qualifications, this section is designed to compel co-representatives to agree on all matters relating to administration when circumstances permit. Delegation by one to another representative is a form of concurrence in acts that may result from the delegation. A co-representative who abdicates his responsibility to co-administer the estate by a blanket delegation breaches his duty to interested persons as described by Section 3-403. Section 3-416(p) authorizes delegation, but only that which is reasonable and for the benefit of interested persons."

It is believed that this section will resolve uncertainties in an area apparently not specifically covered by Oregon statutory or case law.

Section 23(b). Personal liability of personal representative. There is no Oregon Revised Statutes section covering the subject matter of the proposed section. For a discussion of the case law in this area see Sections 638 and 646, Vol. 2, Oregon Probate Law and Practice, Jaureguy and Love.

The committees agreed that it would be of value to spell out in the proposed code a specific section delineating the areas in which personal liability would attach.

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Section 9. Property discovered after inventory filed.

Whenever any property not included in the inventory comes to the possession or knowledge of the personal representative, he shall either file a supplemental inventory within 30 days of receiving possession or knowledge, or include the property in his next accounting.

Section 10. Appraisement; employment and appointment of appraisers. The personal representative may employ a qualified and disinterested appraiser to assist him in the appraisal of any asset the value of which may be subject to reasonable doubt. Different persons may be employed to appraise different kinds of assets included in the estate. The court also in its discretion may direct that all or any part of the property be appraised by one or more appraisers appointed by the court.

Section 11. Appraisal to be at true cash value at date of death. Property for which appraisement is required^{shall be appraised}/at its true cash value as of the date of the decedent's death. Each appraisement shall be in writing and shall be signed by the appraiser or appraisers making it.

Section 12. Fees of appraisers. Each appraiser shall be entitled to be paid from the estate a reasonable fee and necessary expenses.

Section 13. Naming of personal representative does not discharge claim against him. The naming or appointment of any one as personal representative shall not operate to discharge

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the person from any claim which the decedent had against him, and the claim shall be included in the inventory. If he agrees to act as personal representative he shall be liable for such claim as for so much money in his hands at the time the claim became due and payable; otherwise he is liable for such claim as any other debtor of the deceased.

Section 14. Discharge or devise in will of claim of testator. The discharge or devise in a will of a claim of the testator against a personal representative or against any other person shall be of no effect as against creditors of the decedent. The claim shall be included in the inventory and for purposes of administration shall be regarded and treated as a specific legacy in that amount.

Section 15. Transactions authorized for personal representative. Except as restricted or otherwise provided by the will or by court order, a personal representative, acting reasonably for the benefit of interested persons, is authorized to:

(1) Direct and authorize disposition of the remains of the decedent pursuant to ORS 97.130 and incur expenses for the funeral, burial or other disposition of the remains in a manner suitable to his condition in life.

(2) Retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested or which are otherwise unsuitable for trust investment.

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(3) Receive assets from fiduciaries, or other sources.

(4) Complete, compromise, or refuse performance of the decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other courses of action, may:

(a) Execute and deliver a deed upon satisfaction of any sum remaining unpaid, or upon receipt of the purchaser's note adequately secured; or

(b) Deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement.

(5) Satisfy written pledges of the decedent for contributions irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented as claims.

(6) Deposit funds not needed to meet currently payable debts and expenses, and not immediately distributable, in bank or saving and loan accounts, or invest the funds in short term United States government obligations.

(7) Abandon burdensome property when it is valueless, or is so encumbered or is in a condition that it is of no benefit to the estate.

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(8) Vote stocks or other securities in person or by general or limited proxy.

(9) Pay calls, assessments, and other sums chargeable or accruing against or on account of securities.

(10) Sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(11) Hold a security in the name of a nominee or in other form without disclosure of the interest of the estate, but the personal representative shall be liable for any act of the nominee in connection with the security so held.

(12) Insure the assets of the estate against damage and loss and himself against liability to third persons.

(13) Advance or borrow money with or without security.

(14) Compromise, extend, renew or otherwise modify an obligation owing to the estate. If the personal representative holds a mortgage, pledge, lien or other security interest, accept a conveyance or transfer of the encumbered asset in lieu of foreclosure in full or partial satisfaction of the indebtedness.

(15) Accept other real property in part payment of the purchase price of real property sold by him.

(16) Pay taxes, assessments, and expenses incident to the administration of the estate.

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(17) Employ qualified persons, including attorneys, accountants and investment advisors, to advise and assist the personal representative and to perform acts of administration, whether or not discretionary, on behalf of the personal representative.

(18) Prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties.

(19) Continue any business or venture in which decedent was engaged at the time of his death to preserve the value of the business or venture.

(20) Incorporate or otherwise change the business form of any business or venture in which decedent was engaged at the time of his death.

(21) Discontinue and wind up any business or venture in which the decedent was engaged at the time of his death.

(22) Provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate.

(23) Satisfy and settle claims and distribute the estate as provided in this Code.

(24) Perform all other acts required or permitted by law or by the will of decedent.

Section 16. Right to file notice of and perfect lien.

The personal representative shall have the same rights to perfect a lien or security interest as the decedent would have had if he were living.

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and the person in the next degree of kindred to him, in the order named. If disposition of the remains has not been directed and authorized within ten days after the death of decedent the special administrator or the personal representative of the deceased may direct and authorize disposition of the remains.

Section 25. ORS 116.115 is amended to read:

116.115. Authority of personal representative when will includes gift of body for scientific and medical purposes; nonliability for actions. The authority of a person named [executor] personal representative of a will which includes a gift pursuant to ORS 97.132 extends to performing acts necessary to carrying out the gift although [the] letters testamentary have not been issued. A person named [executor] personal representative who carries out the gift of the testator before issuance of letters testamentary or under a will which is not admitted to probate shall not be liable to the surviving spouse or next of kin for performing acts necessary to carry out the gift of the testator.

Section 26. Discovery of assets during procedure by personal representative. The court may order any person to appear and give testimony as provided in ORS chapter 45 if it appears probable:

(1) That he has concealed, secreted or disposed of any property of the estate of a decedent.

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(2) That he has been intrusted with property of the estate of a decedent and refuses or neglects to account therefor to the personal representative.

(3) That he has concealed, secreted or disposed of any writing or other instrument or document relating or pertaining to the estate.

(4) That he has knowledge or information that is necessary to the administration of the estate.

(5) That officers or agents of a corporation refuse to allow examination of the books and records of the corporation which the decedent had the right to examine.

Section 27. Proceedings when person refuses to appear and give testimony. If the person cited as provided in ORS _____ refuses to appear, or to answer questions asked of him as authorized by the order of the court, he is in contempt and may be punished as for other contempts.

Section 28. Power to avoid transfers. The property liable for the payment of charges, administration expenses and claims against a decedent's estate shall include property transferred by him with intent to defraud his creditors or transferred by any means which is in law void or voidable as against his creditors; and the right to recover such property so far as necessary for the payment of charges, administration expenses and claims against the estate shall be in the personal representative, who shall take necessary steps to

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recover it. Such property shall constitute general assets for the payment of creditors.

Section 29. ORS 93.420 is amended to read:

93.420. Execution of deed where personal representative, guardian or conservator is unable or refuses to act. If any person is entitled to a deed from [an executor, administrator,] a personal representative, guardian or conservator who has died or resigned, has been discharged, disqualified or removed or refuses to execute it, the deed may be executed by the judge [authorizing the sale,] before whom the proceeding is pending or by his successor.

Section 30. Repeal of existing sections. ORS 116.105, 116.110, 116.115, 116.120, 116.125, 116.130, 116.135, 116.170, 116.175, 116.180, 116.305, 116.310, 116.320, 116.325, 116.330, 116.340, 116.405, 116.410, 116.415, 116.420, 116.425, 116.430, 116.435, 116.440, 116.445, 116.450, 116.455, 116.460, 116.465, 116.505, 116.705, 116.710, 116.715, 116.720, 116.725, 116.730, 116.735, 116.740, 116.745, 116.750, 116.755, 116.760, 116.765, 116.770, 116.775, 116.780, 116.785, 116.790, 116.795, 116.800, 116.805, 116.811, 116.815, 116.820, 116.825, 116.830, 116.840, 116.850, 116.860, 116.870, 116.880, 116.890, 116.990 and ORS 121.060 are repealed.

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Prepared by:
Stanton Allison

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The proposed chapter follows closely the format and language of the 1967 draft of the Uniform Probate Code. A reference to the corresponding Uniform Code sections will show that while much of the language has been adopted verbatim, a large part of the language is that of the combined committees.

The general approach of the Uniform Code is that the personal representative is given power to act without hearing, order, or adjudication of the probate court unless he may desire to secure such adjudication. This new approach will be most noticeable in the section covering sale, mortgage, lease, and other dealings with property of the estate. These powers of the personal representative are given without the requirement of petition, hearing, notice and court order and confirmation of these transactions. This concept does not seem so radical, however, if it is remembered that the Oregon courts have always recognized the right of a testator to give his executor exactly the same power to operate without court order as the proposed code would do in the absence of testamentary instructions. Logically and factually, there seems no reason why the personal representative in an intestate situation or in the absence of testamentary provisions should not be given the same power over the administration of the estate as now given by a testator by his will. It should be noted further that in the usual will where the executor is authorized to act

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without court order or supervision in the sale of estate assets the executor is operating without bond. In the proposed code, in an intestate situation, a surety bond is required in all cases and the court is given a wider discretion to require a surety bond in testate situations where the court deems such protection advisable. Although persons dealing with a personal representative are protected in a much greater degree than provided in the present code, the proposed chapter imposes a liability upon the personal representative for a breach of his fiduciary duty "to the same extent as a trustee of an express trust." It would seem therefore that under the proposed code the actual protection to the estate is much greater than under our present probate code.

Separate comments with reference to the equivalent ORS section as well as the source of the new language will follow as to each section. However, comments should be made of certain fundamental differences between the present code and the proposed code. First, no distinction is made as between real and personal property, but they are included and treated identically in all the powers granted in the chapter.

Second, unlike the present probate code, the provisions concerning the title and the possession of property both real and personal are specifically spelled out in the proposed code. No such specific provisions occur in the present code. There is a fundamental distinction in this area from our present law. In the proposed code, title to both real

and personal property is vested in the heirs and/or devisees; under the present law title only to the real property is so vested.

The proposed chapter sets out in much greater detail not only the powers of the personal representative, but also his duties and authority in a good number of specific areas which are not covered by the present rather piecemeal approach of the ORS sections. We believe this feature will have particular value to attorneys who may not specialize in probate practice, many of whom have expressed the thought of the difficulty of finding code provisions covering specific duties, specific problems, and specific authorities.

Section 1. No distinction between real and personal property. The language is taken generally from Section 3-101 of the 1967 Uniform Probate Code. The rationale of this concept is described in the following comment in the 1967 Wisconsin Probate Code discussing intestate succession.

This section makes one very substantial change in the legal structure of intestate succession in Wisconsin. Existing law treats real property in a different manner than personal property and even within the classification of real property draws a sharp distinction between the homestead and other real property. These distinctions are products of our inherited system of descent and distribution, drawn from the English law of prior centuries and abandoned in England by statute in 1925; the separate descent of the homestead is added as a purely American statutory innovation. The result of this hodgepodge of legislation is that inheritance rights are dependent upon the kind of property owned by the decedent. There is no longer any sound policy reason for retaining these distinctions, and the modern trend is toward a single system of inheritance (intestate succession) with abolition of common-law dower

and curtesy. This statute provides a single rule for inheritance of all kinds of property. Although there is a strong argument for special treatment of the home, the present law of homestead and descent is illustrative of the complexities involved in attempting any such distinction. Moreover, most homes are owned jointly by husband and wife and do not pass under the intestate law at all (but go to the survivor because of the survivorship right in joint tenancy).

It is recognized that many of the most difficult problems in our present probate code arise because of this artificial distinction between real and personal property. The proposed code in all the areas of intestate succession and administration would resolve these technical difficulties by abolishing all distinction between real and personal property.

Section 2. Devolution of estate at death; title to property. The general language is taken from Section 3-101 of the 1967 Uniform Probate Code. This would change the present law of Oregon in that it would vest title at the date of death not only to the real property but to the personal property of the estate in the heirs or devisees. The section spells out that this vesting is subject to family allowance, creditors' rights, the elective share of the surviving spouse, and administration. Reference may be made to ORS 111.020.

Section 3. Duty of personal representative; possession of estate. This language is based upon Section 3-409 of the 1967 Uniform Code. It would replace ORS 116.105. The proposed section spells out what has been a difficult practical problem in the present Oregon code. The proposed code recognizes

the factual situation that much of the real and personal property of an estate should remain, and rightfully so, in the possession of those to whom it is left by will or intestacy who were in actual possession at the time of the decedent's death. The proposed section recognizes this situation and specifies that the personal representative may recognize such possession and is only required to take actual possession where it is required for purposes of administration.

Section 4. Time of accrual and duties and powers. This section is taken from Section 3-401 of the 1967 Uniform Probate Code. We do not find an equivalent of this most useful section in the present Oregon Revised Statutes. The obvious value of spelling out this provision is evident.

Section 5. Duties of personal representative. The language is taken from Section 3-403 of the 1967 Uniform Probate Code. The section would include the provisions of ORS 116.105.

Section 6. Personal representative to proceed without court order; application for authority, approval or instructions. This section is taken from Sections 1-207 and 3-404 of the 1967 Uniform Probate Code. The thrust of this section was commented on in the introduction. It gives full authority to the personal representative to proceed without court order unless he desires the authority, approval or instructions of the court in particular situations.

Section 7. Publication of notice by personal representative. This is a redraft of ORS 116.505. The first basic change is that the number of publications is cut from five to

two. The committees considered that the first publication is the one most likely to be seen by those who systematically check such notices, and that two publications would be adequate. The second substantial change is that the statute designates the information which must appear in the published notice. The committees felt that the notice should be kept as simple as possible and that the four items required gave adequate notice. Finally, it was felt that, in view of the present state of the technology of communications, the period for filing claims could reasonably be cut from six to four months, to attempt to shorten the time of probate. Beyond this the new section merely clarifies the language of the present section.

Section 8. Inventory and Appraisement, when and how made. The proposed sections covering inventory and appraisement would supersede and replace ORS 116.405 to 116.465 inclusive. The background for these sections is taken principally from Sections 361 to 365 of the 1963 Iowa Probate Code. For other comparable sections see Chapter 11.44, 1965 Washington Code, Chapter 858 of the State of Wisconsin 1967 Probate Code, and Sections 3-406, 3-407, and 3-408 of the 1967 draft of the Uniform Probate Code.

Section 8 includes much of the language of ORS 116.405, with the following differences. The initial period is changed from one month to 60 days, which your committee felt was a more realistic period. The requirement of the oath was

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eliminated as is done in all the other provisions of the proposed code. The section makes a basic change in that the inventory shall include the personal representative's estimate of the true cash value of the items he lists in his inventory. This would permit the personal representative to include his own appraisal of such items as bank accounts, cash items, securities whose quotations are listed on the major stock exchanges and shown in the daily paper, and other items where an appraisal is not necessary to arrive at the actual true cash value.

Section 9. Property discovered after inventory filed.

This section would replace ORS 116.415. However, it allows thirty days for the preparation and filing of a supplemental inventory, and further gives the personal representative the option of including the after-discovered property in his next accounting.

Section 10. Appraisement; employment and appointment of appraisers. The proposed section embodies a fundamental change in the appraisement procedure. The suggested language would place the power to employ the services of "qualified and disinterested appraisers" in the hands of the personal representative, in much the same manner as the other professional helper, namely, the attorney for the estate, is retained by the interested party. The section, rather than setting out fixed fees as now contained in ORS 116.425,

provides in Section 12 that the appraiser shall be paid "a reasonable fee and necessary expenses." Your committees have not only heard criticisms from their clients and the general public of the appraisers' fees in some instances, but have also had serious criticism from realtor and professional appraiser bodies. They feel, and in the opinion of your committees justly so, that the relationship of the appraiser to the personal representative should be similar to the present attorney relationship.

So far as appraising real estate is concerned, we quote the following from the report of Mr. Robert Lundy, Legislative Counsel of Oregon.

Lundy commented that he had received correspondence from real estate appraisers who indicated the scale was in conflict with their code of ethics. He had, he said, received a letter from Oregon Chapter 14, American Institute of Real Estate Appraisers, in which they set forth the following four specific recommendations:

"1. That some form of qualification as evidenced by membership in a properly recognized professional organization or by examination or by demonstration, be a requirement of eligibility to appraise an estate or a portion of an estate and that appointment be made only for such portion of an estate for which proper qualification is so evidenced.

"2. That appraisal fees be agreed upon in advance (prior to assignment) and that they be based on the investigation and analysis necessary for a proper appraisal rather than on the amount of value found. A procedure somewhat similar to that which is in current use by the State Highway Commission is suggested.

"3. That any appraiser for an estate or a portion of an estate should sign and attest to his opinion of value only on types of assets for which his qualifications are in evidence.

"4. That the over-all value of an estate be submitted to the court by the attorney conducting probate thereof, and that such be a composite of values found on various types of assets; each by persons qualified to appraise the specific types involved."

In general, we believe that the suggested provisions meet the criticisms and suggestions referred to. The proposed section requires a qualified and disinterested appraiser. Different appraisers may be employed to appraise different kinds of assets. The employment would be on a reasonable fee and expenses basis which would take into account the difficulty and expertise required in individual appraisals.

Power is retained in the probate court to direct that all or any part of the property be appraised by one or more appraisers appointed by the court. It may well be that the personal representative in certain cases has failed or neglected to arrange for the appraisal, or that he would prefer to have the court take direction and appointment of the appraisal and the appraisers.

Section 11. Appraisal to be at true cash value at date of death. Section 11 replaces ORS 116.435 and substitutes the requirement that each article shall be appraised "at its true cash value as of the date of the decedent's death." This language has been adopted in preference to the term "full and true value" which now appears in the inheritance tax code (ORS 118.640).

Section 12. Fees of appraisers. This has been covered in the preceding comment.

Section 13. Naming of personal representative does not discharge claim against him. This section replaces and incorporates most of the language/ORS 116.440. The language of the present ORS section has been changed to include not only executors but personal representatives of intestate estates. The necessity of this statute and the reason for the language incorporated from our present ORS section is explained in Section 626, Jaureguy & Love, Oregon Probate Law and Practice, as follows: (Notes to citations omitted).

At common law, if testator appointed as executor of his estate a person who was his debtor and the latter accepted the appointment, the debt was thereby discharged unless there were not sufficient other assets to satisfy creditors. This rule of law has been expressly changed by statute which provides that such a claim is not discharged and must be included in the inventory. Furthermore, if the person so named accepts the appointment and administers the estate, the amount of the indebtedness is treated as "so much money in his hands" for which he must account. The same rule apparently applies in the case of an administrator.

This particular wording of our statute becomes important in case of the insolvency of the executor or administrator. In some states a similar statute provides that the debt of the personal representative "shall be assets", instead of "so much money", in his hands. Under such a statute "a debt due from an executor is placed on the same footing with debts due the estate from other sources, and he and his sureties are only required to account for the actual value thereof." In those states, accordingly, in case of the personal representative's insolvency, his sureties need only pay a portion of the indebtedness. But under our statute providing that the debt of the personal representative is deemed "so much money" it is held that the estate is entitled to recover the full amount of the representative's debt.

Section 14. Discharge or devise in will of claim of testator. Section 14 is identical with ORS 116.445 except for minor editorial changes.

Section 15. Transactions authorized for personal representative. The language of this comprehensive section has been taken, with substantial changes, from Section 3-416 of the 1967 Uniform Probate Code. It would, among its various provisions, cover powers given by ORS 116.110, 116.125, 116.130, 116.135, 116.170, 116.175, 116.180, 116.785, 116.790, 116.795 and 116.800. A detailed comment upon each of the specific authorities given would seem unnecessary. Subsections (1), (2) and (3) grant broad powers not prescribed by present ORS sections. The provisions for performing contracts made by the deceased are broader than the present ORS provision. It would specifically sanction practices which now do not have legislative authority. Subsection (7) for abandonment of burdensome property and Subsections (8), (9), (10) and (11) for dealing with securities of the estate do not have counterparts in our present code. Subsection (16), authorizing personal representatives to employ attorneys, accountants, and investment authorities supplies an authority not found in our present code. To summarize, an examination of this section will make it clear that many essential acts of administration which have to be now performed without express legislative sanction are covered by this comprehensive section.

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Section 16. Right to file notice of and perfect lien.

This section is ORS 16.120 with editorial changes.

Section 17. Power of personal representative to sell, mortgage, lease and deal generally with property. As noted in the introductory comment, this section would give the personal representative power to sell, mortgage, lease or otherwise deal with property of the estate without petition, notice, hearing or court order. It gives not only full power to the personal representative in this area, but it gives the widest protection to those dealing with the personal representative, against will provisions, procedural irregularity or jurisdictional defect in the administration. This is a wide protection not extended by our present code.

The philosophy of the proposed section is described in the comment to Section 860.01 of the proposed Wisconsin Code (Assembly Bill 280, March 1, 1967):

"This section gives to all personal representatives the power that is given to executors in most wills. It is the power which all personal representatives have always had over personal property in Wisconsin. Though a personal representative is given unrestricted power to sell, mortgage or lease property he will be held financially responsible to the persons interested if he acts carelessly or unreasonably. He 'must act not only honestly or with good faith in the narrow sense but must also exercise the duty of loyalty toward the beneficiary for whose benefit the power of sale is to be exercised and with such care and skill as a man of ordinary prudence would exercise in dealing with his own property.'"

We call attention to the fact that this proposed short section would replace some thirty-three sections of the present code, ORS 116.705 to 116.890 inclusive, covering 6 1/2 pages of the

present Oregon Revised Statutes, which have probably caused more practical difficulties and problems to attorneys representing estates than all of the other sections of the code combined. Yet, with this simple authority given, adequate protection is given in succeeding provisions, both to the parties dealing with the personal representative, and to the parties interested as heirs, devisees, and creditors.

Section 18. Court order for sale, mortgage or lease.

This section is taken from Section 860.11 of the 1967 Wisconsin Code. It would permit any interested person to apply to the court for an order of sale, mortgage or lease which would protect and justify the personal representative in proceeding.

Section 19. Title conveyed free of claims of creditors.

This section is taken from Section 860.05 of the 1967 Wisconsin Probate Code. It is merely a statement of the present Oregon law, although its exact parallel is not now found in ORS.

Section 20. Non-liability of transfer agents. This section is taken from Section 860-01 of the 1967 Wisconsin Code. It may avoid some technical problems now raised by transfer agents in transferring securities sold by personal representatives.

Section 21. Persons dealing with personal representatives; protection. This section is a verbatim copy of Section 3-415 of the 1967 Uniform Probate Code. The effect of this section is to grant absolute protection to purchasers and other parties dealing with personal representatives. It is felt that such

a broad and absolute protection is necessary in view of the fact that the personal representative is operating, in dealing with estate property, without specific court order or adjudication.

Section 22. Sale or encumbrance to personal representative voidable; exceptions. This section is taken verbatim from Sections 3-414 of the 1967 Uniform Probate Code. This section would replace the present ORS 116.820 which reads in part as follows: "All purchases of the property of the estate by an executor or administrator, however made, whether directly or indirectly, are prohibited, and if made are void, except when made in compliance with another statute, or the will of the decedent, or a contract, or other instrument, executed by the decedent." This section is discussed in Sections 754 and 755 of Volume II, Oregon Probate Law and Practice, Jaureguy and Love, in which the authors mention a number of problems either inherent in the present ORS section quoted or not dealt with by the section. It is believed that the proposed new section, particularly in its use of the term "voidable" rather than "void," and in its protection of an innocent purchaser for value without notice of the circumstances of the transaction, is a definite improvement over the ORS section it would replace.

Section 23. Improper exercise of power; breach of fiduciary duty. This section is taken from Section 3-413 of the 1967 Uniform Probate Code. For a discussion of the problems covered by this section see Section 638, Volume II,

Oregon Probate Law and Practice, Jaureguy and Love. The proposed section spells out that the liability of the personal representative for breach of duty is that of the trustee of an express trust. This is a more forthright statement than that contained in some of the Oregon cases. The definition of interested persons is a broad one, including heirs, devisees, creditors, and others having a property right in or claim against the estate which may be affected by the proceedings. The personal representative is made liable for breach of his fiduciary duty for resulting damage or loss to these persons.

Section 24. Right to control disposition of remains. This section would amend ORS 97.130 as indicated. The amendment would take care of a very present and serious problem when directions and authority for disposition of the remains of the deceased parties cannot be obtained from the parties now given such authority by the statute. The proposed amendment would effectively meet this problem.

Section 25. Authority of personal representative when will includes gift of body for scientific and medical purposes; nonliability for actions. This section amends ORS 116.115. Since ORS 97.130 is in the general section giving the power of the personal representative to control the remains, it would seem preferable that ORS 116.115 be placed to follow ORS 97.134. It should be noted that ORS 97.132 was Section 1 of Chapter 674, Session Laws of 1961, ORS 97.134 comprised

Sections 2 and 3 of this chapter, and ORS 116.115 was Section 4 of the same chapter. ORS 116.115 applies not only to wills which have been probated but also to unprobated instruments. There therefore seems no reason why this section should not follow ORS 97.134.

Section 26. Discovery of assets during procedure by personal representative. This section would rewrite and replace ORS 116.305, 116.310, and 116.320. Additional language has been included covering the right to examine books and records of a corporation which the decedent had a right to examine. It was considered preferable to make a general reference to the procedure set out in chapter 45 for taking testimony, rather than limiting it to the present language of ORS 116.310.

Section 27. Proceedings when person refuses to appear and give testimony. Section 27 rewrites ORS 116.315 to provide for a punishment for refusal to appear or answer questions as a contempt.

Section 28. Power to avoid transfers. This section would replace ORS 116.330, 116.335, and 116.340. The language is taken from Sections 3-410 of the 1967 Uniform Probate Code. The proposed section is also almost verbatim Section 368 of the 1963 Iowa Probate Code.

Section 29. Execution of deed where personal representative, guardian or conservator is unable or refuses to act. This useful section is amended to cover the situation where the personal representative sells property without a court order.

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Prepared by
Stanton Allison

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REPRESENTATIVES
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Stanton Allison

Section 1. No distinction between real and personal property. The provisions of this code shall apply without distinction between real and personal property.

Section 2. Devolution of estate at death; title to property. Upon the death of a decedent title to his property vests in the persons to whom it is devised by his will, or, in the absence of testamentary disposition, in his heirs, subject to family allowance, rights of creditors, elective share of the surviving spouse and administration.

Section 3. Duty of personal representative; possession of estate. A personal representative has a right to and shall take possession and control of the decedent's estate, except that he shall not be required to take possession of or be accountable for property in the possession of an heir or devisee unless in his opinion possession by the personal representative is reasonably required for purposes of administration.

Section 4. Time of accrual of duties and powers. The duties and powers of a personal representative commence upon the issuance of his letters. The powers of a personal representative relate back in time to give his acts occurring prior to appointment the same effect as those

occurring thereafter. A personal representative may ratify and accept acts on behalf of the estate done by others where such acts would have been proper for a personal representative.

Section 5. Duties of personal representative. A personal representative is a fiduciary who is under a general duty to and shall collect the income from property of the estate in his possession and preserve, settle and distribute the estate in accordance with the terms of the will and this code, as expeditiously and with as little sacrifice of value as is reasonable under the circumstances.

Section 6. Application to court. A personal representative shall proceed with the settlement and distribution of the estate without adjudication, order or direction of the court, but he may apply to the court for an adjudication of questions concerning the estate or its administration.

Section 7. 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.

Section 8. Inventory and appraisement, when and how made. Within 60 days after the date of his appointment, unless a longer time shall be granted by the court, the personal representative shall file an inventory of all of the property of the decedent which has come into his possession or knowledge. The inventory shall show the estimates of the personal representative of the respective true cash values of the properties described in the inventory as of the date of the decedent's death.

Section 9. Property discovered after inventory filed. Whenever any property not included in the inventory comes to the possession or knowledge of the personal representative,

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he shall either file a supplemental inventory within 30 days of receiving possession or knowledge, or include the property in his next accounting.

Section 10. Appraisement; employment and appointment of appraisers. The personal representative may employ a qualified and disinterested appraiser to assist him in the appraisal of any asset the value of which may be subject to reasonable doubt. Different persons may be employed to appraise different kinds of assets included in the estate. The court also in its discretion may direct that all or any part of the property be appraised by one or more appraisers appointed by the court.

Section 11. Appraisal to be at true cash value at date of death. Property for which appraisement is required shall be appraised at its true cash value as of the date of the decedent's death. Each appraisement shall be in writing and shall be signed by the appraiser or appraisers making it.

Section 12. Fees of appraisers. Each appraiser shall be entitled to be paid from the estate a reasonable fee and necessary expenses.

Section 13. Removal of personal representative does not disallow claim against him. The removal or appointment of any new personal representative shall not operate to divest the personal representative from any claim which the decedent had against him, and all such claims shall be included in the inventory.

If he agrees to act as personal representative he shall be liable for such claim as for so much money in his hands at the time the claim became due and payable; otherwise he is liable for such claim as any other debtor of the deceased.

Section 14. Discharge or bequest in will of claim of testator. The discharge or devise in a will of a claim of the testator against a personal representative or against any other person shall be of no effect as against creditors of the decedent. The claim shall be included in the inventory and for purposes of administration shall be regarded and treated as a specific legacy in that amount.

Section 15. Transactions authorized for personal representative. Except as restricted or otherwise provided by the will or by court order, a personal representative, acting reasonably for the benefit of interested persons, is authorized to:

(1) Direct and authorize disposition of the remains of the decedent pursuant to ORS 97.130 and incur expenses for the funeral, burial or other disposition of the remains in a manner suitable to his condition in life.

(2) Retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested or which are otherwise unsuitable for trust investment.

(3) Receive assets from fiduciaries, or other sources.

(4) Complete, compromise, or refuse performance of the

decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other courses of action, may:

(a) Execute and deliver a deed upon satisfaction of any sum remaining unpaid, or upon receipt of the purchaser's note adequately secured; or

(b) Deliver a deed in escrow with directions that the proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement.

(5) Satisfy written pledges of the decedent for contributions irrespective of whether the pledges constituted binding obligations of the decedent or were properly presented as claims.

(6) Deposit funds not needed to meet currently payable debts and expenses, and not immediately distributable, in bank or saving and loan accounts, or invest the funds in short term United States government obligations.

(7) Abandon burdensome property when it is valueless, or is so encumbered or is in a condition that it is of no benefit to the estate.

(8) Vote stocks or other securities in person or by general or limited proxy.

(9) Pay calls, assessments, and other sums chargeable or

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accruing against or on account of securities.

(10) Sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(11) Hold a security in the name of a nominee or in other form without disclosure of the interest of the estate, but the personal representative shall be liable for any act of the nominee in connection with the security so held.

(12) Insure the assets of the estate against damage and loss and himself against liability to third persons.

(13) Advance or borrow money with or without security.

(14) Compromise, extend, renew or otherwise modify an obligation owing to the estate. If the personal representative holds a mortgage, pledge, lien or other security interest, accept a conveyance or transfer of the encumbered asset in lieu of foreclosure in full or partial satisfaction of the indebtedness.

(15) Pay taxes, assessments, and expenses incident to the administration of the estate.

(16) Employ qualified persons, including attorneys, accountants and investment advisors, to advise and assist the personal representative and to perform acts of administration, whether or not discretionary, on behalf of the personal representative.

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(17) Prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties.

(18) Continue any business or venture in which decedent was engaged at the time of his death to preserve the value of the business or venture.

(19) Incorporate or otherwise change the business form of any business or venture in which decedent was engaged at the time of his death.

(20) Discontinue and wind up any business or venture in which the decedent was engaged at the time of his death.

(21) Provide for exoneration of the personal representative from personal liability in any contract entered into on behalf of the estate.

(22) Satisfy and settle claims and distribute the estate as provided in this Code.

(23) Perform all other acts required or permitted by law or by the will of decedent.

Section 16. Right to file notice of and perfect lien.

The personal representative shall have the same rights to file notice of or otherwise perfect a lien or security interest as the decedent would have had if he were living.

Section 17. Power of personal representative to sell, mortgage, lease and deal generally with property. A personal

representative has the same power over title to property of the estate that he would have if he owned the property personally. He has power to sell, mortgage, lease and otherwise deal with property of the estate without notice, hearing or court order. The rights and title of any purchaser, mortgagee, lessee or other person dealing with the personal representative are in no way affected by any provision in a will of the decedent or by any procedural irregularity or jurisdictional defect in the administration of the estate.

Section 18. Title conveyed free of claims of creditors. Property sold, mortgaged or leased by a personal representative shall be subject to liens and encumbrances of record but shall be free and clear of rights of creditors based on the filing and allowance of a claim in the estate. The filing and allowance of a claim in an estate does not make the claimant a secured creditor.

Section 19. Nonliability of transfer agents. A transfer agent or a corporation transferring its own securities incurs no liability to any person by making a transfer of securities in an estate as requested or directed by a personal representative.

Section 20. Persons dealing with personal representatives; protection. A person dealing with or assisting a personal representative without actual knowledge that the personal representative is improperly exercising his power is protected as if the personal representative properly exercised the

power. The person is not bound to inquire whether the personal representative is properly exercising his power, and is not bound to inquire concerning the provisions of any will or any order of court that may affect the propriety of the acts of the personal representative. No provision in any will or order of court purporting to limit the power of a personal representative shall be effective except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets paid or delivered to a personal representative. The protection here expressed extends to instances where some procedural irregularity or jurisdictional defect, including the case where the alleged decedent is found to be alive, occurred in proceedings leading to the issuance of letters.

Section 21. Sale or encumbrance to personal representative voidable; exceptions. Any sale or encumbrance to the personal representative, his spouse, agent or attorney, or any corporation or trust in which he has more than a one-third beneficial interest, is voidable unless:

(1) The transaction was consented to by all interested persons affected thereby except any who were under legal disability for whom no guardian had been appointed; or

(2) The will expressly authorizes the transaction by the personal representative with himself.

The title of a purchaser for value without notice of the circumstances of the transaction with the personal representative

is not affected unless the purchaser should have known of the defect in the title of his seller.

Section 22. Improper exercise of power; breach of fiduciary duty. If the exercise of power by the personal representative in the administration of the estate is improper he shall be liable for breach of his fiduciary duty to interested persons for resulting damage or loss to the same extent as a trustee of an express trust. Exercise of power in violation of a court order is a breach of duty. Exercise of power contrary to the provisions of the will may be a breach of duty.

Section 23. ORS 97.130 is amended to read:

97.130. Right to control disposition of remains. The right to control the disposition of the remains of a decedent, unless other directions have been given by him, vests in his surviving spouse, his surviving children, his surviving parents and the person in the next degree of kindred to him, in the order named. If disposition of the remains has not been directed and authorized within ten days after the death of decedent the special administrator or the personal representative of the deceased may direct and authorize disposition of the remains.

Section 24. ORS 116.115 is amended to read:

116.115. Authority of personal representative when will includes gift of body for scientific and medical purposes;

nonliability for actions. The authority of a person named [executor] personal representative of a will which includes a gift pursuant to ORS 97.132 extends to performing acts necessary to carrying out the gift although [the] letters testamentary have not been issued. A person named [executor] personal representative who carries out the gift of the testator before issuance of letters testamentary or under a will which is not admitted to probate shall not be liable to the surviving spouse or next of kin for performing acts necessary to carry out the gift of the testator.

Section 25. Discovery of assets during procedure by personal representative. The court may order any person to appear and give testimony as provided in ORS chapter 45 if it appears probable:

(1) That he has concealed, secreted or disposed of any property of the estate of a decedent.

(2) That he has been intrusted with property of the estate of a decedent and refuses or neglects to account therefor to the personal representative.

(3) That he has concealed, secreted or disposed of any writing or other instrument or document relating or pertaining to the estate.

(4) That he has knowledge or information that is necessary to the administration of the estate.

(5) That officers or agents of a corporation refuse to allow examination of the books and records of the corporation which the decedent had the right to examine.

Section 26. Proceedings when person refuses to appear and give testimony. If the person cited as provided in ORS

_____ refuses to appear, or to answer questions asked of him as authorized by the order of the court, he is in contempt and may be punished as for other contempts.

Section 27. Power to avoid transfers. The property liable for the payment of charges, administration expenses and claims against a decedent's estate shall include property transferred by him with intent to defraud his creditors or transferred by any means which is in law void or voidable as against his creditors; and the right to recover such property so far as necessary for the payment of charges, administration expenses and claims against the estate shall be in the personal representative, who shall take necessary steps to recover it. Such property shall constitute general assets for the payment of creditors.

Section 28. Repeal of existing sections. ORS 116.105, 116.110, 116.115, 116.120, 116.125, 116.130, 116.135, 116.170, 116.175, 116.180, 116.305, 116.310, 116.320, 116.325, 116.330, 116.340, 116.405, 116.410, 116.415, 116.420, 116.425, 116.430, 116.435, 116.440, 116.445, 116.450, 116.455, 116.460, 116.465, 116.705, 116.710, 116.715, 116.720, 116.725, 116.730, 116.735, 116.740, 116.745, 116.750, 116.755, 116.760, 116.765, 116.770, 116.775, 116.780, 116.785, 116.790, 116.795, 116.800, 116.805, 116.811, 116.815, 116.820, 116.825, 116.830, 116.840, 116.850, 116.860, 116.870, 116.880, 116.890, 116.900, 116.990 and 121.060 are repealed.

Proposed revised Oregon probate code
TITLE AND POSSESSION OF PROPERTY;
DUTIES AND POWERS OF PERSONAL
REPRESENTATIVES
3rd Draft
October 9, 1967

Prepared by
Stanton Allison

COMMENTS

The proposed chapter follows closely the format and language of the 1967 draft of the Uniform Probate Code. A reference to the corresponding Uniform Code Sections will show that while much of the language has been adopted verbatim, a large part of the language is that of the combined committees.

The general approach of the Uniform Code is that the personal representative is given power to act without hearing, order, or adjudication of the probate court unless he may desire to secure such adjudication. This new approach will be most noticeable in the section covering sale, mortgage, lease, and other dealings with property of the estate. These powers of the personal representative are given without the requirement of petition, hearing, notice and court order and confirmation of these transactions. This concept does not seem so radical, however, if it is remembered that the Oregon courts have always recognized the right of a testator to give his executor exactly the same power to operate without court order as the proposed code would do in the absence of testamentary instructions. Logically and factually, there seems no reason why the personal representative in an intestate situation or in the absence of testamentary provisions should not be given the same power over the administration of the estate as now given by a testator by his will. It should be noted further that in the usual will where the executor is authorized to act

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without court order or supervision in the sale of estate assets the executor is operating without bond. In the proposed code, in an intestate situation, a surety bond is required in all cases and the court is given a wider discretion to require a surety bond in testate situations where the court deems such protection advisable. Although persons dealing with a personal representative are protected in a much greater degree than provided in the present code, the proposed chapter imposes a liability upon the personal representative for a breach of his fiduciary duty "to the same extent as a trustee of an express trust." It would seem therefore that under the proposed code the actual protection to the estate is much greater than under our present probate code.

Separate comments with reference to the equivalent ORS section as well as the source of the new language will follow as to each section. However, comments should be made of certain fundamental differences between the present code and the proposed code. First, no distinction is made as between real and personal property, but they are included and treated identically in all the powers granted in the chapter.

Second, unlike the present probate code, the provisions concerning the title and the possession of property both real and personal are specifically spelled out in the proposed code. No such specific provisions occur in the present code. There is a fundamental distinction in this area from our present law. In the proposed code, title to both real and personal property is vested in the heirs and/or devisees;

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under the present law title only to the real property is so vested.

The proposed chapter sets out in much greater detail not only the powers of the personal representative, but also his duties and authority in a good number of specific areas which are not covered by the present rather piecemeal approach of the ORS sections. We believe this feature will have particular value to attorneys who may not specialize in probate practice, many of whom have expressed the thought of the difficulty of finding code provisions covering specific duties, specific problems, and specific authorities.

Section 1. No distinction between real and personal property. The language is taken generally from Section 3-101 of the 1967 Uniform Probate Code. The rationale of this concept is described in the following comment in the 1967 Wisconsin Probate Code discussing intestate succession.

This section makes one very substantial change in the legal structure of intestate succession in Wisconsin. Existing law treats real property in a different manner than personal property and even within the classification of real property draws a sharp distinction between the homestead and other real property. These distinctions are products of our inherited system of descent and distribution, drawn from the English law of prior centuries and abandoned in England by statute in 1925; the separate descent of the homestead is added as a purely American statutory innovation. The result of this hodgepodge of legislation is that inheritance rights are dependent upon the kind of property owned by the decedent. There is no longer any sound policy reason for retaining these distinctions, and the modern trend is toward a single system of inheritance (intestate succession) with abolition of common-law dower and curtesy. This statute provides a single rule for inheritance of all kinds of property. Although there

is a strong argument for special treatment of the home, the present law of homestead and descent is illustrative of the complexities involved in attempting any such distinction. Moreover, most homes are owned jointly by husband and wife and do not pass under the intestate law at all (but go to the survivor because of the survivorship right in joint tenancy).

It is recognized that many of the most difficult problems in our present probate code arise because of this artificial distinction between real and personal property. The proposed code in all the areas of intestate succession and administration would resolve these technical difficulties by abolishing all distinction between real and personal property.

Section 2. Devolution of estate at death; title to property. The general language is taken from Section 3-101 of the 1967 Uniform Probate Code. This would change the present law of Oregon in that it would vest title at the date of death not only to the real property but to the personal property of the estate in the heirs or devisees. The section spells out that this vesting is subject to family allowance, creditors' rights, the elective share of the surviving spouse, and administration. Reference may be made to ORS 111.020.

Section 3. Duty of personal representative; possession of estate. This language is based upon Section 3-409 of the 1967 Uniform Code. It would replace ORS 116.105. The proposed section spells out what has been a difficult practical problem in the present Oregon code. The proposed code recognizes the factual situation that much of the real and personal property of an estate should remain, and rightfully so, in

the possession of those to whom it is left by will or intestacy who were in actual possession at the time of the decedent's death. The proposed section recognizes this situation and specifies that the personal representative may recognize such possession and is only required to take actual possession where it is required for purposes of administration.

Section 4. Time of accrual and duties and powers. This section is taken from Section 3-401 of the 1967 Uniform Probate Code. We do not find an equivalent of this most useful section in the present Oregon Revised Statutes. The obvious value of spelling out this provision is evident.

Section 5. Duties of personal representative. The language is taken generally from Section 3-403 of the 1967 Uniform Probate Code. The section would include the provisions of ORS 116.105.

Section 6. Application to court. This section is taken from Section 3-404 of the 1967 Uniform Probate Code. The thrust of this section was commented on at some length in the introduction. It gives full authority to the personal representative to proceed without court order unless he desires the decision and adjudication of the court in particular situations.

Sections 7-14. The separate comments on Sections 7 to 14 inclusive are included in the chapters where these sections have been placed temporarily.

Section 15. Transactions authorized for personal

representative. The language of this comprehensive section has been taken, with substantial changes, from Section 3-416 of the 1967 Uniform Probate Code. It would, among its various provisions, cover powers given by ORS 116.110, 116.125, 116.130, 116.135, 116.170, 116.175 and 116.180. A detailed comment upon each of the specific authorities given would seem unnecessary. Subsections (1), (2) and (3) grant broad powers not prescribed by present ORS sections. The provisions for performing contracts made by the deceased are much broader than the present ORS provision. It would specifically sanction many practices which now do not have legislative authority. Subsection (7) for abandonment of burdensome property and Subsections (8), (9), (10) and (11) for dealing with securities of the estate do not have counterparts in our present code. Subsection (16), authorizing personal representatives to employ attorneys, accountants and investment authorities supplies an authority not found in our present code. To summarize, an examination of this section will make it clear that many essential acts of administration which have to be now performed without express legislative sanction are covered by this comprehensive section.

Section 16. Right to file notice of and perfect lien. This section is ORS 16.120 with editorial changes.

Section 17. Power of personal representative to sell, mortgage, lease and deal generally with property. As noted in the introductory comment, this section would give the

personal representative power to sell, mortgage, lease or otherwise deal with property of the estate without petition, notice, hearing or court order. It gives not only full power to the personal representative in this area, but it gives the widest protection to those dealing with the personal representative, against will provisions, procedural irregularity or jurisdictional defect in the administration. This is a wide protection not extended by our present code.

The philosophy of the proposed section is described in the comment to Section 860.01 of the proposed Wisconsin Code (Assembly Bill 280, March 1, 1967):

"This section gives to all personal representatives the power that is given to executors in most wills. It is the power which all personal representatives have always had over personal property in Wisconsin. Though a personal representative is given unrestricted power to sell, mortgage or lease property he will be held financially responsible to the persons interested if he acts carelessly or unreasonably. He 'must act not only honestly or with good faith in the narrow sense but must also exercise the duty of loyalty toward the beneficiary for whose benefit the power of sale is to be exercised and with such care and skill as a man of ordinary prudence would exercise in dealing with his own property.'"

We call attention with some amazement to the fact that this proposed short section would replace some thirty-three sections of the present ORS code, 116.705 to 116.890 inclusive, covering 6 1/2 pages of the present Oregon Revised Statutes, which have probably caused more practical difficulties and problems to attorneys representing estates than all of the other sections of the code combined. Yet, with this simple authority given, adequate protection is given in succeeding

provisions, both to the parties dealing with the personal representative, and to the parties interested as heirs, devisees and creditors.

Section 18. Title conveyed free of claims of creditors.

This section is taken from Section 860.05 of the 1967 Wisconsin Probate Code. It is merely a statement of the present Oregon law, although its exact parallel is not now found in ORS.

Section 19. Nonliability of transfer agents. This section

is taken from Section 860.01 of the 1967 Wisconsin Code. It may avoid some technical problems now raised by transfer agents in transferring securities sold by personal representatives.

Section 20. Persons dealing with personal representatives; protection.

This section is a verbatim copy of Section 3-415 of the 1967 Uniform Probate Code. The effect of this section is to grant absolute protection to purchasers and other parties dealing with personal representatives. It is felt that such a broad and absolute protection is necessary in view of the fact that the personal representative is operating in dealing with estate property without specific court order or adjudication.

Section 21. Sale or encumbrance to personal representative voidable; exceptions. This section is taken verbatim from Section 3-414 of the 1967 Uniform Probate Code. This section

would replace the present ORS 116.820 which reads in part as follows: "All purchases of the property of the estate by an executor or administrator, however made, whether directly or indirectly, are prohibited, and if made are void, except when made in compliance with another statute, or the will of the decedent, or a contract, or other instrument, executed by the decedent." This section is discussed in Sections 754 and 755 of Volume II, Oregon Probate Law and Practice, Jaureguy and Love, in which the authors mention a number of problems either inherent in the present ORS section quoted or not covered by this section. It is believed that the proposed new section, particularly in its use of the term "voidable" rather than "void," and in its protection of an innocent purchaser for value without notice of the circumstances of the transaction, is a definite improvement over the ORS section it would replace.

Section 22. Improper exercise of power; breach of fiduciary duty. This section is taken from Section 3-413 of the 1967 Uniform Probate Code. For a discussion of the problems covered by this section see Section 638, Volume II, Oregon Probate Law and Practice, Jaureguy and Love. The proposed section spells out that the liability of the personal representative for breach of duty is that of the trustee of an express trust. This is a more forthright statement than that contained in some of the Oregon cases. The definition of interested persons is a broad one, including heirs, devisees,

creditors, and others having a property right in or claim against the estate which may be affected by the proceedings. The personal representative is made liable for breach of his fiduciary duty for resulting damage or loss to these persons.

Section 23. Right to control disposition of remains.

This section would amend ORS 97.130 as indicated. The amendment would take care of a very present and serious problem when directions and authority for disposition of the remains of deceased parties cannot be obtained from the parties now given such authority by the statute. The proposed amendment would effectively meet this problem.

Section 24. Authority of personal representative when will including the gift of body for scientific and medical purposes; nonliability for actions. This section is identical with the present ORS 116.115. However, since the reference to ORS 97.130 is incorporated in the general section giving the power of the personal representative to control the remains, it would seem preferable that ORS 116.115 be placed to follow ORS 97.134. It should be noted that ORS 97.132 was section 1 of chapter 674, Session Laws of 1961, ORS 97.134 comprised sections 2 and 3 of this chapter, and ORS 116.115 was section 4 of the same chapter. Please note also that ORS 116.115 applies not only to wills which have been probated but also applies to unprobated instruments. There therefore seems no reason why this section would have to be incorporated in the probate code.

Section 25. Discovery of assets during procedure by personal representative. This section would rewrite and replace ORS 116.305, 116.310 and 116.320. Additional language has been included covering the right to examine books and records of a corporation which the decedent had a right to examine. It was considered preferable to make a general reference to procedure set out in Chapter 45 for taking testimony, rather than limit it to the present language of 116.310.

Section 26. Proceedings when person refuses to appear and give testimony. Section 26 rewrites ORS 116.315 and generalizes the language to provide for a punishment for refusal to appear or answer questions as a contempt.

Section 27. Power to avoid transfers. This section would replace ORS 116.330, 116.335 and 116.340. The language is taken from Section 3-410 of the 1967 Uniform Probate Code. The proposed section is actually almost verbatim Section 368 of the 1963 Iowa Probate Code.

CORRESPONDING SECTIONS - CHAPTER ON
TITLE AND POSSESSION OF PROPERTY; DUTIES AND
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<u>Draft Sections</u>	<u>Proposed Third Draft</u>	<u>ORS Sections</u>
1		
2		
3		116.105
4		
5		116.105
6		
7		116.505
8		116.405, 116.410
9		116.415
10		116.420
11		116.435
12		116.425
13		116.440
14		116.445
15(4)		116.110
15 (13)		116.125
15 (14)		116.130, 116.135
15 (18)		116.170, 116.175
15 (20)		116.180
16		116.120
17		116.705 to 116.830 incl. and 116.840 to 116.900 incl.
18		
19		
20		
21		116.820

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Draft Sections

ORS Sections

22

23

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25

26

27

28

97.130

116.115

116.305, 116.310,
116.320

116.315

116.330, 116.335,
116.340

Repealer

Section 1. Devolution of estate at death; restrictions.

The power of a person to leave property by will, and the rights of creditors, devisees, and heirs to his property are subject to the restrictions and limitations expressed or implicit in this chapter to facilitate the prompt settlement of estates. Upon the death of a person, his real and personal property devolves to the persons to whom it is devised by his last will, or, in the absence of testamentary disposition, to his heirs, subject to family allowance, rights of creditors, elective share of the surviving spouse, and to administration. The provisions of this chapter shall apply without any preference or priority as between real and personal property.

References: Uniform Probate Code,
Sec. 3-101 (1967)

Section 2. Duty of personal representative; possession of estate. Every personal representative has a right to, and shall take possession or control of the decedent's estate, except that property in the possession of the person presumptively entitled thereto as heir or devisee shall be possessed by the personal representative only when reasonably necessary for purposes of administration. The request by a personal representative for delivery of any property possessed by the heir or devisee shall be conclusive evidence, in any action against the heir or devisee for possession thereof, that the possession of the property by the personal representative is reasonably necessary for purpose

of administration. The personal representative shall pay taxes on all property in his possession. He shall keep buildings and fixtures in his possession in tenantable repair. He may maintain an action to recover possession of any property or to determine the title thereto.

References: Uniform Probate Code,
Sec. 3-409 (1967)
ORS 116.105

Section 3. Time of accrual of duties and powers. The duties and powers of a personal representative commence upon the issuance of his letters. The powers of a personal representative relate back in time to give his acts occurring prior to appointment the same effect as those occurring thereafter where beneficial to the estate. A personal representative may ratify and accept acts on behalf of the estate done by others where such acts would have been proper for a personal representative.

References: Uniform Probate Code,
Sec. 3-401 (1967)

Section 4. General duties; relation and liability to persons interested in estate; standing to sue.

(1) A personal representative is a fiduciary who, in addition to the specific duties expressed in this chapter, is under a general duty to settle and distribute the estate of the decedent in accordance with the terms of the will and this chapter, and as expeditiously and with as little sacrifice of value as is reasonable under all of the circumstances. He shall use the authority

conferred upon him by this chapter, the terms of the will, if any, any order of the court, and the rules generally applicable to fiduciaries, for the best interests of creditors of the decedent and successors to the estate. A personal representative shall not be surcharged for acts of administration or distribution if the conduct in question was authorized at the time.

(2) A personal representative of a decedent who was domiciled in this state at his death has the same standing to sue and be sued in the courts of this state and the courts of any other jurisdiction as his decedent had immediately prior to death.

References: Uniform Probate Code,
Sec. 3-403, (1967)

Section 5. Powers of personal representative; in general.
Until termination of his appointment a personal representative has the same power over the title to property of the estate as an absolute owner would have, in trust however, for the benefit of the creditors and others interested in the estate. This power may be exercised without notice, hearing, or order of court.

References: Uniform Probate Code,
Sec. 3-412, (1967)

Section 6. Notice to creditors. (See Section 11.A of chapter on Initiation of Probate draft dated 7/5/67.

Section 7 - 13, inclusive. Inventory and Appraisal. (See

second draft pursuant to minutes of 8/18, 19/1967.)

Section 14. Transactions authorized for personal representative. Except as restricted or otherwise provided by the will or by court order, a personal representative, acting reasonably for the benefit of the interested persons, may properly:

(1) Direct and authorize disposition of the remains of the decedent pursuant to ORS 97.130 and incur expenses for the funeral, burial or other disposition of the remains in a manner suitable to his condition in life.

(2) Retain assets owned by the decedent pending distribution or liquidation including those in which the representative is personally interested or which are otherwise improper for trust investment.

(3) Receive assets from fiduciaries, or other sources.

(4) Complete, compromise, or refuse performance of the decedent's contracts that continue as obligations of the estate, as he may determine under the circumstances. In performing enforceable contracts by the decedent to convey or lease land, the personal representative, among other possible courses of action, may:

(a) Execute and deliver a deed of conveyance, for cash payment of all sums remaining due, or the purchaser's note for the sum remaining due secured by a mortgage or deed of trust on the land; or

(b) Deliver a deed in escrow with directions that the

proceeds, when paid in accordance with the escrow agreement, be paid to the successors of the decedent, as designated in the escrow agreement.

(5) Satisfy written charitable pledges of the decedent irrespective of whether such pledges constituted binding obligations of the decedent or were properly presented as claims when, in the judgment of the personal representative, the decedent would have wanted the pledges completed under the circumstances.

(6) When funds are not needed to meet debts and expenses currently payable and are not immediately distributable, deposit liquid assets of the estate, including moneys received from the sale of other assets, in federally insured interest-bearing accounts or other short-term loan arrangements that may be reasonable for use by trustees generally.

(7) Abandon property when, in the opinion of the personal representative, it is valueless, or is so encumbered or is in condition that it is of no benefit to the estate;

(8) Vote stocks or other securities in person or by general or limited proxy.

(9) Pay calls, assessments, and other sums chargeable or accruing against or on account of securities, unless barred by the provisions relating to claims.

(10) Hold a security in the name of a nominee or in other form without disclosure of the interest of the estate but the

personal representative shall be liable for any act of the nominee in connection with the security so held.

(11) Insure the assets of the estate against damage, loss and liability and himself against liability in respect to third persons.

(12) Borrow money with or without security to be repaid from the estate assets or otherwise; and advance money for the protection of the estate.

(13) Effect a fair and reasonable compromise with any debtor or obligor, or extend, renew or in any manner modify the terms of any obligation owing to the estate. If the personal representative holds a mortgage, pledge or other lien upon property of another person, he may, in lieu of foreclosure, accept a conveyance or transfer of encumbered assets from the owner thereof in satisfaction of the indebtedness secured by lien.

(14) Pay taxes, assessments, compensation of the personal representative, and other expenses incident to the administration of the estate.

(15) Sell or exercise stock subscription or conversion rights; consent, directly or through a committee or other agent, to the reorganization, consolidation, merger, dissolution, or liquidation of a corporation or other business enterprise.

(16) Allocate items of income or expense to either estate income or principal, as permitted or provided by law.

(17) Employ persons, including attorneys, auditors,

investment advisors, or agents, even if they are associated with the personal representative, to advise or assist the personal representative in the performance of his administrative duties; to act without independent investigation upon their recommendations; and instead of acting personally, to employ one or more agents to perform any act of administration, whether or not discretionary.

(18) Prosecute or defend actions, claims, or proceedings in any jurisdiction for the protection of the estate and of the personal representative in the performance of his duties.

(19) Continue any unincorporated business or venture in which the decedent was engaged at the time of his death:

(a) In the same business form for a period of not more than four months from the date of appointment of the personal representative where continuation is a reasonable means of preserving the value of the business including good will.

(b) In the same business form for any additional period of time that may be approved by order of the court, or

(c) Throughout the period of administration if the business is incorporated by the personal representative and if none of the probable distributees of the business who are competent adults object to its incorporation and retention in the estate.

(20) Upon order of the court discontinue and wind up any business or venture in which the decedent was engaged at the time of his death.

(21) Provide for exoneration of the personal representative

from personal liability in any contract entered into on behalf of the estate.

(22) Satisfy and settle claims and distribute the estate as provided in this Code.

References: Uniform Probate Code,
Sec. 3-416, (1967) and

ORS 116.110, 116.125,
116.130, 116.135,
116.170, 116.175 &
116.180.

Section 15. Power of personal representative to sell, mortgage and lease. A personal representative has power to sell, mortgage or lease property of the estate without notice, hearing or court order. The rights and title of any purchaser, mortgagee or lessee from the personal representative are in no way affected by any provision in a will of the decedent or any procedural irregularity or jurisdictional defect in the administration of the decedent's estate. A transfer agent or a corporation transferring its own securities incurs no liability to any person by making a transfer of securities in an estate as requested or directed by a personal representative.

Section 16. Free of claims and creditors. Property sold, mortgaged or leased by a personal representative shall be subject to liens and encumbrances of record but shall be free and clear of rights of creditors based on the filing and allowances of a claim in the estate. The filing and allowance of a claim in an estate does not make one a secured creditor.

Section 17. Contract of decedent to sell or lease land.

When any person legally bound to make a sale, mortgage or lease dies before making the same and the personal representative fails or refuses to perform in accordance with the decedent's contract, any person claiming to be entitled to the sale, mortgage or lease may petition the court for specific performance of the contract. Upon satisfactory proof the court may order the personal representative to make a sale, mortgage or lease or may by its own order make a conveyance, mortgage or lease to the person entitled thereto upon the performance of the contract.

Section 18. Except as may be required by section 17, any sale, mortgage or lease of property by a personal representative shall be without express or implied warranties.

Section 19. Persons dealing with personal representatives; protection. A person dealing with or assisting a personal representative without actual knowledge that the personal representative is improperly exercising his power is protected as if the personal representative properly exercised the power. The person is not bound to inquire whether the personal representative is properly exercising his power, and is not bound to inquire concerning the provisions of any will or any order of court that may affect the propriety of the acts of the personal representative. No provision in any will or order of court purporting to limit the power of a personal representative shall be effective except as to persons with actual knowledge thereof. A person is not bound to see to the proper application of estate assets

paid or delivered to a personal representative. The protection here expressed extends to instances where some procedural irregularity or jurisdictional defect, including the case where the alleged decedent is found to be alive, occurred in proceedings leading to the issuance of letters.

References: Uniform Probate Code,
Sec. 3-415, (1967)

Section 20. Sale or encumbrance to personal representative voidable; exceptions. Any sale or encumbrance to the personal representative, his spouse, agent or attorney, or any corporation or trust in which he has more than a one-third beneficial interest, is voidable unless,

(a) The transaction was consented to by all interested persons affected thereby, or approved by the court.

(b) The will expressly authorized the transaction by the personal representative with himself.

The title of a purchaser for value without notice of the circumstances of the transaction with the personal representative is not affected unless the purchaser should have known of the defect in the title of his seller.

References: Uniform Probate Code,
Sec. 3-414, (1967)

Section 21. Improper exercise of power; breach of fiduciary duty. If the exercise of power concerning the estate is improper, the personal representative shall be liable for beach of his

fiduciary duty to interested persons for resulting damage or loss to the same extent as a trustee of an express trust. The exercise of power in violation of court order, or contrary to the provisions of the will may be breaches of duty. The rights of purchasers and others dealing with a personal representative shall be determined as provided in ORS _____ and _____ and may be unaffected by the fact that the personal representative breached his fiduciary duty in the transaction.

References: Uniform Probate Code,
Sec. 3-413, (1967)

Section 22. Right to file notice of and perfect lien. The personal representative shall have the same rights to file notice of or otherwise perfect a lien or security interest as the decedent would have had if he were living.

References: Advisory Committee Minutes:
6/17, 18/66 p. 19; and Appendix
ORS 116.120

Section 23. ORS 97.130 is amended to read:

97.130. Right to Control Disposition of Remains. The right to control disposition of the remains of a decedent, unless other directions have been given by him, vests in his surviving spouse, his surviving children, his surviving parents and the person in the next degree of kindred to him, in the order named. If disposition of the remains has not been directed

and authorized within ten days after the death of decedent the special administrator or the personal representative of the deceased may direct and authorize disposition of the remains.

Section 24. Authority of executor when will includes gift of body for scientific and medical purposes; nonliability for actions. The authority of a person named executor of a will which includes a gift pursuant to ORS 97.132 extends to performing acts necessary to carrying out the gift although letters testamentary have not been issued. A person named executor who carries out the gift of the testator before issuance of letters testamentary or under a will which is not admitted to probate shall not be liable to the surviving spouse or next of kin for performing acts necessary to carry out the gift of the testator.
Reference: ORS 116.115

Section 25. Discovery of assets during procedure by personal representative. The court may order any person to appear and give testimony as provided in ORS chapter 45 if it appears probable:

(1) That he has concealed, secreted or disposed of any property of the estate of a decedent.

(2) That he has been intrusted with property of the estate of a decedent and refuses or neglects to account therefor to the personal representative.

(3) That he has concealed, secreted or disposed of any writing or other instrument or document relating or pertaining to the estate.

(4) That he has knowledge or information that is necessary to the administration of the estate and the knowledge or information is otherwise unavailable to the personal representative.

(5) That corporate officers or agents refuse to allow inspection of books and records of a corporation in which there are stocks, bonds or debentures of the estate.

References: Advisory Committee Minutes:
6/17, 18/66 Appendix
7/15, 16/66 pp. 5 and 6; and Appendix

ORS 116.305
116.320

Section 26. Proceedings when person refuses to appear and give testimony. If the person cited as provided in ORS _____ refuses to appear, or to answer questions asked of him as authorized by the order of the court, he is in contempt and may be punished as for other contempts.

References: Advisory Committee Minutes:
6/17, 18/66 Appendix
7/15, 17/66 pp. 5 to 7; and Appendix

ORS 116.315

Section 27. Power to avoid transfers. The property liable for the payment of debts of a decedent shall include all property transferred by him by any means which is in law void or voidable as against his creditors, and the right to recover such property, so far as necessary for the payment of the debts of the decedent, shall be exclusively in the personal representative.

References: Uniform Probate Code,
Sec. 3-410, (1967)

ORS 116.330, 116.335,
116.340

Section 28. Property embezzled or converted. If any person embezzles or converts to his own use any of the personal property of a decedent before the appointment of a personal representative, the person shall be liable to return the property or its value to the estate. No person shall be charged as executor by his own wrong [de son tort].

References: Uniform Probate Code,
Sec. 3-411, (1967)

ORS 116.325

Section 29. Repeal of existing statutes:

Proposed revised Oregon probate code
POWERS AND DUTIES OF PERSONAL REPRESENTATIVE
2nd Draft
September 1, 1967

Prepared by
Stanton W. Allison

COMMENTS

In view of the general directive to your draftsman at the meeting of August 18 and August 19, 1967, to incorporate to a substantial extent the applicable language of the 1967 Draft Uniform Code, I suggested that I prepare a tentative draft of Tabs 15, 19, and 21 to be combined in a single chapter. However, since Tab 19 covering discharge of incumbrance has not been on the agenda for consideration by the committee, I have not included this material in the present draft. Since Section 7 of the first draft of April 27 also appears in Tab 19, I have not included that section.

The sections on notice to creditors and inventory and appraisal have been separately redrafted, and since these were thoroughly considered at the previous meeting and at earlier meetings, I have not included these items.

Tab 21 covering sale, mortgage, and lease of property was considered and discussed at previous meetings as noted on the report. Although powers in this category are included within the general sections of the Uniform Code, because Tab 21 had been carefully discussed and also because in your draftsman's opinion it will be preferable to have a separate section on real property sales, I have included the separate section from Tab 21.

In preparing this tentative draft I followed as closely as possible the general order and outline of the first draft. As

will be noted, a number of the sections use the language of the first draft. However, where I felt the language of the Uniform Code covered the same material and in some cases with broader language, I have incorporated the language of the Uniform Code.

The following separate comments are not intended for use when the final draft is approved and written but are primarily for the understanding of the two committees to explain the changes or substitutions from the former draft. It should also be stated that minor changes and some eliminations have been made in the Uniform Code sections, but, somewhat to your draftsman's surprise, the sections seemed appropriate without any extensive editing.

Section 1. Devolution of estate at death.

Although the discussion of this subject is on the agenda for the September meeting, I felt the language taken from Section 3-101 of the Uniform Code was so in line with our previous discussion that it would be helpful to have it included here.

Section 2. Duty of Personal Representative; Possession of Estate.

The comment on Section 1 is equally applicable to Section 2. The language has been taken from Section 3-409 of the Uniform Code without change.

Section 3. Time of accrual of duties and powers.

This section is taken verbatim from Section 3-401 of the

Uniform Code. There is no precise counterpart in ORS but this supplies language applicable in a number of situations, particularly in regard to ORS 116.115.

Section 4. General Duties; relation and liability to persons interested in estates; standing to sue.

The language of this section, with minor modifications, is the same as Section 3-403 of the Uniform Code. Although there is now a counterpart for this section in ORS, it was felt advisable to include this language to implement the general theory of the new code that the personal representative, except in special instances where order of court was required, would be given powers to operate without court order. It is, however, the general understanding that the administrator should have the supervision of the court and complete permission to secure court order when needed. Please note, however, that the draftsman has not included the language of Section 3-404 of the Uniform Code which reads as follows: "Except where supervised administration has been ordered, a personal representative shall proceed expeditiously with the settlement and distribution of a decedent's estate without adjudication, order, or direction of the (judge), but he may invoke the jurisdiction of the (probate) court, in proceedings authorized by this Code, to resolve questions concerning the estate or its administration." The proposed code does not adopt the distinction in the Uniform Code between informal probate and supervised administration. In view of the proposal that the county clerk act in ex parte matters, it would seem advisable to make it permissive

in all cases for a personal representative to seek the advice and the authority of the probate court. Any hard and fast legislation in the form of the above-quoted section might tend to change this concept.

Section 5. Powers of personal representative; in general.

This language is taken verbatim from Section 3-412 of the Uniform Code. No comparable section is now in ORS. This is the basic section for the protection of persons dealing with a personal representative under the broad powers given by the proposed code. It was thought advisable to place this basic section prior to the later specific sections on powers and particularly that of the power of sale. It is the intention to incorporate all or at least a major part of the comment in the Uniform Code when the definitive comments are prepared on these individual sections.

Section 6. Notice to creditors.

This has been drafted and placed temporarily in the second draft of the Initiation of Probate chapter which has been already circulated to key members of the committees.

Sections 7 to 13, covering Inventory and appraisal, as stated above, have been drafted separately and will be circulated separately.

Section 14. Transactions authorized for personal representatives.

As instructed by the last joint meeting, this language was incorporated from Section 3-416 of the Uniform Code. The changes

from 3-416 have been minimal. To comply with directions of the August meeting, I have included a section which would authorize disposition of the remains of the decedent when authority was given under ORS 97.130, which provides that authority can be given when no directions have been received for ten days following the death. I have eliminated the provisions for sale, mortgage, and lease since, as stated, those are included in a separate section and I have included a specific section authorizing a discontinuing and winding up of a business upon court order, which complies with present ORS.

Sections 15-21 cover Tab 21. Minor editing changes have been made. However, the sections covering breach of duty have been taken from comparable provisions of the Uniform Code and appear as Sections 16, 17, and 18.

Section 22 is Section 4 of Tab 15.

Section 23 implements the instructions from the August meeting to give the power to the personal representative to provide for funeral and burial of the remains where the family failed to act for ten days. The amendment is to ORS 97.130.

Section 24 is identical with the present ORS 116.115. However, since the reference to ORS 97.130 is incorporated in the general section giving the power of the personal representative to control the remains, it would seem preferable that 116.115 be placed to follow ORS 97.134. It should be noted that 97.132 was Section 1 of Chapter 674, Session Laws of 1961, 97.134 comprised Sections 2 and 3 of this chapter, and ORS 116.115 was Section 4 of the same chapter. Please note also that 116.115 applies

not only to wills which have been probated but also applies to unprobated instruments. There therefore seems no reason why this section would have to be incorporated in the probate code.

Sections 25 and 26 cover Sections 11 and 12 of Tab 15. Please note that Section 7 of Tab 15 will be considered as a part of Tab 19; that Section 9 of Tab 15 is now included as Section 19 of Tab 23. I suggest that Section 10, Recording with copies, be considered where it is later shown as Section 16 of Tab 23.

Section 27 would substitute Section 3-410 of the Uniform Code for ORS 116.330, 116.335, and 116.340 shown as Sections 14, 15, and 16 of Tab 15.

Section 28 covers present ORS 116.325. I have incorporated the language of Section 3-411 of the Uniform Code which would seem more comprehensive than Section 13 of the present Tab 15.

To summarize, your draftsman has checked the comparable ORS sections and believes that all of the pertinent sections have been covered by the proposed draft or the drafts for future consideration.

1st Draft
March 26, 1967

POWERS AND DUTIES OF PERSONAL REPRESENTATIVE

Section Powers and duties, generally. The personal representative shall, with regard to the property of the estate of the decedent:

- (1) Collect and possess all of the property.
- (2) Manage the estate and when reasonable maintain in force or purchase casualty and liability insurance.
- (3) Collect all income and rent.
- (4) Inventory all property subject to inheritance tax and have it appraised as required by law.
- (5) Pay and discharge out of the estate all expenses of administration, taxes, charges, claims allowed by the court or such payment as ordered by the court.
- (6) Sell property when necessary to pay claims, expenses, or as provided by law or order of the court.
- (7) Contest all claims except those claims he believes are valid.
- (8) Sue, be sued and defend in his capacity as personal representative. No order of court shall be required prior to the commencement of or defense of the suit or action except as otherwise provided by law.
- (9) Render accurate accounts.

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(10) Distribute the estate and do such other things as
required by law or order of the court.

References: Advisory Committee Minutes:
12/16, 17/ 66 pp. 4 and 5
8/19, 20/ 66 p. 16

ORS 116.105 to 116.890

Comment: Subsection (5) of this section is not exactly
as adopted by the committees because of previous
action on 8/19, 20/66 p. 16. Subsection (6) was added by
the draftsman.

Proposed revised Oregon probate code
POWERS AND DUTIES OF PERSONAL REPRESENTATIVE
1st Draft
April 27, 1967

This draft is based primarily on a draft by Herbert E. Butler, (appendix to 6/17, 18/66 minutes) and action taken by the committee at the June and July, 1966, meeting.

Section 1. Possession and control of property. (1)

The personal representative is entitled to possession and control of all property of the decedent and to the rents and profits therefrom. Upon completion of the administration of the estate or upon order of the court, the personal representative shall deliver the property to the persons entitled thereto.

(2) The personal representative shall keep property in his possession and control in repair and preserve it from decay.

(3) The rights of the personal representative as provided in this section, are subordinate to the right to possession and control by a third party who has a valid lease or bailment of the property.

References: Advisory Committee Minutes:
6/17, 18/66 pp. 16 and 17; and Appendix
7/15, 16/66 p. 2

ORS 116.105

Section 2. Performance of contract. If a decedent for whom a personal representative is appointed was, at the time of appointment, a party to a contract requiring the decedent to convey property, and if the price has been paid either before or after the appointment of the personal

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representative, the personal representative of the estate, with prior approval of the court by order, may convey the interest of the estate of the decedent in the property.

The effect of the conveyance shall be the same as though made by the decedent while he was alive.

References: Advisory Committee Minutes:
6/17, 18/66 pp. 18 and 19

ORS 116.110 and 126.285

Comment: Compare to section 3 of the draft on Sale, Mortgage and Loan of Property.

Section 3. Gift of body of decedent; nonliability for delivery. Prior to the issuance of letters testamentary or of administration, a person authorized by will or other written instrument may take such action as is necessary to implement a gift of the decedent of the whole or any part of his body as provided in ORS 97.132. Any person implementing a gift of decedent as provided in this section shall not be liable to the surviving spouse or next of kin.

References: Advisory Committee Minutes:
6/17, 18/66 p. 19; and Appendix

ORS 116.115

Section 4. Right to file notice of and perfect lien.

The personal representative shall have the same rights to file notice of or otherwise perfect a lien as the decedent would have had if he were living.

References: Advisory Committee Minutes:
6/17, 18/66 p. 19; and Appendix

ORS 116.120

Section 5. Right of personal representative to borrow money. (1) A personal representative may borrow money when authorized by the will, or order of court, to pay debts; taxes; expenses of administration; payment of legacies; homestead; exempt property, dower or curtesy; or for distribution.

(2) Any debt incurred under the provisions of this section shall be evidenced by a note of the personal representative executed in his capacity as personal representative.

(3) No distribution of assets shall be made by the personal representative while any note is outstanding, without the consent of the holder of the note.

References: Advisory Committee Minutes:
6/17, 18/66 pp. 19 and 20

ORS 116.125

Section 6. Personal Representative may compound for debts due estate. (1) If a debtor of a decedent is not able to pay his debts, the personal representative may petition the court for an order authorizing him to compound with and discharge the debtor.

(2) In making the order the court shall take into consideration whether or not the personal representative will receive a fair and just proportion of the money or property of the debtor.

(3) If a compound is induced by false or fraudulent representations by the debtor, the discharge of the debtor shall only apply to the extent of actual payment or the

value of the property received by the personal representative.

Section 7. Right to redeem mortgaged property. (1)

The court may order redemption of mortgaged property of a decedent upon petition by the personal representative, heir, creditor or other interested party provided:

(a) The will, if any, did not provide for redemption and did not devise the property; and

(b) Redemption would not be detrimental to creditors; and

(c) Redemption of the property appears in the best interests of the estate.

(2) If the debt secured by the mortgage as provided in this section is not due at the time of the making of the order for redemption or application of the proceeds of sale, the party to whom the money is due is entitled to receive in satisfaction thereof such sum as may be ascertained to be equal to the present value thereof.

(3) The personal representative shall have the same rights to redeem property sold upon foreclosure of a mortgage or execution as the decedent would have had if he were alive.

References: Advisory Committee Minutes:
11/19, 20/65 pp. 7 and 8
12/17, 18/65 Appendix A
4/15, 16/66 pp. 31 to 33
5/20, 21/66 pp. 3 to 9

Section 8. Personal representative continue business.

When the will provides the authority or direction to continue the business of the decedent, the personal representative may, without court order, continue the business. However, the court may, on its own motion or that of any other interested party, and upon good cause being shown, order the discontinuance of the business. The order of the court may also provide:

(1) For the conduct of the business solely by the personal representative, or jointly with one or more persons; or

(2) For the formation of a partnership for the conduct of the business; or

(3) For the formation of, or for the personal representative to join in the formation of, a corporation for the conduct of the business; and

(4) The extent of the liability of the estate, or any part thereof, or of the personal representative, for obligations incurred in the continuation of the business; and

(5) Whether or not liabilities incurred in the conduct of the business are to be chargeable solely to the part of the estate set aside for use in the business or to the estate as a whole; and

(6) The period of time for which the business may be conducted; and

(7) Any other conditions, restrictions, regulations and requirements the court requires.

References: Advisory Committee Minutes:
6/17, 18/66 pp. 22 and 23
7/15, 16/66 pp. 2 to 4

ORS 116.170, 116.175, 116.180

Section 9. ORS 116.186. Delivery of personal property and payment of debts to foreign administrators and executors; publication of notice; effect of payment or delivery. (1)

Foreign administrators and executors may receive payment of, and discharge, debts owing by residents of this state and accept delivery of, and give acquittances for, personal property in the possession of residents of this state, upon complying with the provisions of this section.

(2) If the indebtedness is in an amount, or the personal property is of a value, in excess of \$500, such payment or delivery shall not be made until 90 days after first publication of notice, as provided in subsection (5) of this section. If such notice is not required, such payment or delivery shall not be made until 90 days after the date of death of the deceased owner.

(3) (a) If the indebtedness is in an amount, or the personal property is of a value, in excess of \$500, the foreign administrator or executor shall publish a notice once each week for four successive weeks in a newspaper of general circulation in the county in which the debtor or person in possession of personal property resides or is engaged in business, describing the debt or personal

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property, identifying the debtor or person in possession thereof, showing his residence or business address, stating that, after 90 days from the date of first publication, payment or delivery of such indebtedness or personal property to such foreign administrator or executor will be requested, and directing any person objecting to such payment or delivery to give notice in writing to the debtor or person in possession of personal property that he objects thereto. Such notice shall be directed to all persons interested as creditors or beneficiaries in the estate of the decedent.

(b) If the person, indebted to, or holding personal property of, the decedent maintains branch offices, the publication shall be in the county where it is located, and the notices and consent by claimants shall be given to, the office or branch at which the account evidencing the indebtedness or credit is carried, or at which the personal property is located or controlled.

(4) Upon expiration of 90 days after the first publication of such notice, if required, or upon the expiration of 90 days after the date of death of the deceased owner, if such notice is not required, the debtor or person in possession of personal property may pay such debt or deliver such personal property to the foreign administrator or executor if, prior to such payment or delivery, he shall not have received written notice of objections thereto and he shall have received:

(a) Proof of publication of notice, as provided in ORS 193.070, if such notice be required by subsection (3) of this section;

(b) An affidavit of the executor or administrator averring to the best of his knowledge and belief that no other letters on said estate are then outstanding, that no petition for such letters is then pending in this state, that no ancillary proceedings will be brought and that there are no unpaid creditors of the decedent or the estate in this state who have not consented to such payment or delivery;

(c) Copy of letters testamentary or of administration, certified by the clerk of the court out of which such letters issued. The certificate of the clerk shall be dated no more than 30 days prior to the date of delivery thereof to the debtor or person in possession of personal property and shall declare that, at the date thereof, the person therein named is the duly appointed, qualified and acting executor or administrator of the estate of the decedent; and

(d) Release in writing of such indebtedness or personal property, given by the State Treasurer in respect to inheritance taxes.

(5) Payment or delivery of personal property to a foreign administrator or executor, as provided in this section, shall constitute an acquittance and discharge of the debtor or person in possession of personal property, to the extent thereof.

References: Advisory Committee Minutes:
7/15, 16/66

Section 10. Recording of copies of records in other counties wherein real property is situated. (1) If any real property belonging to an estate of a deceased person is situated in any county other than that in which the estate is being administered, the personal representative of the estate shall cause to be recorded in the deed records of each of those counties a certified copy of:

- (1) The will, if any;
- (2) Petition for appointment of personal representative;
- (3) Order appointing personal representative;
- (4) Order determining heirship, if any;
- (5) Order authorizing sale of real property, if any;
- (6) If real property is sold, order approving claims, expenses and costs of administration.
- (7) If real property is sold, approval of final account.

References: Advisory Committee Minutes:
6/17, 18/66 Appendix
7/15, 16/66 pp. 4 and 5

ORS 116.190

Section 11. Discovery of assets during procedure by personal representative. The court may order any person or persons and give testimony as provided in ORS chapter 45 if it appears from the affidavit of the personal representative or other interested person:

- (1) That any person has concealed, secreted or disposed of any property of the estate of a decedent.

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(2) That any person has concealed, secreted or disposed of any writing or other instrument or document relating to the estate of a decedent.

(3) That any person has knowledge or information that is necessary to the administration of the estate of a decedent and the knowledge or information is otherwise unavailable to the personal representative.

(4) That corporate officers or agents refuse to allow inspection of books and records of a corporation in which there are stocks, bonds or debentures of the estate.

References: Advisory Committee Minutes:
6/17, 18/66 Appendix
7/15, 16/66 pp. 5 and 6; and Appendix

ORS 116.305
116.320

Section 12. Proceedings when person refuses to appear and give testimony. If the person cited as provided in ORS _____ refuses to appear, or to answer questions asked of him as authorized by the order of the court, he is in contempt and may be punished as for other contempts.

References: Advisory Committee Minutes:
6/17, 18/66 Appendix
7/15, 17/66 pp. 5 to 7; and Appendix

ORS 116.315

Section 13. Liability for interference with property of deceased. A person who has innocently taken, received or interfered with property of the estate of a decedent is liable for the actual damages resulting to the estate. A person who, before administration is granted, wilfully

embezzles, aliens or in any way converts to his own use any property of a decedent is liable to the estate for double the amount of damages assessed therefor.

References: Advisory Committee Minutes:
7/15, 15/66 p.7; and Appendix

ORS 116.325, 121.060

Comment: Should this section apply only if the wrongdoer acts prior to administration? If so, should there be another provision for a wrong done after letters of administration have been issued?

Section 14. ORS 116.330. Avoidance of acts of decedent in fraud of creditors. Whenever the assets of the estate are insufficient to satisfy the funeral charges, expenses of administration and the claims against the estate, and the deceased in his lifetime made or suffered any conveyance, transfer or sale of any property, or any right or interest therein, with intent to delay, hinder or defraud creditors, or when such conveyance, transfer or sale was so made or suffered that the same is void in law as against creditors, or when the deceased in his lifetime suffered, consented or procured any judgment or decree to be given against him with such intent or in such manner as to be likewise void, such executor or administrator shall make application by petition to the probate court or judge thereof for leave to commence and prosecute to final judgment or decree the necessary and proper actions, suits or

proceedings to have such conveyance, transfer, sale, judgment or decree declared void, and the property affected thereby discharged from the effect thereof.

Section 15. ORS 116.335. Order allowing proceedings therefor. If upon the application it appears to such court or judge that the assets are insufficient for the purposes specified in ORS 116.330, and that it is probable that the conveyance, transfer, judgment or decree was made, suffered, consented to or procured with the intent or in the manner specified in such section, it shall make the order directing the proceedings to be commenced and prosecuted as to any or all of the matters alleged in the petition and necessary to supply the deficiency in the assets.

Section 16. ORS 116.340. Disposition of property recovered. The property recovered by means of any proceeding pursuant to ORS 116.330 and 116.335 is to be sold and appropriated to supply the deficiency mentioned in ORS 116.330 in the same manner as other like property; but the right to or interest in the surplus, if any, remains as if such proceeding had not been allowed or commenced.

References: Advisory Committee Minutes:
6/17, 18/66 Appendix
7/15, 16/66 pp. 9 to 11

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Section 17. Repeal of existing sections. ORS 116.105,
116.110, 116.115, 116.120, 116.125, 116.130, 116.135,
116.140, 116.145, 116.150, 116.155, 116.160, 116.165,
116.170, 116.175, 116.180, 116.190, 116.195, 116.305,
116.310, 116.320, 116.325 and ORS 121.060 are repealed.