

PROBATE LAW REVISION IN OREGON

An Initial Staff Report to the  
Advisory Committee on Probate Law Revision

April 1964

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

You have recently accepted appointment to serve on an advisory committee to assist the Law Improvement Committee in the formulation of recommendations and proposed legislation designed to improve Oregon's probate law. Your first meeting will soon be held.

This is an initial report prepared by your staff and submitted for your information and consideration. It briefly describes some of the recent history of substantive law revision in Oregon and the inauguration of the probate law revision project. It inquires into the meaning of the term "probate law" for purposes of considering the scope of the project, and recounts some past efforts in Oregon to revise all or part of our probate law. It refers to probate revisions enacted or in progress in other states in recent years, and to uniform or model Acts pertaining to probate. Finally, it sets forth some thoughts on procedure that may be employed by the advisory committee in prosecuting the project and on services and facilities available to assist the advisory committee.

The aim of this report is to give you some helpful background and preliminary information pertinent to the probate law revision project and your role in this project. Our hope is that this aim may prove reasonably accurate.

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Salem, Oregon  
April 1964

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## I. THE OREGON LAW REVISION PROGRAM AND THE PROBATE PROJECT

By passage of Senate Bill 321<sup>1</sup> the 1963 Regular Session of the Oregon Legislative Assembly has directed the Legislative Counsel Committee to "cause to be conducted a continuous substantive law revision program" and to "establish a law improvement committee to supervise the conduct of the program."<sup>2</sup> The law improvement committee is to consist of the chairman of the Legislative Counsel Committee and eight other members appointed by him with the approval of the Legislative Counsel Committee.<sup>3</sup> Subject to approval by the Legislative Counsel Committee, the Legislative Counsel is to furnish to the law improvement committee the services of personnel and other facilities.<sup>4</sup>

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<sup>1</sup> Senate Bill 321 was approved by the Governor and filed in the office of the Secretary of State on May 15, 1963. It became effective September 2, 1963, as chapter 292, Oregon Laws 1963 (Regular Session), and was compiled as ORS 173.310 to 173.340. In conception Senate Bill 321 was the embodiment of the views and aims of many persons in this state who have shown deep interest in the establishment and maintenance of a continuing substantive law revision program and who have labored on behalf of this cause. However, the principal sponsor of the bill, as a piece of proposed legislation, was the Oregon State Bar Committee on Law Revision, at whose request the Senate Committee on Judiciary introduced the bill. See Oregon State Bar, 1961 Committee Reports 68-71 (1961); Oregon State Bar, 1962 Committee Reports 133-34 (1962); Oregon State Bar, 1963 Committee Reports 48-50 (1963).

<sup>2</sup> ORS 173.310.

<sup>3</sup> ORS 173.310. At least four of the members of the law improvement committee are to be appointed from the membership of the Oregon State Bar committee on law revision, or from a standing bar committee with similar functions in the event there is no committee by that name.

<sup>4</sup> ORS 173.330.

Since its establishment on January 1, 1954,<sup>5</sup> the Legislative Counsel Committee has had, as one of its statutory duties, some responsibility for the conduct of a substantive law revision program.<sup>6</sup> However, with the establishment of a law improvement committee to supervise the program, the role of the Legislative Counsel Committee becomes one that is less directly concerned with the details of the conduct of the program.<sup>7</sup>

Representative C. R. Hoyt, Chairman of the Legislative Counsel Committee, appointed the eight other members of the Law Improvement Committee, and these appointments were

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<sup>5</sup> See ORS 173.110 and section 16, chapter 492, Oregon Laws 1953.

<sup>6</sup> See ORS 173.150 (section 5, chapter 492, Oregon Laws 1953) and 173.155 (section 1, chapter 295, Oregon Laws 1959). ORS 173.155 was repealed by section 1, chapter 292, Oregon Laws 1963 (Regular Session). The substantive law revision duty embodied in ORS 173.150 is not definite, merely requiring the Legislative Counsel Committee to "formulate, supervise and execute plans and methods for . . . the . . . clarification . . . of the Oregon Revised Statutes." ORS 173.155 specifically directed the Legislative Counsel Committee to "exercise its authority under ORS 173.150 to develop and cause to be executed a substantive law revision program." During the 1959-1961 biennium the Legislative Counsel Committee undertook and completed five substantive law revision projects, the results of four of which were embodied in legislation enacted by the 1961 Legislative Assembly, including revisions of laws relating to the legislature and to guardianship and conservatorship.

<sup>7</sup> Of express concern to the Legislative Counsel Committee are: (1) Membership of the law improvement committee (see ORS 173.310); (2) services of personnel and other facilities furnished to the law improvement committee by the Legislative Counsel (see ORS 173.330); and (3) appointment and expenses of advisory committees to assist the law improvement committee (see ORS 173.340). Implicit in the statutes relating to the program (i.e., ORS 173.310 to 173.340), is the exercise by the Legislative Counsel Committee of some measure of budgetary control over the program.

approved by the Legislative Counsel Committee at its meeting on November 13, 1963.<sup>8</sup> At its first meeting on December 20, 1963, the Law Improvement Committee selected Oregon's probate law as the subject of its first substantive law revision project, and authorized its chairman, Mr. Allan G. Carson, to appoint a nine-member advisory committee to assist in the formulation of recommendations and proposed legislation designed to improve Oregon's probate law.<sup>9</sup> On January 20, 1964, Chairman Carson appointed the members of the advisory committee, who are: Judge William L. Dickson, Chairman, Portland; Clifford E. Zollinger, Vice Chairman, Portland; Stanton W. Allison, Portland; Herbert E. Butler, Portland; Wallace P. Carson, Salem; Otto J. Frohnmayer, Medford; R. Thomas Gooding, La Grande; Nicholas Jaureguy, Portland; and William P. Riddlesbarger, Eugene.

Before commencing the main body of this report, which concerns itself with the probate law revision project, it may

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<sup>8</sup> Members of the Law Improvement Committee and their terms, commencing November 13, 1963, are: Senator Harry D. Boivin, Klamath Falls (two years); Allan G. Carson, Chairman, Salem (four years); Gene B. Conklin, Pendleton (two years); Paul E. Geddes, Roseburg (two years); Representative C. R. Hoyt, Corvallis (ex officio member as Chairman of the Legislative Counsel Committee); Senator Donald R. Husband, Eugene (two years); William E. Love, Portland (four years); Norman A. Stoll, Vice Chairman, Portland (four years); and Manley B. Strayer, Portland (four years).

<sup>9</sup> ORS 173.340 authorizes the law improvement committee, subject to approval by the Legislative Counsel Committee, to "appoint such advisory committees as are necessary to assist the law improvement committee in carrying out its functions as provided by law."

be worthwhile at this point to restate, briefly, the nature and objectives of a substantive law revision program.

"Revision" means, simply, change in pre-existing law, and is accomplished by enactment of a finished product by the legislature (as compared with "compilation," which is merely a bringing together of pre-existing statutes under an arrangement designed to facilitate use, with no change in wording).

"Substantive" revision is the process by which the meaning and effect of pre-existing statutes, and in some cases common law principles, are changed so as to accommodate them to changing conditions (as compared with "formal" revision, which deals only with the form and expression of pre-existing statutes, and is carried on for the purpose of producing certainty and conciseness in express and logic in arrangement of pre-existing statutes, so that they may be found readily and, when found, understood easily).

In a sense, much of the legislation enacted from time to time by the Oregon and other state legislatures is in the nature of "substantive revision" as broadly defined. Perhaps what distinguishes a substantive law revision program, as conceived and executed in Oregon and other states with similar programs,<sup>10</sup> is a matter of objectives, as well as emphasis and

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<sup>10</sup> Substantive law revision programs similar in concept to that in Oregon are known to have been established in at least five other states: California, Louisiana, New Jersey, New York and North Carolina. In terms of continuous operation and achievement, as well as inauguration, the New York program, under the New York Law Revision Commission created in 1934, is the pioneer and a recognized leader. See N.Y. Legis. Law §§ 70-72. A more recent arrival on the scene, the California

working procedures. The objectives of the Oregon substantive law revision program appear to be embodied in the statutory recital of some of the duties and powers of the Law Improvement Committee, as follows:

"(1) To examine the Constitution, statutes and common law of the state for the purpose of discovering defects and anachronisms therein and recommending needed reforms.

"(2) To receive and consider suggestions and proposed changes in the law from interested groups and individuals.

"(3) To recommend from time to time such changes in the law as are considered necessary to modify or eliminate antiquated and inequitable rules of law and to bring the law of the state into harmony with modern conditions.

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program, under the California Law Revision Commission created in 1953, shows promise of at least matching the success of the New York program. See Cal. Gov't Code §§ 10300-340. The Louisiana program, under the Louisiana State Law Institute created in 1938, is making a creditable record. See La. Rev. Stat. §§ 24:201-05 (1950). The New Jersey program, under the Law Revision and Legislative Services Commission in existence since 1939, and the North Carolina program, under the General Statutes Commission created in 1945 and assigned substantive law revision functions in 1951, appear to have been less productive than the New York, California and Louisiana programs, or at least less publicized. See N.J. Rev. Stat. §§ 52:11-6 to -31 (Supp. 1954); N.C. Gen. Stat. §§ 164-12 to -19 (1951).

"(4) To report recommendations with respect to changes in the law to the Legislative Assembly and, if considered desirable, to accompany such reports with proposed legislation designed to carry out such recommendations."<sup>11</sup>

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<sup>11</sup> ORS 173.320. Similar duties and powers are assigned to the California Law Revision Commission (Cal. Gov't Code §§ 10330, 10333, 10334); Louisiana State Law Institute (La. Rev. Stat. § 24:204 (1950)); New Jersey Law Revision and Legislative Services Commission (N.J. Rev. Stat. § 52:11-18 (Supp. 1954)); and New York Law Revision Commission (N.Y. Legis. Law §72).

## II. THE OREGON PROBATE LAW

The "probate law" has been selected by the Law Improvement Committee as the subject of its first substantive law revision project. Some preliminary inquiry as to the meaning of the term "probate law" is pertinent to a consideration of the scope of the project.<sup>12</sup>

Webster defines "probate law" as the "law regulating the jurisdiction, rights, powers, and functions of a probate court," and "probate court" as "a court that probates wills and attends to the administration of the estates of deceased persons and that often has additional jurisdiction and powers granted to it by particular statutes in these and related matters."<sup>13</sup> Legal authorities appear to agree that "the real meaning of the word 'probate' is proof, and originally it meant relating to proof, although somewhat later it came to signify relating to proof of wills, but in American law it is now a

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<sup>12</sup> The meanings of "probate court," "probate jurisdiction" and similar terms, as used in the Oregon Constitution, statutes and court decisions, are extremely difficult to determine. See 1 Jaureguy & Love, Oregon Probate Law and Practice §§ 501-18 (1958). Problems in connection with that use of those terms will be encountered in the course of the probate law revision project and may require intensive study. Consideration of these problems is both premature and unnecessary for purposes of this report.

<sup>13</sup> Merriam-Webster Third New International Dictionary 1806 (1961).

general term used to include all matters of which probate courts have jurisdiction."<sup>14</sup>

From 1859, when Oregon achieved statehood, until 1919 the only probate court in this state was the county court.<sup>15</sup> In 1919 and since probate jurisdiction has been transferred from the county court to the circuit court<sup>16</sup> or district court<sup>17</sup> in at least one-half of Oregon's 36 counties. A general idea of the scope of "probate law" may be had from a statute first enacted in 1862 and still in effect, that gives probate court jurisdiction to the county court and itemizes

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<sup>14</sup> 72 C.J.S. Probate 970 (1951). See Ballentine, Law Dictionary 1021 (1930); Black, Law Dictionary 1365 (4th ed. 1951); 3 Bouvier, Law Dictionary 2728 (Rawle's 3d rev. ed. 1914); 34 Words and Phrases, "Probate" 95-98 (1957).

<sup>15</sup> The original Oregon Constitution gave the county court "the jurisdiction pertaining to Probate Courts." Section 12, Article VII (Original), Oregon Constitution. Until adoption of the 1910 amendment of Article VII it appears that this jurisdiction given by the Constitution could not be taken away or enlarged by the legislature; but the scope of this jurisdiction was not clear, nor was it completely exclusive so as to encompass matters related to probate but not truly probate in nature, such as escheat of real property and certain equity matters. One effect of the 1910 amendment of Article VII was to permit the legislature to transfer probate jurisdiction from the county court to other courts. See sections 1 and 2, Article VII (Amended), Oregon Constitution. The first transfer occurred in Multnomah County in 1919, when probate jurisdiction was transferred from the county court to the circuit court pursuant to chapter 59, Oregon Laws 1919. For a comprehensive treatment of the development of the probate court and its jurisdiction in Oregon, see 1 Jaureguy & Love, op. cit. supra note 12, §§ 501-18.

<sup>16</sup> ORS 3.130.

<sup>17</sup> ORS 46.092.

a number of matters included within this jurisdiction. This statute reads:

"County courts having judicial functions shall have exclusive jurisdiction, in the first instance, pertaining to a court of probate; that is, to:

"(1) Take proof of wills.

"(2) Grant and revoke letters testamentary, of administration, of guardianship and of conservatorship.

"(3) Direct and control the conduct, and settle the accounts of executors and administrators.

"(4) Direct the payment of debts and legacies, and the distribution of the estates of intestates.

"(5) Order the sale and disposal of the property of deceased persons.

"(6) Order the renting, sale or other disposal of the property of minors.

"(7) Appoint and remove guardians and conservators, direct and control their conduct and settle their accounts.

"(8) Direct the admeasurement of dower."<sup>18</sup>

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<sup>18</sup> ORS 5.040. The source of this ORS section is a section of an Act of the Legislative Assembly approved October 11, 1862, which became effective June 1, 1863. Section 869, Code of Civil Procedure, Deady's General Laws of Oregon (1845-1864). Only twice have changes been made in the wording of this source. When Oregon Revised Statutes was enacted in 1953 (see chapter 3, Oregon Laws 1953) the statute was adjusted to specify that it was applicable only to county courts having judicial functions and references to "real and personal property" were shortened to "property." ORS 5.040 was amended in 1961 (see section

With the matters specifically mentioned in the statute set forth above as a guide, and with consideration given other related matters, it is reasonable to conclude that the bulk of Oregon's "probate law" may be found in ORS titles 12 (Estates of Decedents) and 13 (Guardianships, Conservatorships and Trusts), composed of 15 ORS chapters.<sup>19</sup> Some "probate law" and related matters can be expected to be found in a large

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95, chapter 344, Oregon Laws 1961) to adjust portions thereof relating to guardianship and to make portions applicable to guardianship also applicable to conservatorship.

- <sup>19</sup> ORS title 12. Estates of Decedents
- Chapter 111. Descent and Distribution (17 sections)
  - Chapter 112. Uniform Simultaneous Death Act (8 sections)
  - Chapter 113. Dower and Curtesy; Election Against Will (42 sections)
  - Chapter 114. Wills (27 sections)
  - Chapter 115. Initiation of Probate and Administration (32 sections)
  - Chapter 116. Administration of Estates (99 sections)
  - Chapter 117. Settlement and Distribution (38 sections)
  - Chapter 118. Inheritance Tax (62 sections)
  - Chapter 119. Gift Tax (41 sections)
  - Chapter 120. Escheat; Estates of Persons Presumed to be Dead (28 sections)
  - Chapter 121. Actions and Suits Affecting Decedents' Estates and Administration (27 sections)
- ORS title 13. Guardianships, Conservatorships and Trusts
- Chapter 126. Guardianships and Conservatorships; Gifts to Minors (110 sections)
  - Chapter 127. Conserving Property of Missing Persons (24 sections)
  - Chapter 128. Trusts; Educational Institution Annuity Agreements (55 sections)
  - Chapter 129. Uniform Principal and Income Act (14 sections)

There is no intention to represent that all of ORS titles 12 and 13 are "probate law" or even related matters. For example, consideration of ORS chapter 119 (Gift Tax) as a part of or related to the "probate law" may border on the unwarranted.

number of statute sections dispersed throughout the five volumes of Oregon Revised Statutes.

Some mention of the history of Oregon's "probate law" and related statutes may be in order, although a detailed consideration of this subject does not appear to be necessary at this point. The results of more comprehensive research on this subject have been amply recorded elsewhere for reference to by those interested.<sup>20</sup>

Historical evidence supports the proposition that the beginnings of organized government in the Oregon territory received some impetus from the occurrence of a probate law problem. In February 1841, Ewing Young, recognized as perhaps the wealthiest American citizen in the territory, died leaving no known will or heirs.<sup>21</sup> At that time there were no laws on descent and distribution, and no officers to probate

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<sup>20</sup> For a study and comment on the sources of Oregon probate and guardianship statutes, see Clark, "Sources of the Oregon Probate and Guardianship Code," 16 Ore. L. Rev. 271 (1937). This article is limited to a consideration of the sources of Title XI, Oregon Code Annotated (1930), which encompasses much of what is now contained in ORS chapters 115, 116, 117, 120, 126 and 127. For reference to the history of certain areas of probate and related law, see 1 Jaureguy & Love, op. cit. supra note 12, § 61 (dower and curtesy), § 202 (escheats), § 244 (wills) and §§ 501-05 (probate courts); 2 Jaureguy & Love, op. cit. supra note 12, § 571 (administration of estates) and § 901 (guardianship). Two discussions of the early (1864 and before) development of Oregon statute law generally, but which include some reference to probate and related law, are Beardsley, "Code Making In Early Oregon," 23 Ore. L. Rev. 22 (1943), and Harris, "History of the Oregon Code" (pts. 1 & 2), 1 Ore. L. Rev. 129, 184 (1922).

<sup>21</sup> Beardsley, supra note 20, at 24; Clark, supra note 20, at 271; Harris, supra note 20, at 132.

a will had there been one. An English Act of Parliament had extended the colonial jurisdiction and civil laws of Canada over English subjects in the territory, but American settlers had refused to be governed by those laws. As early as 1838 the Methodist missionaries had appointed their own magistrate and constable. Following Young's funeral a number of the men in attendance met together and a discussion of the proper disposition of the estate of the deceased led to the broader question of organizing a civil government. On February 18, 1841, a committee to draft a constitution and code of laws and a judge with probate powers, "to act according to the laws of the state of New York,"<sup>22</sup> were appointed. A provisional government ultimately was established in July 1843. Acts of the legislative body of the provisional government adopted certain of the laws of the Iowa territory, including those relating to wills and administration of decedents' estates, and established and governed probate courts. The provisional government was succeeded in March 1850 by the territorial government pursuant to an Act of Congress passed August 14, 1849. In December 1853, and January and February 1854, the territorial legislature enacted a code of laws prepared by a three-member commission and popularly referred to as the Code of 1853. Oregon attained statehood in 1859, and its first codes of laws were drafted by Judge Matthew P. Deady, who also prepared the first compilation of the general laws of the state. The Deady code of civil procedure, which included a considerable body of

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<sup>22</sup> Harris, supra note 20, at 132.

probate and related law, was enacted in 1862. One authority<sup>23</sup> argues that Deady, in preparing his code of civil procedure, used the Code of 1853, but was influenced by the New York civil procedure laws, and that, contrary to some contemporary thought, the Deady code was not based on Iowa laws. Another authority,<sup>24</sup> whose research was limited to the Oregon probate and guardianship statutes, concludes that the probate statutes, having as their source Deady's 1862 code, were derived from similar California statutes, while the guardianship statutes, having as their source the Code of 1853, came from California and Iowa in about equal measure.

Portions of the Oregon probate and related statutes, of course, have been changed by amendment, repeal and addition since their inception, while other portions have remained virtually unchanged. The guardianship statutes, for example, were substantially revised and rewritten by Acts passed in 1947 and 1961.<sup>25</sup> On the other hand, of the 27 statute sections that presently constitute ORS chapter 114 (Wills), 16 have been unchanged since compilation in Deady's General Laws of Oregon (1845-1864).

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<sup>23</sup> Harris, supra note 20, at 210-15.

<sup>24</sup> Clark, supra note 20, at 277. In arriving at his conclusion Clark compared the California, Iowa and New York probate and guardianship statutes in existence at the time of adoption of the Oregon Code of 1853 with the probate and guardianship portions of that code.

<sup>25</sup> Chapter 524, Oregon Laws 1947; chapter 344, Oregon Laws 1961.

### III. PREVIOUS PROBATE REVISION IN OREGON

There have been at least two previous efforts to accomplish a more or less wholesale revision of the Oregon probate statutes, both at the instigation of the organized bar of Oregon and both unsuccessful in the sense that proposed legislation embodying the revisions was not enacted.

In 1919 Judge William McCamant, then President of the Oregon Bar Association,<sup>26</sup> appointed a three-member committee, pursuant to a resolution adopted at the 1918 annual meeting of the association, to prepare and recommend to the legislature a new probate code.<sup>27</sup> The committee prepared a new probate code, consisting of 201 new statute sections replacing then existing statutes equivalent in substance to that of ORS chapters 115, 116, 117, 118, 121 and 126,<sup>28</sup> and embodied it in a report distributed to all members of the association.<sup>29</sup> B. S. Huntington, chairman of the committee, listed the more important modifications of the existing probate code to be made by the revision as follows: (1) Vest probate jurisdiction primarily in the circuit court; (2) make procedure in matters of decedents' estates and guardianship as identical

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<sup>26</sup> The Oregon Bar Association, a voluntary organization, antedated the establishment of the official integrated Oregon State Bar in 1935 pursuant to chapter 28, Oregon Laws 1935.

<sup>27</sup> 1 Ore. L. Rev. 68-69 (1921).

<sup>28</sup> See note 19 *supra*.

<sup>29</sup> 1 Ore. L. Rev. 69 (1921).

as possible; (3) conform to actual practice the statutes relating to keeping probate court records; (4) adjust the procedure to be followed when the State Treasurer is not satisfied with an appraisal of estate assets; (5) simplify realty sale procedure; (6) simplify inheritance tax determination procedure; (7) repeal statutes making next of kin, legatees and heirs liable for debts of a decedent; and (8) make probate conclusive as to claims against a decedent's estate.<sup>30</sup> The committee's report was discussed at length at the postponed 1921 annual meeting of the association in March 1922. Strong objection arose to the committee's recommendation as to vesting probate jurisdiction almost solely in the circuit court. The committee was directed to redraft the revision to overcome this objection, as well as in other particulars.<sup>31</sup> A redrafted version of the revision was introduced at the 1923 session of the legislature as House Bill 36.<sup>32</sup> The bill was considered in detail by the House Committee on Judiciary, which then invoked the legislative rule that bills amending existing statutes be printed to indicate changes in wording. The bill sponsors were unable to comply with this rule, and the bill was returned to the House, where it was indefinitely postponed. At its 1923 annual meeting the bar association resolved that the proposed revision be adjusted to include legislation enacted in 1923 and that it be

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<sup>30</sup> 1 Ore. L. Rev. 40 (1921).

<sup>31</sup> 1 Ore. L. Rev. 160-61 (1922).

<sup>32</sup> 4 Ore. L. Rev. 87-88 (1924).

resubmitted to the 1925 legislature,<sup>33</sup> but the impetus appears to have been blunted since no further record of this revision has been found.

In 1938 Allan G. Carson, then President of the Oregon State Bar, called to the attention of the Bar the need for a new probate code in Oregon.<sup>34</sup> Apparently in response to this call, the Bar Committee on Probate Law and Procedure undertook to consider the probate code with a view to its revision. The committee reported to the 1940 annual meeting of the Bar that it was considering the revision, had obtained a copy of the proposed revision drafted by the Oregon Bar Association committee in the early 1920's and had examined new probate codes recently enacted in other states, and recommended that a new probate code for Oregon be prepared.<sup>35</sup> The 1940 annual meeting approved this recommendation and directed the committee to proceed.<sup>36</sup> By the time of the 1941 annual meeting the committee was involved in a consideration and refinement of a preliminary draft.<sup>37</sup> The committee's report to the 1942 annual meeting contained a draft of a proposed new probate code and a list of the more important changes intended to be accomplished by the revision.<sup>38</sup> The draft consisted of 220 new statute sections replacing then existing statutes equivalent in substance

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<sup>33</sup> 2 Ore. L. Rev. 265 (1923).

<sup>34</sup> Oregon State Bar, 1940 Committee Reports 20 (1940); Oregon State Bar, 1943 Committee Reports 29 (1943).

<sup>35</sup> Oregon State Bar, 1940 Committee Reports 20-22 (1940).

<sup>36</sup> Oregon State Bar, 1943 Committee Reports 29 (1943).

<sup>37</sup> Oregon State Bar, 1941 Committee Reports 32 (1941).

<sup>38</sup> Oregon State Bar, 1942 Committee Reports 34-91 (1942).

to that of ORS chapters 115, 116, 117, 118, 121 and 126,<sup>39</sup> thus encompassing the same general area of probate law as did the revision proposed by the Oregon Bar Association some 20 years previously. The 1942 annual meeting directed that the question of approval of the committee's draft be submitted to the members of the Bar before any recommendation was made to the legislature.<sup>40</sup> The December 1942 issue of the Oregon State Bar Bulletin contained pro and con arguments on the question and a referendum ballot to be marked and returned.<sup>41</sup> The result of the referendum was 210 negative votes and 157 affirmative.<sup>42</sup> Thus, the second effort on the part of the organized bar to accomplish a revision of the probate code was abandoned.

Despite the failure of the organized bar to gain approval and enactment of an overall revision of a large portion of Oregon's probate law, it appears that many of the reforms proposed by the two revisions described above have been accomplished through separate proposals over the years enacted into law, many of which have been recommended by the Bar Committee on Probate Law and Procedure.<sup>43</sup>

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<sup>39</sup> See note 19 supra.

<sup>40</sup> Ore. S. B. Bull., Oct. 1942, p. 4.

<sup>41</sup> Ore. S. B. Bull., Dec. 1942, pp. 3, 6.

<sup>42</sup> Ore. S. B. Bull., Jan. 1943, p. 1; Oregon State Bar, 1943 Committee Reports 29 (1943).

<sup>43</sup> A comparison of recommendations by the Bar Committee on Probate Law and Procedure in its annual reports in 1940 and since with legislation introduced and enacted during this period lends support to this conclusion.

Two revisions of that portion of the probate law pertaining to guardianship have been favorably accepted and enacted into law. In 1947 the Oregon legislature enacted a guardianship law revision consisting of 41 new statute sections replacing <sup>44</sup> then existing sections. This revision combined existing separate provisions on appointment of guardians for different categories of ward, rewrote other guardianship provisions and added provisions on conservatorship.<sup>45</sup>

The statutes relating to guardianship and conservatorship were again revised by legislation enacted in 1961.<sup>46</sup> This legislation was the end product of a substantive law revision project undertaken by the Legislative Counsel Committee during the 1959-1961 biennium, with the invaluable assistance of an advisory committee composed of members of the bench and bar experienced and knowledgeable in the subject matter.<sup>47</sup>

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<sup>44</sup> Chapter 524, Oregon Laws 1947.

<sup>45</sup> The conservatorship statutes were rewritten in 1951. Chapter 520, Oregon Laws 1951.

<sup>46</sup> Chapter 344, Oregon Laws 1961.

<sup>47</sup> Members of the guardianship and conservatorship advisory committee were: Judge William L. Dickson, Chairman, Portland; Nicholas Jaureguy, Vice Chairman, Portland; Allan G. Carson, Salem; Senator Donald R. Husband, Eugene; Representative George H. Layman, Newberg; Senator (subsequently Judge) Jean L. Lewis, Portland; Judge Robert D. Maclean, Newport; and Clifford E. Zollinger, Portland.

This advisory committee began its deliberations in June 1960 with a section-by-section analysis of the existing Oregon statute law relating to guardianship and conservatorship, considering, in respect to each section, the suggestions by committee members and those received from others, the provisions of the Model Probate Code (prepared by a committee of the American Bar Association in cooperation with the research staff of the University of Michigan Law School), available literature on the subject and pertinent laws of other states. The form and content of each section and its relation to

The revision consisted of 96 new statute sections replacing 68 then existing sections and amendment of 11 then existing sections.<sup>48</sup>

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other provisions of the guardianship and conservatorship law were examined critically, with careful attention to detail, applying to each section the combined practical experience of committee members to test its soundness and value.

Following the section-by-section analysis, a rough draft of a bill incorporating the decisions of the committee was prepared. This draft was hammered into shape for introduction at the 1961 session of the legislature by minute examination of its provisions by the committee and adjustment where considered necessary or desirable.

<sup>48</sup> The advisory committee (see note 47, supra) found the existing Oregon statute law relating to guardianship and conservatorship to contain many ambiguous provisions. In some instances it was silent on important phases of guardianship and conservatorship. It contained some provisions that were inadequate and others that were just poor law. The legislation enacted strove to clarify ambiguities, to fill gaps, to repair inadequacies and to improve poor law. It authorized a guardian, subject to court control, to do things that formerly he either could not do (but should) or his authority to do was uncertain. On the other side of the scale, it attempted in better fashion to fix and clarify a guardian's responsibility to his ward.

#### IV. RECENT PROBATE REVISION IN OTHER STATES

In the past 20 years there have been revisions of the probate law, or substantial portions thereon, in at least seven other states. Since 1960 probate law revision projects have been undertaken in at least three other states, apparently now abandoned in one of these but currently being prosecuted in the other two. Some reference to these probate law revisions and projects in other states should prove instructive in the process of carrying on probate law revision in Oregon, as sources of ideas both as to the substance of probate law and as to procedures to be used in prosecuting the Oregon project.

##### A. Iowa.

The most recent revision of probate law in another state was enacted by the Iowa legislature in 1963, and became effective January 1, 1964.<sup>49</sup> The 1963 Iowa Probate Code contains 489 new statute sections in 15 divisions, as follows: (1) Introduction and Definitions, (2) Probate Court, Clerk of Probate Court and Procedure in Probate, (3) General Provisions Relating to Fiduciaries, (4) Intestate Succession, (5) Rights of Surviving Spouse, (6) Wills, (7) Administration of Estates of Decedents, (8) Foreign Wills and Ancillary Administration, (9) Estates of Absentees, (10) Uniform Simultaneous Death Act,

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<sup>49</sup> Iowa Acts 1963, ch. 326.

(11) Felonious Death, (12) Proceedings for Escheat, (13) Opening Guardianships and Conservatorships, (14) Administration of Guardianships and Conservatorships, and (15) Trusts.

The Iowa revision was the product of a project undertaken by a Special Committee on Probate Law of the Iowa State Bar Association.<sup>50</sup> This committee, consisting of 22 members, was appointed in June 1958, and held its first meeting in September of the same year. Upon beginning its work the committee apparently had little thought of entering on so extensive a revision as was embodied in the final product. The committee divided into five subcommittees for a two and one-half year study of the law relating to decedents' estates, then redivided into three subcommittees (i.e., drafting, guardianship and testamentary trusts) for work during the following two years. Early in 1962 a draft was submitted to a committee of the Iowa District Judges Association, which studied the draft and then spent a day with the drafting subcommittee of the bar committee discussing, debating and arriving at an approved draft. West Publishing Company of St. Paul, Minnesota, printed the approved draft in the form of a booklet that was distributed to all judges and lawyers in Iowa. Thereafter, the bar committee devoted a week in April 1962 to a statewide bus tour, holding all-day area meetings with judges, lawyers and court clerks in five cities. These meetings resulted in securing for the revision the study and indorsement of more

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<sup>50</sup> West Publishing Co., 1963 Iowa Probate Code at ix-xiii (1963).

than 1,000 of those persons best qualified to understand and evaluate the work and the need for it. The draft was submitted to two of the leading American authorities on the subject, Professors Lewis M. Simes and Paul E. Basye, who made valuable suggestions and praised the work as a whole.

The Iowa State Bar Association, acting through its Board of Governors, approved the revision and recommended it to the 1963 Iowa legislature for adoption. It appears that the Model Probate Code served as a principal source of ideas for deviation from existing Iowa probate statutes by the revision. Also, some credit is given to the Oregon guardianship and conservatorship revision enacted in this state in 1961<sup>51</sup> as being helpful in the formulation of that part of the Iowa revision pertaining to this subject.

#### B. Missouri.

In 1955 the Missouri legislature enacted a new probate code for that state.<sup>52</sup> It was drafted under the supervision of a joint legislative committee, consisting of five senators and seven representatives, created in 1953, and with the assistance of an 11-member advisory committee of probate judges and lawyers.<sup>53</sup> After enactment in 1955 the operation of the

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<sup>51</sup> See pp. 18-19 & notes 46-48 supra.

<sup>52</sup> Mo. Laws 1955, at 385; see Mo. Rev. Stat. chs. 472-75 (1959).

<sup>53</sup> Joint Probate Laws Revision Committee, Final Report at vii-viii (1955); City National Bank & Trust Co. of Kansas City, Mo., Probate Code and Forms 3-4 (1958).

new Missouri probate code was studied by a special committee of the St. Louis Bar Association, which consulted with the Missouri Probate Judges' Association, and a considerable number of changes proposed as a result of this study, affecting 50 of the code's 355 sections, were enacted in 1957 by the Missouri legislature. The Missouri revision embraced both substantive and procedural aspects of the laws pertaining to wills, administration, descent and distribution, marital rights in property and guardianship. It was represented as primarily a revision and restatement of existing Missouri statutes and case law, with such changes necessary to correct defects. The Model Probate Code was used as a guide as to arrangement, and to some extent as a source of substantive ideas. Probate laws recently adopted in other states, particularly Arkansas, Florida, Illinois, Indiana, Kansas and Michigan, were referred to, and borrowed from in a few instances.

#### C. Texas.

A new probate code was enacted by the Texas legislature in 1955.<sup>54</sup> Work on the new code was begun in 1944 by the State Bar Committee on Real Estate, Probate and Trust Law, which had recommended in an annual report that the entire probate law be completely revised.<sup>55</sup> The bar committee's

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<sup>54</sup> Tex. Laws 1955, ch. 55; see Tex. Prob. Code (1956).

<sup>55</sup> Moorhead, Foreward to Probate Code, 17A Tex. Prob. Code Ann. at iii-vii (1956).

work proceeded on an intermittent basis for several years, a first draft being produced in 1947 and a second draft in 1950. The tempo of the project increased in 1952 when the Texas Civil Judicial Council appointed a committee to work with the bar committee and the Trust Section of the Texas Bankers Association. This collaboration, with the assistance of others, produced a third draft in 1952 and a fourth in 1953. The latter draft was embodied in a bill introduced at the 1953 session of the Texas legislature. This bill passed the Senate but died in the House. Additional drafts were produced during the period 1953-1955, and the last draft was introduced and passed at the 1955 legislative session.

The goal of the Texas probate revision was represented to be elimination of conflicts in existing law, filling of gaps, modernization of some language and solution of problem sections. The statement was made that 95 percent of the new code consisted of reenactment of former statutes in identical language, but rearranged in a more logical order. Nevertheless, there is some evidence of resort to the Model Probate Code for ideas in a few instances.

#### D. North Carolina.

Revisions of portions of the North Carolina probate law were enacted in 1953 (wills)<sup>56</sup> and 1959 (intestate succession).<sup>57</sup>

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<sup>56</sup> N.C. Sess. Laws 1953, ch. 1098; see N.C. Gen. Stat. ch. 31 (Supp. 1961).

<sup>57</sup> N.C. Sess. Laws 1959, ch. 879; see N.C. Gen. Stat. ch. 29 (Supp. 1961).

The revision of intestate succession law was the product of a special drafting committee, consisting of three law school professors, working under the General Statutes Commission.<sup>58</sup> The 1957 legislature appropriated \$2,500 to the commission for purposes of studying the subject, and the work was begun late in 1957. Among other aids, the Model Probate Code was drawn upon.

E. Indiana.

In 1953 a new probate code was enacted in Indiana.<sup>59</sup> The code was prepared by the Indiana Probate Code Study Commission, appointed by the Governor pursuant to joint resolutions adopted by the legislature in 1949 and 1951, in concert with the Probate Code Committee of the Indiana State Bar Association. The Model Probate Code was used as an aid in preparation of the Indiana code.

F. Arkansas.

A revised Arkansas probate code was enacted by the legislature of that state in 1949.<sup>60</sup> It was prepared by a committee of the Arkansas State Bar Association, which commenced its work in 1939. The scope of the revision embodied in the 1949 code appears to be limited to procedural and remedial aspects of probate law, with little change in the substantive law of wills and administration, descent and

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<sup>58</sup> McCall, "North Carolina's New Intestate Succession Act," 39 N.C.L. Rev. 1 (1960).

<sup>59</sup> Ind. Acts 1953, ch. 112; see Ind. Ann. Stat. tit. 6-8 (1953).

<sup>60</sup> Ark. Acts 1949, No. 140; see Ark. Stat. Ann. tit. 57, 60-63 (Supp. 1961).

distribution and dower. No evidence of resort to the Model Probate Code in the course of the revision has been found.

#### G. Pennsylvania.

A revision of Pennsylvania's probate law was accomplished in 1947 and 1949 through several enactments by the state legislature. Acts relating to intestate succession, wills, estates and principal and income were adopted in 1947, and Acts on fiduciaries and investment by fiduciaries in 1949.<sup>61</sup> The revision work was directed and supervised by the Joint State Government Commission pursuant to a resolution adopted by the 1945 legislature. A special committee was appointed in July 1945 to concentrate on the project, and this committee was assisted by a 32-member advisory group consisting of judges, lawyers and trust company executives. The Model Probate Code was used as one of several sources of aid.

#### H. Alaska.

A probate law revision project undertaken recently in Alaska failed to result in an enactment by the legislature. In 1960 the Alaska legislature directed the Legislative Council to prepare a revised probate code and submit it at the 1961 session.<sup>62</sup> The council proceeded in accordance with this

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<sup>61</sup> Pa. Laws 1947, No. 37 (intestate succession); Pa. Laws 1947, No. 38 (wills); Pa. Laws 1947, No. 39 (estates); Pa. Laws 1947, No. 516 (principal and income); Pa. Laws 1949, No. 121 (fiduciaries); Pa. Laws 1949, No. 544 (investment by fiduciaries); see Pa. Stat. Ann. tit. 20 (1950).

<sup>62</sup> Preface to Alaska Legislative Council, Study on the Proposed Alaska Probate Code (1961).

directive, and in May 1960 a committee of the Alaska Bar Association, previously appointed to study the subject, was reconstituted to work with the council staff. Initial drafts were prepared and distributed to the Bar committee, judges and lawyers. A final version of the revision was completed in late 1960 and embodied in a bill introduced at the 1961 legislative session.<sup>63</sup> The revision encompassed wills, descent and distribution, administration of estates and guardianship. The Model Probate Code was used to a considerable extent. However, the bill failed to pass.

#### I. New York.

In New York a Temporary State Commission on the Modernization, Revision and Simplification of the Law of Estates was created in 1961<sup>64</sup> and its existence extended in 1963,<sup>65</sup> for the purpose of making a comprehensive study of relevant provisions of real and personal property law, decedent estate law, surrogates court law and other statutes in order to correct defects in laws relating to estates and their administration, descent and distribution of property, practice and procedure relating thereto, and to modernize, simplify and improve such law and practice. The commission consists of 14 members appointed by the presiding officers of the two

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<sup>63</sup> Senate Bill 4, 2d Alaska Legislature, 2d Sess. (1961).

<sup>64</sup> N.Y. Sess. Laws 1961, ch. 731.

<sup>65</sup> N.Y. Sess. Laws 1963, ch. 78.

houses of the New York legislature and the Governor, and seven ex officio members who are legislators.<sup>66</sup>

Faced first with a consideration of whether to engage in a bulk revision to be incorporated in a single package of proposed legislation or to proceed area by area and submit separate revision proposals for each area, the New York commission chose the latter course. An extensive program to ascertain problem areas was initiated in 1961. This program included:

(1) Establishment of an advisory committee in each of New York's 11 judicial districts. Members of the advisory committees, in number ranging from 17 to 69, include surrogates, legislators, representatives of national, state and local bar associations chosen from their trust and estate law committees, outstanding lawyers, tax and estate planners, trust company officials, law school professors, life insurance attorneys and title company representatives. Also, a 25-member advisory committee was appointed by the New York State Bar Association.

(2) Informal hearings with representatives of interested groups and public hearings were held by the commission.

(3) Bills introduced in the New York legislature in the preceding five years were examined.

(4) State legislators were contacted and their suggestions solicited.

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<sup>66</sup> N.Y. Temporary State Comm'n on the Modernization, Revision and Simplification of the Law of Estates, First Report (1962); N.Y. Temporary State Comm'n on the Modernization, Revision and Simplification of the Law of Estates, Second Report (1963).

(5) Liaison with legislative committees and state agencies with estates law responsibilities was established for purposes of cooperation, as was liaison with the Surrogates' Association of the State of New York.

(6) Material relating to estates law produced by the New York Law Revision Commission was obtained.

(7) All bar associations, the deans of law schools and many statewide professional associations in New York were contacted and their cooperation requested.

(8) Appearances by commission members and its counsel before various conventions and associations to explain commission purposes and request suggestions were made.

(9) Text for radio announcements requesting suggestions from the general public was prepared and circulated among various broadcasting stations.

As a result of the program outlined above the commission in late 1961 evolved seven general subject areas for current study: Family rights, small estates, probate practice, jurisdiction of parties, estate administration, trust administration and accounting proceedings. Research work on these subject areas was commenced, which included reference to court decisions, statutes, uniform laws, restatements, law reviews, legal studies and periodicals, New York Law Revision Commission studies, textbooks, legal encyclopedias, proposed legislation, New York Legislative Reference Library material, laws and practice in other states and countries and reports and studies of state legislative committees and administrative agencies.

In 1962 the commission continued to hold informal hearings with representatives of interested groups. A research analysis and partial statutory outline were developed. Forty-six staff reports covering a wide variety of subjects in the seven general subject areas were completed or in process. An additional general subject area (i.e., codification of statutes) was designated. Sixteen bills were introduced at the 1963 session of the New York legislature.

Commission procedure appears to follow this pattern:

(1) A subject in one of the designated general areas is assigned to particular members of the commission with responsibility in that area; (2) a staff report on the subject is prepared; (3) the staff report is considered by the full committee and circulated among the advisory committees for their comments; (4) the report is revised and a bill is prepared and discussed by the commission; and (5) the commission makes a recommendation to the legislature, accompanied by proposed legislation, a legislative note and the final version of the report.

That the New York revision program is a large-scale operation is evidenced by the number and size of the advisory committees previously referred to, by the commission staff of 16 counsel and four administrative assistants, by 14 research counsel (i.e., law school professors) who assist the commission on a contract basis and by an annual commission budget of a quarter million dollars.

J. Wisconsin.

A Probate Study Committee of the Wisconsin Bar Association commenced work on a revision of that state's probate law in January 1963. The probate project is part of a package undertaken by the bar association; other subjects are estates, trusts and powers, landlord and tenant and conveyancing. Research and drafting services on the package are currently being performed by a Wisconsin University Law School professor. Approximately \$25,000, made available by the bar association, was expended in 1963 on the package.

Through August 1963 the probate committee had held seven meetings. Tentative drafts on wills and intestate succession were prepared, as well as studies on the problems of rights of surviving spouse and exemptions from creditor claims. The matter of will substitutes (i.e., joint tenancies, living trusts, insurance, pension plans) was given consideration. The committee appears to have concluded that a thorough overhaul of all Wisconsin probate statutes is needed, but that more time and money will be required to accomplish this.

## V. UNIFORM AND MODEL ACTS

Over the years the National Conference of Commissioners on Uniform State Laws has promulgated a considerable number of uniform and model Acts that pertain, in whole or in part, to probate and related matters. In prosecuting a revision of Oregon's probate law it appears reasonable to consider some of these Acts with a view to their adoption or, at least, a source of ideas for adaptation in a new state probate code. Through 1962 some of these Acts, the date of their promulgation by the National Conference and the number of jurisdictions having enacted them are:<sup>67</sup>

| <u>Name of Act</u>   | <u>Year Promulgated</u> | <u>Number of jurisdictions enacting</u> |
|--|-------------------------|---|
| Absence as Evidence of Death and Absentees' Property Act             | 1939                    | 3                                       |
| Act Governing Secured Creditors Dividends in Liquidation Proceedings | 1939                    | 5                                       |
| Ancillary Administration of Estates Act as Amended                   | 1953                    | 1                                       |
| Death Tax Credit Act   | 1961                    | 0                                       |
| Estate Tax Apportionment Act   | 1958                    | 2                                       |
| Execution of Wills Act   | 1940                    | 1                                       |
| Fiduciaries Act  | 1922                    | 25                                      |
| Gifts to Minors Act  | 1956                    | 47                                      |
| Interstate Arbitration of Death Taxes Act                            | 1943                    | 14                                      |
| Interstate Compromise of Death Taxes Act                             | 1943                    | 17                                      |
| Joint Obligations Act  | 1925                    | 5                                       |
| Partnership Act  | 1914                    | 40                                      |
| Powers of Foreign Representatives Act                                | 1944                    | 0                                       |

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<sup>67</sup> National Conference of Commissioners on Uniform State Laws, Handbook 341-44 (1962).

| <u>Name of Act</u>                                     | <u>Year Promulgated</u> | <u>Number of jurisdictions enacting</u> |
|--|-------------------------|---|
| Principal and Income Act                               | 1931                    | 24                                      |
| Amendments   | 1958                    | 3                                       |
| Revised  | 1962                    | 0                                       |
| Probate of Foreign Wills Act                           | 1950                    | 2                                       |
| Property Act   | 1938                    | 1                                       |
| Reciprocal Transfer Tax Act                            | 1928                    | 21                                      |
| Simplification of Fiduciary Security Transfers, Act on | 1958                    | 35                                      |
| Simultaneous Death Act                                 | 1940                    | 44                                      |
| As Amended   | 1953                    | 9                                       |
| Small Estates Act                                      | 1951                    | 2                                       |
| Testamentary Additions to Trusts Act                   | 1960                    | 10                                      |
| Trustees' Accounting Act                               | 1937                    | 3                                       |
| Trusts Act   | 1937                    | 7                                       |
| Veterans' Guardianship Act                             | 1942                    | 28                                      |
| War Service Validation Act                             | 1944                    | 1                                       |

Of the Acts listed above, the following have been enacted in Oregon: Gifts to Minors Act,<sup>68</sup> Partnership Act,<sup>69</sup> Principal and Income Act<sup>70</sup> and Simultaneous Death Act.<sup>71</sup> Acts introduced at Oregon legislative sessions in 1941 and since that have failed to pass are: Absence as Evidence of Death and Absentees' Property Act,<sup>72</sup> Ancillary Administration of Estates Act,<sup>73</sup> Probate of Foreign Wills Act<sup>74</sup> and Veterans' Guardianship Act.<sup>75</sup>

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<sup>68</sup> ORS 126.805 to 126.880; enacted, with modifications, in 1959.

<sup>69</sup> ORS chapter 68; enacted in 1939.

<sup>70</sup> ORS chapter 129; enacted, with modifications, in 1931.

<sup>71</sup> ORS chapter 112; enacted in 1947.

<sup>72</sup> House Bill 45, 41st Oregon Legislative Assembly (1941).

<sup>73</sup> Senate Bill 139, 46th Oregon Legislative Assembly (1951).

<sup>74</sup> Senate Bill 135, 46th Oregon Legislative Assembly (1951).

<sup>75</sup> Senate Bill 98, 47th Oregon Legislative Assembly (1953); House Bill 78, 48th Oregon Legislative Assembly (1955); Senate Bill 73, 48th Oregon Legislative Assembly (1955).

The Oregon State Bar Committee on Probate Law and Procedure from time to time has studied and, in some instances, made recommendations concerning some of the Acts listed above. These are: Ancillary Administration of Estates Act,<sup>76</sup> Execution of Wills Act,<sup>77</sup> Gifts to Minors Act,<sup>78</sup> Powers of Foreign Representatives Act,<sup>79</sup> Probate of Foreign Wills Act,<sup>80</sup> Small Estates Act,<sup>81</sup> Simultaneous Death Act,<sup>82</sup> Trustees' Accounting Act<sup>83</sup> and Veterans' Guardianship Act.<sup>84</sup>

Previously in this report a number of references have been made to the Model Probate Code. This code is not one of those Acts that have been promulgated by the National Conference of Commissioners on Uniform State Laws. Rather, it was prepared for the Probate Law Division of the Section of Real Property, Probate and Trust Law of the American Bar Association by the Division's Model Probate Code Committee in cooperation with the Research Staff of the University of Michigan

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<sup>76</sup> Oregon State Bar, 1948 Committee Reports 52-53 (1948); Oregon State Bar, 1954 Committee Reports 25 (1954); Oregon State Bar, 1958 Committee Reports 47 (1958).

<sup>77</sup> Oregon State Bar, 1942 Committee Reports 34, 36, 89-90 (1942); Oregon State Bar, 1943 Committee Reports 34-35 (1943).

<sup>78</sup> Oregon State Bar, 1956 Committee Reports 44 (1956); Oregon State Bar, 1958 Committee Reports 47 (1958).

<sup>79</sup> Oregon State Bar, 1954 Committee Reports 25 (1954).

<sup>80</sup> Ibid.

<sup>81</sup> Oregon State Bar, 1954 Committee Reports 25 (1954); Oregon State Bar, 1955 Committee Reports 40-41 (1955); Oregon State Bar, 1956 Committee Reports 44, 46-47 (1956).

<sup>82</sup> Oregon State Bar, 1942 Committee Reports 34, 36, 91 (1942); Oregon State Bar, 1943 Committee Reports 36 (1943).

<sup>83</sup> Oregon State Bar, 1956 Committee Reports 44 (1956).

<sup>84</sup> Oregon State Bar, 1948 Committee Reports 52 (1948).

Law School. The code, with comments on the provisions thereof and monographs on problems in probate law prepared by two of the principal draftsmen of the code, were published in 1946.<sup>85</sup>

Impetus for the undertaking of the drafting of the Model Probate Code was provided by a series of articles by Professor Thomas E. Atkinson on probate courts and procedure published in the Journal of the American Judicature Society in 1939 and 1940.<sup>86</sup> Also, a movement for probate reform had been in progress for several years, with new probate codes having been adopted in at least eight states,<sup>87</sup> and revision work underway in a number of other states.

At the 1940 meeting of the American Bar Association the Section of Real Property, Probate and Trust Law proposed a Model Probate Code, and a committee was appointed to engage in the project. The initial work of the Section's committee, with the assistance of advisory groups appointed by the state bar associations of many states, was preparation of a list of proposed general headings of matters to be included in a Model Probate Code and an order of classification. This initial work was completed in 1941. Faced with the familiar problem of finding persons able to devote the time necessary

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<sup>85</sup> Simes, Problems In Probate Law (1946).

<sup>86</sup> See Id. at v-x, 5-8.

<sup>87</sup> Cal. Stat. 1931, ch. 281; Fla. Laws 1933, ch. 16103; Ill. Laws 1939, at 4; Kan. Laws 1939, ch. 180; Mich. Pub. Acts 1939, No. 288; Minn. Laws 1935, ch. 72; Nev. Stat. 1941, ch. 107; Ohio Laws 1931, at 320.

to perform research and drafting services, the Section's committee achieved a satisfactory solution by an agreement in 1942 with the University of Michigan Law School, which was carrying on a number of legal research projects. A subcommittee on drafting was established, consisting of R. G. Patton, Chairman of the Section's committee, Professor Lewis M. Simes, Professor Atkinson and Paul E. Basye. The project procedure followed this general plan: Probate statutes of various states were read and classified, memoranda were prepared on more difficult points, monographs on some of the most basic topics were written, preliminary drafts were prepared and distributed, conferences were held at which 10 tentative drafts were criticized and revised and many recognized experts were consulted and furnished advice and assistance.

The stated objective of the Model Probate Code is improvement of probate procedure wherever revision is sought, rather than attainment of uniformity among the several states.<sup>88</sup> It is apparently intended as a reservoir of ideas and of acceptable legislative formulations of those ideas, from which draftsmen and policy-makers may draw in the preparation of new probate codes.

Almost 20 years have elapsed since the Model Probate Code was drafted, and there is considerable evidence that it has served its intended objective. However, with the passage of time it perhaps is inevitable that new ideas not embodied in

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<sup>88</sup> Simes, *op. cit.* supra note 85, at 10.

the code, as well as modifications of old ideas contained therein, should have been developed and advanced.

At the 1962 mid-year meeting of the Executive Committee of the National Conference of Commissioners on Uniform State Laws, the Subcommittee on Scope and Program reported that it had been contacted by an officer of the Section of Real Property, Probate and Trust Law of the American Bar Association who indicated the interest of the Section in review and revision of the Model Probate Code and inquired as to the views of the National Conference on aiming this review and revision more in the direction of achieving some uniformity among the states with respect to probate law. The Subcommittee further reported that it believed at least some portions of the code were appropriate for adoption in much the same manner as uniform Acts and that the project of review and revision of the code would be worthwhile. The Executive Committee authorized appointment of a special committee to study the matter of undertaking the project and investigate ways and means of obtaining research services necessary therefor.

At its August 1963 meeting the National Conference approved going ahead with preparation of a uniform probate code, and considered a first tentative draft of two portions (i.e., intestate succession and simultaneous death) of such a code. In April 1963, and again during the National Conference meeting in August of that year, the Conference's Special Committee on Uniform Probate Code met jointly with the Special Committee on Revision of Model Probate Code of the ABA

Section of Real Property, Probate and Trust Law and discussed the project of a uniform or revised model probate code. The two special committees agreed on several points in connection with the project, which were: (1) There is a need for the project; (2) the project will be a long-term one extending over a period of 5 to 10 years, quality being more important than speed; (3) probate law revision projects in individual states, such as the one currently underway in New York, should not deter the joint project of the committees; (4) the two committees will coordinate their efforts and cooperate in every phase so as to make the project a true joint venture; (5) ABA members, experienced and knowledgeable in the subject area, should be utilized to evaluate portions of the proposed new code; and (6) during the ensuing year consideration would be given to the financing required for the project, some portions of the proposed new code would be prepared for review in 1964, drafting responsibilities would be assigned, research papers would be exchanged and members of both committees would complete a 246-item questionnaire on the Model Probate Code promulgated in 1946.

VI. THE OREGON PROBATE PROJECT -- THOUGHTS ON PROCEDURE  
AND STAFF

In authorizing the appointment of an advisory committee to assist in the formulation of recommendations and proposed legislation designed to improve Oregon's probate law, the Law Improvement Committee did not define in detail the role of the advisory committee nor establish any specific guidelines for it to follow, except to indicate that the advisory committee was "to operate in the same manner as the advisory committee had worked in connection with the guardianship law revision program."<sup>89</sup> The work of the guardianship and conservatorship advisory committee in 1960 and early 1961 has been referred to previously.<sup>90</sup> Three members of the current probate advisory committee were members of that guardianship and conservatorship advisory group,<sup>91</sup> and they may recall the manner in which that group proceeded. Those procedures may or may not be appropriate for prosecution of the probate law revision project.

It appears that, unless the Law Improvement Committee undertakes to supply additional instructions, the procedures to be employed by the probate advisory committee are to be

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<sup>89</sup> Law Improvement Committee, Minutes of Meeting, December 20, 1963, at 2.

<sup>90</sup> See p. 18 & note 47 supra.

<sup>91</sup> Judge William L. Dickson, Portland; Nicholas Jaureguy, Portland; and Clifford E. Zollinger, Portland.

within the discretion of that committee. While it is certainly not the intention of this report in any way to attempt to usurp the exercise of this discretion on the part of the advisory committee, your staff believes it is part of its duty to bring to your attention a few thoughts on procedure that might be followed and on the role staff will be able to play in assisting you.

The probate advisory committee will be faced, perhaps initially but at least at some point in the course of its deliberations, with the task of defining the scope of the probate law revision project. Some space in this report has already been devoted to an inquiry into the meaning of the term "probate law,"<sup>92</sup> and reference to Oregon statutes which appear to encompass the bulk of Oregon's "probate law" has been made.<sup>93</sup> One question for consideration may be whether the scope of the project should be limited to the procedural aspects of probate (i.e., matters relating to the administration of estates of decedents and wards), or whether it should encompass related substantive law (e.g., intestate succession and will-making formalities). Another question may be the extent to which the Oregon guardianship and conservatorship statutes should be re-examined in view of the complete

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<sup>92</sup> See pp. 7-9 & notes 12-18 supra.

<sup>93</sup> See p. 10 & note 19 supra.

revision thereof enacted in 1961.<sup>94</sup>

The probate project, even if its scope is limited to some extent, appears to be one of considerable magnitude. To hope to complete the project in time for submission of recommendations and proposed legislation to the Legislative Assembly at its regular session in 1965 no doubt is vain. Indeed, the Law Improvement Committee appears to have recognized that the project is a long-term one to be completed, at best, in time for consideration by the 1967 Oregon legislature. In view of this characteristic of the project the advisory committee may wish to give thought to the question of submitting a proposed revision of the probate law in segments or as a complete package.

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<sup>94</sup> See pp. 18-19 & notes 46-48 supra. In August 1962 the staff of the Legislative Counsel Committee undertook, with the committee's approval, an evaluation of the revised guardianship and conservatorship statutes enacted in 1961 and effective January 1, 1962. This evaluation was in the nature of a follow through, and its purpose was to determine whether the new statutes were having the effect intended; that is, improvement of practice and procedure as to guardianship and conservatorship matters. Such a follow through, by the way, would appear to be an important aspect of a continuous substantive law revision program. As a part of the evaluation project a letter and a reply form were sent to all probate judges in Oregon. Responses were received from 18 of the 46 probate judges thus contacted, and the reaction to the new statutes indicated by these responses was almost unanimously favorable. However, suggestions for improvement of the new statutes were offered by six of the responding probate judges. The evaluation project was reported in the August 1962 issue of the Oregon State Bar Bulletin, together with a request that members of the Bar who had had experience with the new statutes send in their comments and suggestions. Three attorneys answered this request with suggestions for improvement of the new statutes. Unfortunately, because of the press of other business the evaluation project was not completed and, in effect, is still pending.

Despite the form of submission to the legislature, it appears that the work of the advisory committee necessarily may need to be segmented according to defined segments that make up Oregon's probate law. Perhaps the possibility of subcommittees and use of more than one research assistant in order to facilitate work on more than one segment at the same time should be explored. The advisory committee may wish to establish some kind of time schedule for completion of various phases of the project.

Notwithstanding the scope of the probate law revision project and its anticipated length of time in progress before completion, or perhaps because of these factors, it is quite likely that the Law Improvement Committee will expect progress reports from time to time from the advisory committee. It is quite likely also that the Law Improvement Committee will wish to submit at least a progress report on the project to the 1965 Oregon legislature.

Many other questions relating to its procedures will arise for consideration and decision by the advisory committee in the course of performance of its assigned task. For example, should meetings of the committee be scheduled on a regular basis or held on call of the chairman when in his opinion a sufficient agenda is ready for committee action? Should the advisory committee hold informal meetings with invited representatives of interested groups or interested individuals for the purpose of soliciting suggestions or reviewing tentative drafts? Should the committee hold public meetings for the same

purposes? What sort of liaison should be established and consultation engaged in with appropriate committees of the Oregon State Bar, Oregon probate judges, probate court clerks, state and local governmental agencies concerned with probate matters and others? You may wish to consider that kind of services and facilities you will require to assist you in performing your task; that is, what kind of research and bill drafting services, what kind of services of an administrative nature, what basic reference materials and so forth.

Some mention should be made of the capacity of the staff of the Legislative Counsel's office to furnish assistance to the advisory committee. By law the Legislative Counsel, subject to approval by the Legislative Counsel Committee, is to furnish to the Law Improvement Committee, and, inferentially, to advisory committees thereof, the services of personnel and other facilities necessary to enable the Law Improvement Committee to carry out its functions.<sup>95</sup> However, the resources of the Legislative Counsel are not only limited but spread quite thinly over the program of several services which he is required to perform. At the present time one member of the Legislative Counsel's staff (i.e., the writer of this report) is assigned to assist the advisory committee on the probate law revision project. It is likely that the level of assistance furnished by the Legislative Counsel will

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<sup>95</sup> ORS 173.330.

fluctuate from time to time. At times perhaps more than one staff member may be available; at others (during a legislative session, for example), perhaps the Legislative Counsel will be unable to furnish assistance. This circumstance may make it desirable for the advisory committee to look for some kinds of staff assistance from other quarters. Perhaps some attorney or law school faculty member could be induced to volunteer his services to perform some small part of the research or other background work necessary in the prosecution of the project. The word "volunteer" is used in the sense of a willing offer without expectation of remuneration. The current budget for the probate project is limited to whatever the Legislative Counsel Committee is able to make available out of its budget established by the Legislative Assembly for the 1963-1965 biennium, and this, for practical purposes and unless the Legislative Counsel Committee affirmatively directs otherwise, more or less means services and facilities furnished directly by the Legislative Counsel. As a matter of fact, at the present time no moneys have been budgeted for payment of the individual expenses of members of the advisory committee itself.

In addition to preparation of this report, the Legislative Counsel's office has been engaged, since designation of probate law as the subject of a substantive law revision project by the Law Improvement Committee in December 1963, in gathering certain materials that may prove helpful to the advisory committee and in performing certain other tasks of a preliminary nature.

The comments and suggestions of persons whose work or interests bring them into contact with probate law will be helpful, if not essential, in the prosecution of the probate law revision project. There are a number of ways available to solicit these comments and suggestions, not the least of which is an effort to publicize the existence of the project. We are making a concerted effort to bring the project to the attention of the bench, bar, particular interest groups and general public. For example, recent issues of the Oregon State Bar Bulletin contained items, based on copy we furnished, reporting on the law improvement program and the probate project.<sup>96</sup> These items also requested suggestions from interested persons. News releases have also been sent to various newspapers in the state. Response to this appeal thus far has been negligible, but we hope the maintenance of this kind of publicity, together with employment of more direct methods of solicitation, will produce the necessary response.

Over the past several years the Legislative Counsel's office has received a few comments and suggestions concerning defects in and improvement of the Oregon probate law. Copies of these, as well as any such comments and suggestions received in the future, will be made available to the members of the advisory committee as a matter of course.

We have been able to acquire for each member of the

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<sup>96</sup> Ore. S. B. Bull., Jan. 1964, p. 10; Ore. S. B. Bull., Feb. 1964, p. 4.

advisory committee a copy of the recently enacted 1963 Iowa Probate Code, with comments of the special bar committee responsible for the revision project out of which that new code arose.<sup>97</sup> We have contacted persons involved in the current probate law revision projects underway in New York<sup>98</sup> and Wisconsin,<sup>99</sup> as well as in the joint project on a uniform or model probate code recently undertaken by special committees of the National Conference of Commissioners on Uniform State Laws and the American Bar Association,<sup>100</sup> and expect to receive copies of studies, drafts of proposed legislation and other materials produced in the course of these projects.

As possible sources of ideas for improvement of Oregon's probate law, we have scanned all the printed annual reports of the Committee on Probate Law and Procedure to the membership of the Oregon State Bar, and have attempted to identify and list all bills relating to probate matters introduced in Oregon legislative sessions in 1941 and since but which failed of enactment. With the same thought in mind, we have made an effort to find material relating to probate law published over the years in the Oregon Law Review. Further recourse to these items for purposes of more concentrated study may be in order.

We have attempted to identify and obtain copies of the product of studies on probate matters undertaken by the California Law Revision Commission and New York Law Revision Commission.

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<sup>97</sup> See pp. 20-22 supra.

<sup>98</sup> See pp. 27-30 supra.

<sup>99</sup> See p. 31 supra.

<sup>100</sup> See pp. 37-38 supra.

We plan to supply each member of the advisory committee a copy of the principal Oregon statutes pertaining to probate,<sup>101</sup> and, if available, of the Oregon annotations (including pertinent Oregon Supreme Court decisions, federal court decisions, Oregon Attorney General opinions and Oregon Law Review material) to those statutes.

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<sup>101</sup> ORS chapters 111 to 129. See note 19 supra.