Washington Law Review

Volume 34
Number 2 *Washington Case Law—1958*

7-1-1959

# Court Supervision of the Administration of Estates and Guardianships

Philip H. Austin

# COMMENTS

## COURT SUPERVISION OF THE ADMINISTRATION OF ESTATES AND GUARDIANSHIPS

PHILIP H. AUSTIN

In June 1958 The Probate Committee of the King County Superior Court, under the chairmanship of Judge Eugene A. Wright, initiated an experiment in court supervision of probate administration. The primary purpose of the program is to insure that persons serving as personal representatives of the estates of decedents, or as guardians of the estates of minors and incompetent persons, are properly and expeditiously performing the duties of their offices, as prescribed by law. The writer of this Comment, a third-year law student at the University of Washington, was employed on a part-time basis to work for the committee on this program as a probate records checker.

It is the purpose here (1) briefly to outline the operation of the program and to relate its results to date, (2) to suggest certain conclusions with particular emphasis on the question of the respective responsibilities of court and counsel in supervising probate administration, and (3) to comment briefly on several legal problems involved in the administration of estates and guardianships which the records checking program has revealed to be apparently misunderstood by more than a few practicing attorneys.

**The records checking program and its results.** The probate records checking program basically involves a systematic investigation of the condition of dormant estates and guardianships.[1] These are estates and guardianships which have not been closed by any of the methods prescribed by law, and which apparently are not receiving the diligent attention of the personal representative or guardian required by the applicable statutes and rules of court.

The records checker, using a mimeographed check sheet, initially searches the files of those estates and guardianships which appear

[1] The probate checker's duties also include a daily inspection of each of the estate and guardianship files docketed on the daily probate calendar for actions by the court. The purpose of this check is to facilitate handling of the matter when the parties appear before the probate judge for his decision on the matter presented; e.g., final account and decree of distribution of estate, petition for award in lieu of homestead, or petition for the appointment of a guardian. The items checked by the checker at this time are substantially the same as those checked on inspection of the dormant files.

from an examination of the clerk's probate docket to be in need of attention. With respect to estates, the matters particularly noted on the check sheet are defects in qualification of the personal representative, including failure to file an oath,[2] to post a bond where required to do so,[3] to file an inventory and appraisement,[4] to file proof of publication of notice to creditors,[5] to file an affidavit that notice of the pendancy of probate has been given to all known heirs and distributees,[6] apparent failure to pay creditors' claims[7] and appraisers' fees,[8] and finally, failure to take the requisite action to complete administration as rapidly as possible.[9] The matters of particular inquiry with respect to guardianships are defects in qualification, including failure to give the requisite notice of hearing to appoint,[10] to file an oath,[11] to post bond where required,[12] to file proof of publication of notice to creditors,[13] to file an inventory of the wards' estate,[14] or to file proof of payment of creditors.[15] In addition, the guardianship files are checked to determine whether the guardian's biennial report[16] has been filed, whether the guardian's authority to expend funds of the estate has expired,[17] and finally, whether there is any evidence in the file to indicate that the guardianship ought to be terminated on the ground that the ward has attained majority, died, or regained competency, and a final accounting by the guardian be made.[18] Both estates and guardianships are also checked to determine whether the amount of the bond of the personal representative or guardian is in need of review.[19]

After locating the files of estates and guardianships in need of attention, and searching them, the deficiencies found in each file are noted on the check sheet. The file and check sheet are turned over to the members of the probate committee for such action as they deem

[2] RCW 11.28.170.
[3] RCW 11.28.180.
[4] RCW 11.44.010.
[5] RCW 11.40.010.
[6] RCW 11.76.040; Rules of Pleading, Practice and Procedure 41(1).
[7] RCW 11.48.010.
[8] RCW 11.44.010.
[9] RCW 11.48.010.
[10] RCW 11.88.030-.040.
[11] RCW 11.88.100.
[12] RCW 11.88.100.
[13] RCW 11.92.030 (incompetence only).
[14] RCW 11.92.040 (1).
[15] RCW 11.92.040 (5).
[16] RCW 11.92.040 (3).
[17] Rules of Pleading, Practice and Procedure 24.
[18] RCW 11.92.040 (4).
[19] RCW 11.28.210 (estates); RCW 11.88.100 (guardianships).

ncessary to cure the deficiency and produce performance of his legal responsibilities by the personal representative or guardian.

The normal course of events from this point on includes, first, the mailing of a letter signed by a member of the probate committee to the attorney of record of the personal representative or guardian, or in some cases directly to the personal representative or guardian, as for example where it appears the attorney is no longer practicing or has died. The letter calls attention to the deficiencies noted, requests action be taken to explain or remedy the situation, and indicates that the file will be re-checked on a specified date from four to six weeks after the letter is mailed. If the guardian or personal representative is under a surety bond, an information copy of the letter is also sent to the surety. Then, on the date set for re-check, the checker again searches the file and reports his findings at that time to the committee. If it appears that the deficiencies have been corrected, a report to that effect is made. If some action has been taken and it appears that the deficiencies will soon be taken care of, an informal continuance of the matter will be granted by the court. But if no action has been taken or satisfactory explanation made, the matter is then turned over to the superior court judge who is assigned to probate. He then will cause a citation to be issued, answerable in three to four weeks, requiring the personal representative or guardian to show cause why he should not be removed and a successor appointed.[20] In

[20] With respect to estates of decedents being administered under letters testamentory or of administration, the authority for such action is clearly granted by RCW 11.28.250. It provides that, "Whenever the court has reason to believe that any executor or administrator has wasted, embezzled, or mismanaged, or is about to waste or embezzle the property of the estate committed to his charge, or has committed, or is about to commit a fraud upon the estate, and is incompetent to act, or is permanently removed from the state, *and has wrongfully neglected the estate, or has neglected to perform any acts as such executor or administrator, or for any other cause or reason which to the court appears necessary,* it shall have the power and authority, after citation and hearing to revoke such letters. The manner of the citation and of the service of the same and of the time of the hearing shall be wholly in the discretion of the court, and if the court for any such reasons revokes such letters the powers of such executor or administrator shall at once cease, and it shall be the duty of the court immediately to appoint some other executor or administrator, as in this act provided." (Emphasis added.) Also in point is RCW 11.28.160, which reads: "the court appointing any executor or administrator shall have authority for any cause deemed sufficient, to cancel and annul such letters and appoint other executors or administrators in the place of those removed." And finally, see RCW 11.44.050, which expressly provides that the court may revoke letters testamentary or of administration for failure to file an inventory in accordance with RCW 11.44.010. To the effect that the trial court's discretion in this area is broad, see Wolfe's Estate, 186 Wash. 216, 47 P.2d 1066 (1936).

The court's power to remove a guardian is also clearly spelled out by statute in Washington. RCW 11.88.120 provides that "the court in all cases shall have power to remove guardians for good and sufficient reasons, which shall be entered of record, and to appoint others in their places. . . ." Again, the only limitation on the court's

the event a successor is appointed, a follow-up check will then be made by the records checker after the new appointee has had a reasonable time to clear up the deficiencies leading to his appointment.

The results of the program thus far can perhaps most meaningfully be expressed first in terms of specific facts and figures, from which certain general conclusions then may be suggested. At the time of this writing, every estate of a decedent which was opened in King County during the years 1952-1956 has been checked. Additionally each guardianship estate opened during the years 1949-1958 has been screened. In terms of numbers, this amounts to a check of approximately 13,500 estate files and 7,500 guardianship files. Of this number, approximately 1,200 estate files, or 8.8 per cent of the total number checked, and 900 guardianship files, or 12 per cent of the total number checked, have been found deficient in one or more of the items noted above. Letters have been written, either to the attorney of record, or directly to the personal repre-

power is that it act for good and sufficient reasons, and not arbitrarily. *In re* Robinson, 9 Wn.2d 525, 115 P.2d 734 (1941); *In re* Hemrich, 187 Wash. 21, 59 P.2d 748 (1936); *In re* Shapiro's Estate, 131 Wash. 653, 230 Pac. 627 (1924).

The picture is not so clear, however, when it comes to executors under non-intervention wills. So long as the non-intervention executor remains cloaked with the powers granted him by the will, administering under the will rather than under letters testamentary granted by the court, the provisions of RCW 11.28.150, and RCW 11.28.250 authorizing revocation of letters would not seem to apply. But it also appears that, according to RCW 11.68.010, until an estate to be administered under a non-intervention will has been found fully solvent, it, like all other estates, is to be administered under direction of the court. In State *ex rel.* Lauridsen v. Superior Court, 179 Wash. 198, 208, 37 P.2d 209 (1934), the court apparently sustained this view when it said: "in the case of non-intervention wills, when it appears that the estate is fully solvent, the executor shall have the power to manage and administer the estate without intervention of the court. The corollary to this is that, *until the estate is found and declared solvent,* it must be administered under the direction of the court and subject to its orders." (Emphasis added.)

Therefore, until an estate under a non-intervention will is declared solvent, it is concluded that the powers granted the court by RCW 11.28.160 and RCW 11.28.250, as well as RCW 11.44.050, to remove executors and appoint successors on its own motion, apply to non-intervention estates as well as those estates to be administered under letters testamentary or of administration. *In re* Wolfe's Estate, 186 Wash. 216, 57 P.2d 1066 (1936), is in accord with this conclusion.

After a non-intervention estate has been found solvent, it appears that the court is without power to remove the executor directly. A petition first must be brought by a creditor or distributee under RCW 11.68.030, requesting that the executor be shorn of his non-intervention powers for failure to execute his trust faithfully and to take care to promote the interests of all parties. If the court finds the petitioner's request well taken, it may then require that the estate be administered as in the case of routine estates. *In re* Hooper's Estate, 76 Wash. 72, 135 Pac. 813 (1913). At this point administration again is under direction of the court, so that the above-cited statutory provisions for removal of an executor or administrator would apply.

However, if the executor does not attempt to qualify as a non-intervention executor at all, but submits to the jurisdiction of the court regarding control of administration, the limitations of RCW 11.68.030 do not apply, so that the executor may be removed by the court on its own motion under RCW 11.28.250. *In re* Clawson's Estate, 3 Wn.2d 509, 101 P.2d 986 (1940).

sentative or guardian, in each of these cases where deficiencies were discovered. In response to these letters, the deficiencies noted have been corrected, or a satisfactory explanation as to the state of the file has been received without any further action by the committee or the court in the case of approximately 56 per cent of the estates and approximately 67 per cent of the guardianships originally found to be deficient. Citations have been issued, as related above, in the remaining cases, and removal of the personal representative or guardian and appointment of a successor has been necessary in the case fo 40 estates, or 3.3 per cent of those originally found deficient, and in the case of 10 guardianships, or 1.1 per cent of those originally found deficient.

Broken down by particular items of deficiency, the picture, in terms of the number of occurrences of each deficiency and of approximate percentages of the total number of files checked, is as indicated in the following table:

A. Estates of decedents:[21]
   1. Defect in qualification, 14 (.1%).
   2. Failure to file inventory, 37 (.25%).
   3. Failure to appraise (where required), 45 (.3%).
   4. Failure to file affidavit in accordance with RCW 11.76.040, 325 (5.2%).[22]
   5. Failure to file proof of publication of notice to creditors, 30 (.2%).
   6. Apparent failure to pay creditors' claims, 21 (.15%).
   7. Apparent failure to pay appraisers' fees, 38 (.25%).
   8. Failure to close estate promptly, 860 (6.1%).[23]
   9. Amount of bond insufficient, 610 (5%).

B. Guardianship estates:
   1. Defect in qualification, 5 (.06%).
   2. Failure to file inventory, 27 (2.3%).
   3. Failure to file proof of publication of notice to creditors, 370 (10.3%).[24]
   4. Failure to render biennial report, 470 (5.6%).
   5. Apparent unauthorized expenditures, 53 (.6%).
   6. Failure to close and render final account, where required, 20 (.25%).
   7. Amount of bond insufficient, 483 (6%).[25]

[21] This category includes both non-intervention and routine estates.

[22] RCW 11.76.040 became effective in January 1955. Therefore, only those estates to which this statute applies are considered in this calculation.

[23] Since no estate files opened subsequent to December 1956 have yet been screened, in no case has an estate which has been in probate for less than eighteen months been determined to be deficient for failure to close.

[24] As this requirement applies only to guardianships of incompetents, only those types have been considered in this calculation.

[25] This calculation, as well as the calculation relating to bonds on estates of

**Conclusions—Respective responsibilities of court and counsel.** It is clear from the facts and figures above related that: (1) In a large majority of estates and guardianships, administration is proceeding according to law without any prompting by the court. (2) Of those estates and guardianships initially found deficient, more than half are promptly put in order in response to the initial letters sent out by the probate committee, and all but a relatively few of those matters not cleared up in response to the letters are remedied in response to the citations issued upon failure to respond to the letters. (3) With respect to individual items of deficiency, there are certain matters causing considerably more difficulty than others. The first two of these conclusions will form the basis of the discussion immediately following; the third conclusion will produce the subject matter of the writer's discussion of particular legal problems involved in the administrations of estates and guardianships.

From the first two of these conclusions and from the additional elementary fact that most personal representatives and guardians are laymen who function upon their lawyers' advice, it seems justifiable to conclude that, while many attorneys are properly guiding their clients in the performance of their duties as personal representatives and guardians, some are not so doing until they are prodded into action by the court.[26] However, this is not meant to suggest that all of the deficient estates and guardianships are the result of lax supervision by counsel. The probate committee has also uncovered in some cases ample evidence of simple refusals on the part of the personal representative or guardian to heed advice given by his attorney.

Several questions, not easily resolved, are suggested by the facts and conclusions related so far. Involving the age-old controversy of the respective responsibilities of court and counsel in the administration of the law, they are as follows:

(1) What is the nature of the attorney's responsibility to his client, where the client is acting as a personal representative or guardian, to inform him of his duties, and to supervise their performance?
(2) What is the extent of the court's responsibility in supervising the

decedents, is at best a rough estimate, as the probate judge has on many occasions entered orders altering the amount of bond without previous action by the probate committee or the records checker as the files have come before him for other action.

[26] An additional fact revealed by the records checking program to date seems relevant at this point, which is that, notwithstanding the relatively small percentage of estates and guardianships found to be deficient overall, a much larger percentage of those administered by clients of certain attorneys have been found to be deficient.

administration of estates and guardianships?

(3) What is the responsibility of the attorney, as an officer of the court, to inform the court of the failure of his client who is acting as a personal representative or guardian to function properly as such?

The responsibility of the attorney to his client, where the client is acting as a personal representative or guardian, would seem to be covered by the Canons of Professional Ethics, Canon 32, which reads in part as follows:

> Correspondingly, he [the attorney] advances the honor of his profession and the best interests of his client when he renders service or gives advice tending to impress upon the client and his undertaking exact compliance with the strictest principles of moral law. He must also observe and advise his client to observe the statute law, though until a statute shall have been construed and interpreted by competent adjudication, he is free and entitled to advise as to its validity and as to what he conscientiously believes to be its just meaning and extent.

The probate committee has taken the position that, in fulfillment of this responsibility, the attorney whose client is acting as a personal representative or guardian should fully describe to the client the nature of his obligations and should continue to supervise compliance with those obligations so long as he remains the attorney of record of the particular personal representative or guardian. It has come to the attention of the probate committee that one leading Seattle law firm, as a matter of practice, provides each of its clients who has been appointed a personal representative or guardian with a form letter, detailing in simple, non-legal terms the duties of the client's office and explaining the reason behind each of the rules relating to those duties. This practice, coupled with continual personal contact between the attorney and client during the active period of administration, is commended by the committee and is recommended to other attorneys.

It is also felt by the probate committee that the court shares in the responsibility of insuring that estates and guardianships are administered according to law; hence, the present program. RCW 11.02.020 provides that the court shall have full and ample power and authority to administer and settle all estates of decedents, minors, insane and mentally incompetent persons in this act mentioned. Further, this section provides that if the provisions of the code with reference to the administration and settlement of such estates should in any case

and under any circumstances be inapplicable or insufficient or doubtful, the court shall nevertheless have full power and authority to proceed with such administration and settlement in any manner and way which to the court seems right and proper, all to the end that such estates may be by the court administered upon and settled.

This section of the probate code both defines the extent of the court's power, and thereby provides a broad legislative grant of authority to effect such a program as is now operating in King County, and also by implication defines the extent of the court's responsibility in the area of administration of estates and guardianships. But this responsibility, the committee feels, is coupled with the responsibility of the attorney, not only to his client under Canon 32, but also, as an officer of the court, to inform the court of the client's refusal to heed the attorney's advice to perform the duties required, so that the court may take appropriate action. Some attorneys have been reluctant to come forward with such information, feeling that Canon of Professional Ethics 37, relating to the confidences of a client, as well as Canon 28, relating to stirring up litigation, forbid such action by him. As this is being written, a committee of the Washington State Bar Association is considering the problem; so, within the reasonably foreseeable future a ruling may be had which will provide the answer.

**Certain recurring legal problems.** As has been noted, several of the items checked by the records checker in the process of searching dormant estates and guardianships have accounted for a substantially larger proportion of the deficiencies reported than have the other matters checked. Therefore, it seems appropriate to conclude with a brief review of those matters which are apparently misunderstood by more than a few attorneys.

The first of these problems is that of who is entitled to written notice of the appointment of an executor or administrator of a decedent's estate and of the pendency of probate under RCW 11.76.040, which reads in part as follows:

> Within 20 days after his appointment, the executor or administrator of the estate of a decedent shall cause written notice of his said appointment and of the pendency of probate proceedings, to be mailed to each heir and distributee of said estate whose name and address is known to him, proof of which shall be made by affidavit and filed in the cause.[27]

This statutory requirement became effective in 1955. Some attor-

[27] See also Rules of Pleading, Practice and Procedure, Rule 41 (1).

neys appear to believe that it has been complied with when, in the case of probate based upon a will, notice has been given to all persons named as distributees in the will whose addresses are known to the executor. It is submitted that the language of the statute requires that, in addition, notice be given to those persons who would take by intestate succession in the event the will was held to be invalid. The significant words are, "shall cause written notice . . . to be mailed to each heir *and* distributee. . . ." (Emphasis added.) Their significance can best be seen by contrasting the language used here with that of the following paragraph of RCW 11.76.040,[28] which requires that written notice of the hearing on final account and petition for distribution be given to "each heir *or* distributee." (Emphasis added.) The Washington court has not yet construed the pertinent language of this statute. However, the identical distinction appears in the two sections of Rule 41, Rules of Pleading, Practice, and Proceedure, promulgated by the court. It seems, therefore, that both the legislature and the court intended for both those who would take but for the will and those who are to take if the will is valid to receive notice of the appointment of the executor and the pendency of probate proceedings, while only those who are to take under the will are entitled to notice of the hearing on final account and petition for distribution. It is suggested that the purpose of the statute and rule is to afford those who could take if the will was invalid the opportunity to appear and contest its validity under RCW 11.24.010.[29] Since such a contest can be had only within the six-month period immediately following probate of the will, and since no distribution can be decreed until at least six months after probate of the will, due to the requirements of RCW 11.40.010, relative to claims of creditors, it follows that a rule requiring notice of the pendency of probate would be designed in part to give an opportunity to contest, whereas a requirement of notice of hearing on final account and petition for distribution would not have such a purpose.[30]

[28] See also Rules of Pleading, Practice and Procedure, Rule 41 (2).

[29] "If any person interested in any will shall appear within six months immediately following the probate or rejection thereof, and by petition to the superior court having jurisdiction contest the validity of said will, or appear to have the will proven which has been rejected, he shall file a petition containing his objections and exceptions to said will, or to the rejection thereof. . . . If no person shall appear within the time aforesaid, the probate or rejection of such will shall be binding and final as to all the world."

[30] The portion of RCW 11.76.040 dealing with the notice to be given of the hearing on final account and petition for distribution (see also Rules of Pleading, Practice and Procedure, Rule 41(2) ) appears to have been clearly motivated by the case of Mullane v. Central Hanover Bank & Trust Co., 339 US 306 (1950). In that case the United States Supreme Court held that notice by publication of a hearing on final account

A second item accounting for a large proportion of deficient estates has been simply a failure on the part of the executor or administrator to complete administration as rapidly as possible. RCW 11.48.010 expressly provides that "it shall be the duty of every executor or administrator to settle the estate in his hands as rapidly and as quickly as possible." [31]

By far the largest group of estates which have been reported as deficient for failure to close are non-intervention estates. Prior to the enactment of Laws of 1955, chapter 205, section 5, it was permissible for a non-intervention executor to make a final report and obtain what in essence was a decree of distribution; but it was not necessary for him to close in this or any other manner.[32] In 1955, however, the legislature, by enacting the above statute,[33] made it mandatory for

of a common trust fund established under the New York banking law did not meet the requirements of due process of law under the fourteenth amendment to the United States Constitution, as to those beneficiaries whose names and whereabouts were known to the trustee. One who would inherit under the laws of intestate succession is as effectively deprived of property if the decedent leaves a will cutting him out of his intestate share and the will, for want of a contest, is admitted by the court, as is a beneficiary of a trust or a distributee under a will where the trustee or executor has failed to administer properly over the property he holds for the benficiary or distributee. It seems reasonable to assume that a notice designed to provide an opportunity to contest a will is just as much a requirement of due process of law as is a notice designed to provide an opportunity to appear and object to a trustee's or executor's final account.

[31] In an opinion affirming an order granting a distributee's petition that the executrix who had failed to wind up the estate for over three years from date of probate of the will be compelled to close within sixty days of the date of the order, the Washington court made the following statement: "Our statutes contemplate that estates shall ordinarily be closed shortly after the six months period allowed for filing claims." *In re* Johnson's Estate, 192 Wash. 439, 447, 73 P.2d 755, 759 (1937). In an earlier case, National Bank of Commerce v. Petterson, 179 Wash. 638, 38 P.2d 361 (1934), the court recognized the statutory duty of an executor to settle the estates in his hands as quickly and as rapidly as possible, but then denied its power to compel compliance with this duty. This language was reiterated in a subsequent case also involving the Petterson estate, *In re* Petterson's Estate, 12 Wn.2d 686, 123 P.2d 733 (1942). Both the Johnson case and the Petterson cases involved a non-intervention will and were decided prior to the enactment of Laws of 1955, ch. 205, § 5, requiring the filing of a declaration of completion in the event the non-intervention administrator decides not to close by the more formal petition for a final decree under RCW 11.76.030. Since, prior to the enactment of the requirement of filing a declaration of closing, it had been held not necessary for a non-intervention executor to close at all [Schirmer v. Nethercutt, 157 Wash. 172, 180 Pac. 265 (1930)], the language of the Petterson cases is understandable. The holding in the Johnson case is a bit tenuous, but it is submitted that today there is a clearly enforceable duty on the part of the non-intervention executor or administrator to close the estate within a reasonable time. An order of the nature of that made in the Johnson case, *supra,* will now lie, regardless of whether administration is with or without court intervention. It ought also to be noted that, as of the date of this writing, all of the dormant estates that have been screened by the probate committee were originally opened at least two years ago, and many date back to as long as seven or eight years ago. So in view of the language of the Johnson case, *supra,* clearly a reasonable time for completion of administration has elapsed.

[32] See Schirmer v. Nethercutt, note 31, *supra.*

[33] Codified as a part of RCW 11.68.010. See Gose and Hawley, *Probate Legislation Enacted by the 1955 Session of the Washington Legislature,* 31 WASH. L. REV. 22, 30 (1956); see also discussion in note 30, *supra,* as to the enforceability of the statutory duty to close.

the non-intervention executor to file a declaration of closing if he did not seek a final decree of distribution.

It should be noted that only non-intervention estates may be closed by filing a declaration of closing. The check of dormant estates has revealed a few cases of attempts to close routine estates by this method, rather than by the formal procedure prescribed by RCW 11.76.030. These attempts for the most part have resulted from a misunderstanding of two other statutes: so much of RCW 11.68.010-.040 as bears upon what is a non-intervention will, and RCW 11.28.070, describing the powers of an administrator with will annexed.

In the early case of *Schufeldt v. Hughes*,[34] the Washington court held that the testator's intention to dispense with administration must be shown by express words or necessary implication. A direct statement in the will that it is to be administered without court intervention is sufficient to make the will non-intervention, even though it does not further provide in express language that no letters testamentary are to be required or that the executor is to have the power, after the estate has been adjudged solvent, to mortgage, lease, sell, and convey the real and personal property of the testator without a court order.[35] The non-issuance of letters testamentary, except for the limited purposes of admission of the will to probate, filing of inventory, and publication of notice to creditors,[36] and the powers to mortgage, lease, sell, and convey the real and personal property of the testator without court order follow as a matter of course once a will is determined to be non-intervention.[37] Also, though there appear to be no cases clearly in point, the probate committee has taken the position that a will which does not expressly provide for administration without court intervention but does expressly provide that the executor is to have all of the powers enumerated in RCW 11.68.040, i.e., the power to mortgage, lease, sell, and convey the real and personal property of the testator without a court order, is to be treated as a non-intervention will. But a will which merely provides that the named executor is to serve without bond, as provided for in RCW 11.28.200, is considered by the probate committee, and reasonably so it would seem, not to be a non-intervention will. An estate governed by such a will, not being a non-intervention estate, cannot be closed by the filing of a certificate of completion.

[34] 55 Wash. 246, 104 Pac. 253 (1909).
[35] Miller v. Borst, 11 Wash. 260, 39 Pac. 662 (1895).
[36] RCW 11.68.010.
[37] RCW 11.68.040.

RCW 11.28.070, providing for the authority of an administrator with will annexed, which for many years provided simply that "administrators with will annexed shall have the same authority as the executor named in the will would have had, and their acts shall be as effectual for every purpose," was amended by Laws of 1955, chapter 205, section 3. It provides that such administrators "shall not lease, mortgage, pledge, exchange, sell or convey any real or personal property of the estate except under order of the court and pursuant to procedure under existing laws pertaining to the administration of estates in cases of intestacy, unless the powers expressed in the will are directory and not discretionary." Except for the problem of what powers are "directory and not discretionary," this amendment appears to resolve the conflict between this section of the code prior to the amendment, and RCW 11.68.020, which provides that "in all cases, if the party named in [a non-intervention will] as executor declines to execute the trust or dies or is otherwise disabled for any cause from acting as such executor, letters testamentary or of administration shall issue *and the estate be settled as in other cases.*"[38] (Emphasis added.) Therefore, it has been concluded by the probate committee that, except where the powers granted in a non-intervention will are directory and not discretionary, a non-intervention estate which has passed into the hands of an administrator with will annexed for purposes of administration cannot be closed by the filing of a declaration of closing but must be closed under the provisions of RCW 11.76.030.

Two matters accounting for a large proportion of the deficient guardianships are the requirement, in the case of guardianships of incompetent persons, that notice to creditors of the appointment of the guardian be published,[39] and the requirement that all guardians render an account of their receipts and expenditures at least every two years.[40]

The first of these requirements does not seem to call for any dis-

[38] The previous confusion is illustrated by two papers presented at the Legal Institute held at the University of Washington law school May 23, 1941: Foster, *Powers and Duties of Executors and Administrators,* c.t.a *Under Non-Intervention Wills,* 16 WASH. L. REV. 196 (1941), and a critique of that article by Johnson, 16 WASH. L. REV. 200 (1941). Gose and Hawley, *Probate Legislation Enacted by the 1955 Session of the Washington Legislature,* 31 WASH. L. REV. 22, 29 (1956), takes the view that the amendment "seems entirely clear and certainly it is now definite that as to the matters mentioned in the amendment, an administrator with will annexed *does not* have the same powers as an executor named in the will."

[39] RCW 11.92.030.

[40] RCW 11.92.040 (3).

cussion. The statute is clear and free from ambiguity, but it is not being complied with in a substantial number of guardianships. It is true that, unlike RCW 11.40.010, which requires publication of notice to creditors of a decedent's estate "*immediately* after appointment," (Emphasis added.) RCW 11.92.030 merely requires publication "after appointment and qualification." But the probate committee has taken the position that, since it is one of the duties of a guardian "to pay all just debts due from the ward out of the estate in his hands,"[41] it was contemplated by the legislature that notice to creditors of an incompetent ward is to be published soon after appointment and qualification of the guardian.

The requirement of a biennial report seems equally clear and unambiguous. The difficulty here seems to be one created by simple inadvertance on the part of the guardian and his attorney. Prior to 1955, the statute provided that, as a penalty for failure to render a report once every two years or whenever asked to do so, the guardian should receive no allowance for his services and be liable to the ward on his bond for costs, disbursements, and attorney's fees in any proceeding brought against him to enforce the rights of the ward, his liability not to exceed ten per cent of the estate. This statute provided some incentive to the guardian to set up a system for reminding himself of the due dates of his reports. In 1955, by section 15, chapter 205, Laws of 1955, the legislature repealed this sanction and provided instead that the clerk of the court was to notify each guardian to file an account, whenever he failed to do so for a period of two years. In the event of a failure to heed the clerk's notification, the legislature left it to the court to determine what action would be proper.[42] This change cast upon the clerk's office a burden which it was not equipped to handle; so by section 1, chapter 64, Laws of 1957, the provision calling for the clerk to remind the guardian of his duty was repealed. The probate committee, therefore, has taken over this task in King County, and in conjunction with a judicious exercise of the power of the court to remove guardians under RCW 11.88.120, it is hoped that the number of guardianships found deficient for failure to file biennial reports can be substantially reduced.

Finally, a glance back at the statistics reported above will reveal that a relatively large percentage of both estates and guardianships

[41] RCW 11.92.040 (5).

[42] Gose and Hawley, *Probate Legislation Enacted by the 1955 Session of the Washington Legislature*, 31 WASH. L. REV. 22, 37 (1956).

have been reported as deficient because the amount of the personal representative's or guardian's bond has been found insufficient. Both RCW 11.28.180, with respect to personal representatives' bonds, and RCW 11.88.100, relating to guardians' bonds, expressly allow the court wide discretion in the matter of fixing the amount of such bonds. RCW 11.28.200 even allows the court to require a bond of an executor, where it is deemed necessary, in cases where the testator's will has expressly waived the requirement of a bond. All these sections of the code contemplate periodic reviews by the court of the amount of the bond. The court's power to fix and alter the amount of the bond is perhaps the most effective check it has on the activities of the personal representative and guardian. Unlike the other deficiencies noted in the screening of dormant estates and guardianships, the allowing of an inadequate bond is more a reflection on the laxness of the court than it is on any lack of proper functioning by the attorney or his client, the personal representative or guardian. Opinions may differ as to what is an adequate bond, but the probate committee has taken the position that a guardian's bond is inadequate if it does not approximate the value of the personal property in the estate. This of course does not apply where RCW 11.88.100 requires no bond at all, i.e., where the guardian is a bank or trust company, or where the value of the estate does not exceed five hundred dollars, and the guardian is the parent of, or a person standing in loco parentis to, the ward. With respect to administrators' bonds, except in the case of administration by the surviving spouse where the value of the estate does not exceed the exemptions allowed by law to the surviving spouse,[43] the suggested rule-of-thumb is that the bond equal at least half the value of the personal property of the estate.[44] The same rule is applied in the case of executors and administrators w.w.a. who are acting without non-intervention powers, unless the requirement of a bond has been waived in accordance with RCW 11.28.200 and there appears to be no reason for imposing a bond notwithstanding the waiver. As for the executor who is administering an estate under non-intervention powers granted by the will rather

[43] RCW 11.28.180.

[44] Since neither a guardian nor an administrator or executor not having non-intervention powers can sell real property of the estate without first obtaining a court order of authorization, it has not been thought necessary to require that the bond cover the value of such property until such time as it is converted by sale into personalty. However, it has become routine procedure in King County for the probate judge, upon approving a sale of realty, to review the bond at that time and to revise its amount in accordance with the amount to be received upon sale of the realty.

than under letters testamentary issued by the court, the committee has taken the position that no bond is required at all, for two reasons. In the first place, the overwhelming majority of non-intervention wills executed contain an express waiver of such a requirement. Secondly, and of more importance in view of the power of the court to impose a bond even in the face of an express waiver when it is deemed necessary, RCW 11.28.180, which provides for the bonding of personal representatives of estates of decedents, apparently only applies in cases where those representatives are acting under letters testamentary or of administration.[45]

[45] If this is the true meaning of the statute, it becomes immediately apparent that the express waiver of the requirement of a bond which commonly appears in the non-intervention will is mere surplusage. The writer's research has revealed only two Washington cases in which the court has broadly indicated that a non-intervention executor is not required to give a bond: Walla Walla v. Moore, 16 Wash. 339, 47 Pac. 753 (1897), and *In re* Passage's Estate, 122 Wash. 249, 210 Pac. 370 (1922). However, the wills in both of these cases not only provided that the will was to be administered without court intervention, but expressly waived the requirement of a bond. It is suggested that neither these cases nor the statute, RCW 11.28.180, are clear cut authority for the proposition that the court has no power to require a bond of a non-intervention executor at any time. The reader is again referred to the reasoning employed in note 20, *supra*, relative to the power of the court to remove a non-intervention executor on its own motion prior to a determination that the estate is solvent; that is, that until such time, the executor acts under authority granted by the court, and not under the non-intervention powers granted by the will. It would seem reasonable to conclude that during that period of court supervision, the court might, for good cause, require a bond to be posted, to be exonerated upon the determination of the solvency of the estate. It may well be that, because of the special trust inferentially invested in a non-intervention executor by the testator, where the will also waives the requirement of a bond, the court should be less disposed to exercise its power to require a bond in spite of the waiver than it would be in the face of a waiver contained in a will which is not also a non-intervention will.