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BIENNIAL REPORT OF THE OREGON LAW COMMISSION TO THE LEGISLATIVE ASSEMBLY 1999 – 2001

**This Report is prepared for the Legislative Assembly
as required by ORS §173.342.**



*The Oregon Law Commission
is housed at the Willamette
University College of Law,
which also provides executive,
administrative and research
support for the Commission.*



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From
The Office of the Executive Director
David R. Kenagy

Prepared by
Michelle M. Mhoon
Assistant to the Executive Director



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COMMISSIONERS OF THE OREGON LAW COMMISSION

Representative Lane Shetterly - Chair

Attorney at Law, Shetterly, Irick, Shetterly and Ozias, Dallas, Oregon

Senator Kate Brown - Vice Chair

Attorney at Law, Portland, Oregon

Mr. Steve Blackhurst

Attorney at Law, Ater Wynne LLP, Portland, Oregon

Chief Justice Wallace P. Carson Jr.

Chief Justice of the Oregon Supreme Court, Salem, Oregon

Mr. Jeff Carter

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David W. Heynderickx

Senior Deputy Legislative Counsel

William Taylor

Judiciary Committee Counsel

Marilyn Odell

Judiciary Committee Counsel

The following law students at the Willamette University College of Law served the Oregon Law Commission:

Nicole Brugato

Extern, Fall 2000

Mike Hamilton

Extern, Fall 2000

Deborah Trant

Extern, Fall 2000

Alexa Crutchfield

Extern, Spring 2001

Kristin Flickinger

Extern, Spring 2001

Liz Vohland

Research Assistant, Summer 2000

Owen Von Flue

Research Assistant, Summer 2000

Jonathon Clark

Research Assistant, Fall 2000

Michael Hallinan

Research Assistant, Fall 2000

INTRODUCTION

The Oregon Law Commission was created in 1997 by the Legislative Assembly to conduct a continuous program of law revision, reform and improvement (ORS 173.315). The Commission's predecessor, the Law Improvement Committee, had been inactive since 1990. Legislative appropriations supporting the Commission's work began July 1, 2000. At that time, the State, through the Office of Legislative Counsel, and Willamette University entered into a public-private partnership. The Commission is now housed at the Willamette University College of Law, which also provides executive, administrative and research support for the Commission.

The Commission assists the legislature in keeping the law up to date. By statute, the Commission will "conduct a continuous substantive law revision program . . ." (ORS 173.315). The Commission assists the legislature in keeping the law up to date by: identifying and selecting law reform projects, researching the area of law at issue, including other states' laws to see how they deal with similar problems, communicating with and educating those who may be affected by proposed reforms, and drafting proposed legislation, comments and reports for legislative consideration.

In creating the Commission, the Legislative Assembly recognized the need for a distinguished body of knowledgeable and respected individuals to undertake law revision projects requiring long-term commitment and an impartial approach. The Commissioners include four legislators or their designees, the chief justice of the Oregon Supreme Court, the attorney general, a governor's appointee, the deans or representatives from each law school in Oregon and three representatives from the Oregon State Bar. Representative Lane Shetterly and Senator Kate Brown were re-elected to serve as the Commission's Chair and Vice-chair, respectively, on September 16, 1999.

In addition to the thirteen Commissioners, currently over seventy volunteers serve on the Commission's Work Groups. Once an issue has been selected by the Commission for study and development, a Work Group is established. Work Groups are made up of Commissioners, volunteers selected by the Commission based on their professional areas of expertise, and volunteers selected by the Commission to represent the parts of the community particularly affected by the area of law in question. The Commission works to produce reform solutions of highest quality by drawing on a wide range of experience and interests.

The Office of the Executive Director provides administrative support to the Commission and the Commission's Work Groups. The Office of the Executive Director, housed at Willamette University College of Law, also facilitates student and faculty participation in support of the Commission's work.

The purpose of the Commission's Program Committee, chaired by Attorney General Hardy Myers, is to review the laws that have been identified as needing reform, and then make recommendations to the Commission regarding which laws should be studied and developed by the Commission. The Commission considers several factors when choosing a law reform project. Written guidelines govern the issue selection process (see page 8). Priority is given to private law issues that affect large numbers of Oregonians and public law issues that are not in the scope of an existing state agency. The Commission also considers the resource demands of a particular issue, the length of time required for study and development of proposed legislation, and the probability of approval of the proposed legislation by the legislature and the governor. The Program Committee selected the following issues for the Commission to consider and develop for the 2001 Legislative session:

Civil Rights Law Statutory Revision
Conflict of Laws Codification
Elective Shares/Community Property
Judgments and Garnishments
Judicial Review of Government Action Codification
Juvenile Law Statutory Revisions
“Public Body” Statutory Definition

With the help of the many dedicated volunteers serving on the Commission’s Work Groups, the Commission has prepared and approved ten bills for recommendation and introduction in the 2001 session. Appendices to this report contain summary reports for these bills. The Commission presents its recommended bills to the 2001 Legislative Assembly anticipating careful consideration and enactment of legislative proposals submitted with this report.

THE WORK OF THE COMMISSION: 1999 – 2001

MEETINGS

The Commission held twelve meetings from January 1, 1999 through December 31, 2000. Committees and Work Groups established by the Commission held numerous additional meetings. The Commission meetings were held on the following dates:

March 19, 1999 State Capitol June 25, 1999 State Capitol September 16, 1999 Seaside, Oregon
December 1, 1999 State Capitol January 26, 2000 State Capitol March 3, 2000 Willamette University
June 16, 2000 State Capitol September 22, 2000 State Capitol October 13, 2000 State Capitol October
27, 2000 State Capitol November 17, 2000 State Capitol December 18, 2000 State Capitol
Minutes for the twelve Commission meetings are available at the Oregon Law Commission, 245 Winter St. SE, Salem, OR 97301, (503) 370-6973, have been archived according to law with the Archives Division of the Secretary of State and may be viewed at the Oregon Law Commission web site, www.willamette.edu/wucl/oregonlawcommission.

PROGRAM COMMITTEE

The Program Committee held two meetings from January 1, 1999 through December 31, 2000 on the following dates: November 16, 1999 and May 11, 2000. The Program Committee is chaired by Attorney General and Commissioner **Hardy Myers** and the members of the Committee are: Mr. Steve Blackhurst, Chief Justice Wallace P. Carson Jr., Mr. Jeff Carter, Professor Hans Linde, and Representative Lane Shetterly.

The purpose of the Program Committee is to review the laws that have been identified as needing reform, and then make recommendations to the Commission regarding which laws should be studied and developed by the Commission. The Commission approved the following criteria for the selection of issues for consideration by the Commission:

SELECTION OF ISSUES FOR STUDY/DEVELOPMENT OF LEGISLATION

The Commission should select issues for study/development of legislation based on the following criteria:

Source of Work Proposals (Priorities)

Legislative Assembly proposals approved by resolution, legislative leadership or committee chair;
Judicial branch proposals approved by the Chief Justice of the Supreme Court, Judicial Conference or State Court Administrator;
Legislative Counsel proposals;
Law school proposals;
Oregon State Bar section proposals;
Commission member proposals;
Other sources.

Nature of Issues

The Commission should give highest priority to private law issues that affect large numbers of Oregonians and public law issues that fall outside particular regulatory areas administered by state agencies.

Resource Demands

The Commission should select issues that available staff and the Commission can finish within the time set for the study/development of legislation.

Probability of Approval by Legislature/Governor

The Commission, at least during its first biennium of work, should select issues that can produce legislative proposals with a good prospect of approval by the Legislature and Governor.

Length of Time Required for Study/Development of Legislation

The Commission should select issues that include both those permitting development of proposed legislation for the next legislative session and those requiring work over more than one biennium. The Program Committee, based on the guidelines listed above, recommended that the Commission take under consideration the projects that subsequently became the focus of the Work Groups.

The Program Committee has commenced study on several other significant undertakings including:

Conflict of Laws – codify additional choice of law areas such as Trusts and Estates

Juvenile Code Revision – continue revisions to the Juvenile Code and follow-up on the Oregon Rules of Juvenile Court Procedure

Judgments – pursue second charge – “Judgments”- of the Judgments and Garnishments Work Group

Elective Shares/Community Property – review the Oregon form of Uniform Marital Property Act and determine whether to pursue a community property scheme for Oregon

The Program Committee meets again in February 2001 and will begin selecting issues to be developed for the 2003 Legislative Session at that time.

WORK GROUPS

Once an issue has been selected by the Commission for study and development, a Work Group is established to conduct such process. Work Groups are made up of Commissioners and volunteers selected by the Commission based on their professional areas of expertise. Currently, over seventy volunteers serve on the Commission's Work Groups. The Work Group topics presently being developed are:

- Civil Rights Law Statutory Revision
- Conflict of Laws Codification
- Elective Shares/Community Property
- Judgments and Garnishments
- Judicial Review of Government Action Codification
- Juvenile Law Statutory Revisions
- "Public Body" Statutory Definition

The status of each Work Group is summarized below.

A. Civil Rights Law Statutory Revision Work Group:

At the March 19, 1999 meeting of the Commission, the Civil Rights Law Statutory Revision Work Group was established to reorganize Oregon's civil rights laws (ORS chapter 659). Commissioner **Jeff Carter**, attorney at law, acted as Chair of the Work Group. The Work Group had two main goals. The first goal was a reorganization and systemization of the civil rights laws that would clarify the authority of the Commissioner of the Bureau of Labor and Industries and eliminate the many confusing series references in ORS chapter 659. The second goal was clarification of the statutory language governing the procedure for administrative claims of unlawful discrimination and a clarification of the procedure for bringing civil actions.

The Work Group completed a proposed bill on June 12, 2000 – LC 371. On September 7, 2000, the Work Group met with interested parties at the Oregon State Bar offices to discuss the draft, answer questions, alleviate any misconceptions, and identify issues and resolve those issues. The bill was presented to the Commission and the Commission unanimously approved the bill for recommendation to the Legislative Assembly on November 17, 2000. Please see [Appendix A](#) for a detailed Commission report on the Oregon Law Commission's proposed bill to reorganize Oregon's civil rights laws – LC 371.

B. Conflict of Laws Codification Work Group:

The Conflict of Laws Codification Work Group was established at the May 8, 1998 Commission meeting to study and codify Oregon's choice-of-law doctrines. Professor and Commissioner **Dominick Vetri**, professor of law at the University of Oregon School of Law, served as Chair of the Work Group. The Work Group had two goals. The first goal was to determine whether codification of Oregon's choice-of-law doctrine should be comprehensive or limited to certain areas or topics. The Work Group decided to undertake codification of one substantive area of law, selecting the field of contracts. The second goal was to reach a consensus on the law applicable to contracts that should be expressed in statutory form and draft appropriate text for consideration by the Commission.

The Work Group produced a draft bill, Conflicts Law Applicable to Contracts – LC 2255, and held a public discussion of the bill on October 30, 2000 at the Oregon State Bar offices to answer questions and receive feedback. The proposed bill was revised based on comments received at the public discussion and presented to the Commission on December 18, 2000. The Commission unanimously approved the proposed bill for recommendation to the Legislative Assembly on December 18, 2000. Please see [Appendix B](#) for a detailed Commission report on the Oregon Law Commission's proposed bill, Conflicts Law Applicable to Contracts – LC 2255.

C. Elective Shares/Community Property Work Group:

The Elective Shares/Community Property Work Group, chaired by Representative and Commissioner **Lane Shetterly**, was established in 1999 and began with a consideration of Oregon's elective shares statute. Addressing that statute involved consideration of Oregon's marital property law. The Work Group concluded that to meaningfully deal with elective shares a host of other statutes and practice areas would require study. The common element in each practice area is the nature of Oregon's marital property law. The Work Group decided, with the Commission's assent, to approach the issue broadly by asking whether a change from the existing form of marital property to a community property system in Oregon would be prudent. The Work Group plans to redraft the Uniform Marital Property Act into Oregon form and structure and then present the draft Act for public discussion in 2001. The issue of whether to proceed with the preparation of a community property scheme for Oregon will be presented to the Commission for consideration in 2001-2002. Any recommendation from the Commission will not appear until the 2003 Legislative Assembly.

D. Garnishments Work Group:

At the March 19, 1999 meeting of the Commission the Garnishment Work Group was established to clarify and simplify the garnishment process. Representative and Commissioner **Max Williams** served as Chair of the Work Group. Stakeholders represented on the Work Group included:

- Attorneys, who have an interest in the process for enforcement of judgments;
- The courts, who are interested in the clarity of law governing garnishments and any changes that might lead to increases in judicial efficiency;
- The Department of Justice, who collects on judgments both for state agencies and on behalf of persons to whom support is owed;
- Financial institutions, who, along with employers, make up the bulk of garnishees;
- Collection agencies, who probably issue more writs of garnishment than any other group;
- and Debtors, who have an interest in the laws governing exemptions and the process for challenging garnishments.

The Work Group had two main goals. The first goal was to draft new Writ of Garnishment, Garnishee Response, and Instructions to Garnishee forms. The purpose of the new forms is to simplify the garnishment process by creating a universal Writ of Garnishment form and Garnishee Response form, thus eliminating the confusion over selecting the appropriate form and minimizing the procedural mistakes made in the garnishment area. The second goal was to revise the garnishment statutes where necessary to be consistent with the changes made to the simplified garnishment forms.

The Work Group produced a proposed bill and presented it to the Commission on October 13, 2000. The Commission unanimously approved the bill for recommendation to the Legislative Assembly on that date. Please see [Appendix C](#) for a detailed Commission report on the Oregon Law Commission's proposed bill to clarify and simplify the garnishment process - LC 1302.

E. Judicial Review of Government Action Codification Work Group:

The Judicial Review of Government Action Codification Work Group was established on June 25, 1999 by the Oregon Law Commission. The charge of the Work Group was to prepare a comprehensive statute governing court procedures for judicial review of government acts. Attorney General and Commissioner **Hardy Myers** acted as Chair of the Work Group and representatives of the private bar, the courts, and state and local governments were represented on the Work Group. The Work Group's goal was to codify the procedure for seeking judicial review of state and local government action.

The Work Group produced a proposed bill, the Judicial Review Procedures Act – LC 1374. The proposed Judicial Review Procedures Act was distributed to interested parties on October 6, 2000 in order to receive questions and comments regarding the draft bill. The Work Group held additional meetings and revised the proposed bill based on the feedback the group received. The Commission approved the Judicial Review Procedures Act on December 18, 2000 for recommendation to the Legislative Assembly. A detailed Commission report on the bill is contemplated for distribution and use during the 2001 Legislative session.

F. Juvenile Law Statutory Revisions Work Group:

The Juvenile Law Statutory Revisions Work Group was established by the Oregon Law Commission on June 8, 1998 and is charged with exploring statutory improvements in both the juvenile dependency code and the juvenile delinquency code. Senator and Commissioner **Kate Brown** chairs the Work Group with over thirty members, including judges, attorneys in private practice, and representatives of private, state and local agencies who actively deal with juvenile issues. The Work Group focused its energies on several topic areas, each of which was organized into a Sub-Work Group. The focus of each of the Sub-Work Groups is briefly outlined below:

1. Child Support Obligations – LC 1510:

LC 1510 allows the State Offices for Services to Children and Families and the Oregon Youth Authority to enter into payment arrangements with a child support obligor. These arrangements may reduce or stop income withholding in order to reduce monthly payment obligations in those cases where such action is necessary to stabilize the financial situation of the family and effect reunification with the child or children. Please see [Appendix D](#) for a detailed Commission report on the Oregon Law Commission's proposed bill to allow for flexibility in enforcing certain child support obligations when it is in the best interests of the child - LC 1510.

2. Oregon Rules of Juvenile Court Procedure – LC 1665:

LC 1665 creates the Oregon Rules of Juvenile Court Procedure, a single set of procedural rules for use in juvenile dependency cases and in termination of parental rights proceedings through a consolidation of the applicable rules found in the Oregon Rules of Civil Procedure and provisions of ORS Chapter 419B. The bill eliminates the need to determine what rules should apply in juvenile dependency and termination of parental rights proceedings by providing

Oregon Rules of Juvenile Court Procedure that are applicable statewide. Please see [Appendix E](#) for a detailed Commission report on the Oregon Law Commission's proposed Oregon Rules of Juvenile Court Procedure - LC 1665.

Termination of Parental Rights – LC 1509

LC 1509 assists in keeping parental contact information updated. The bill requires a court conducting a hearing to inquire of those present as to the parents' contact information. It also allows the court to enter a protective order limiting disclosure of this information. LC 1509 also encourages court hearings to resolve disputes over the service agreement developed by the State Office for Services to Children and Families (SOCF) so that cases may proceed without delay. The bill requires SOCF to take reasonable steps to provide parents with a clear statement of expectations to make return of the child or children possible and requires SOCF to make request of the court to review and approve or disapprove the case plan if the parent is unable to meet outlined expectations. Please see [Appendix F](#) for a detailed Commission report on LC 1509.

Post Adjudication Relief in Juvenile Court Delinquency Proceedings – LC 436

LC 436 provides that a person under the age of 18 or currently within the jurisdiction of the juvenile court may petition the juvenile court to set aside a delinquency adjudication on the same grounds that may be asserted by an adult to set aside a criminal conviction, such as claims for inadequate counsel or other constitutional violations, and that, where appropriate, the same limitations apply. Please see [Appendix G](#) for a detailed Commission report on LC 436.

Notice of Appeal in Juvenile Court Proceedings– LC1361:

LC 1361 requires court appointed counsel in termination of parental rights proceedings to file a notice of appeal if the party whose rights or duties are adversely affected by a final order requests counsel to do so. LC 1361 eliminates the need to file motions for delayed or late appeals because the party is waiting for new counsel to be appointed. Please see [Appendix H](#) for a detailed Commission report on LC 1361.

G. “Public Body” Statutory Definition Work Group:

At the March 19, 1999 meeting of the Commission, the Public Body Statutory Definition Work Group was established to codify a comprehensive definition of “public bodies.” Professor and Commissioner **Bernie Vail**, professor of law at Northwestern School of Law, acted as Chair of the Work Group. The Work Group created uniform definitions of the following terms to be used consistently in the Oregon Revised Statutes: public body, state government, executive department, legislative department, judicial department, local government, district and special government body. The Work Group presented a proposed bill, LC 1633, to the Commission on December 18, 2000 and the bill was unanimously approved by the Commission for recommendation to the Legislative Assembly on that date.

LEGISLATIVE PACKAGE SUMMARY FOR THE 71ST LEGISLATIVE ASSEMBLY

With the help of the many dedicated volunteers serving on the Commission's Work Groups (see [Appendix I](#)), the Commission has prepared and approved ten bills for recommendation to the Legislative Assembly. The following is a brief summary of each bill. Please see the attached Appendices for a more detailed description of each bill. The actual drafts proposed by the Commission are not attached to the report but copies are available upon request from the Oregon Law Commission, 245 Winter St. SE, Salem, OR, 97301, (503) 370-6973.

Reorganization of Oregon's Civil Rights Laws - LC 371

LC 371 reorganizes Oregon's civil rights statutes to put them into more logical order, address unclear or inconsistent language relating to enforcement procedures, and make the statutes easier for the reader to understand and use. The Commission endeavored to fix the organizational problems of the current civil rights laws without changing substance. See attached [Appendix A](#) for a detailed Commission report on LC 371.

Conflicts Law Applicable to Contracts – LC 2255

LC 2255 codifies choice-of-law for Oregon-related contracts. The proposed codification provides rules and principles to determine which law or laws should govern issues that may arise in Oregon-related contracts involving transactions or relationships across state or national lines. See attached [Appendix B](#) for a detailed Commission report on LC 2255.

Simplification of the Garnishment Process – LC 1302

LC 1302 represents a comprehensive rewrite of garnishment procedures and forms. LC 1302 does not substantively change existing garnishment law but simplifies and clarifies the garnishment process. The proposed bill consolidates the four existing writ forms into a single form, the two forms for writs of continuing garnishment are eliminated and the two existing forms for "snapshot" writs are consolidated into a single form. See attached [Appendix C](#) for a detailed Commission report on LC 1302.

Judicial Review Procedures Act – LC 1374

LC 1374 creates a coherent and systematic law for judicial review of state and local government acts. A detailed Commission report on the bill is contemplated for distribution and use during the 2001 Legislative session.

Child Support Obligations – LC 1510

LC 1510 allows flexibility in enforcing certain child support obligations in cases where such flexibility is necessary to stabilize the financial situation of the family and effect reunification with the child or children. See attached [Appendix D](#) for a detailed Commission report on LC 1510.

Oregon Rules of Juvenile Court Procedure – LC 1665

LC 1665 creates the Oregon Rules of Juvenile Court Procedure, a single set of procedural rules for use in juvenile dependency cases and in termination of parental rights proceedings through a consolidation of the applicable rules found in the Oregon Rules of Civil Procedure and provisions of ORS Chapter 419B. See attached [Appendix E](#) for a detailed Commission report on LC 1665.

Termination of Parental Rights – LC 1509

LC 1509 assists in keeping parental contact information updated by tracking the current address of the parent throughout the termination of parental rights proceedings. LC 1509 also encourages court hearings to resolve disputes over the service agreement developed by the State Office for Services to Children and Families so that cases may proceed without delay. See attached [Appendix F](#) for a detailed Commission report on LC 1509.

Post Adjudication Relief in Juvenile Court Delinquency Proceedings – LC 436

LC 436 provides that a person under the age of 18 or currently within the jurisdiction of the juvenile court may petition the juvenile court to set aside a delinquency adjudication on the same grounds that may be asserted by an adult to set aside a criminal conviction, such as claims for inadequate counsel or other constitutional violations, and that, where appropriate, the same limitations apply. See [Appendix G](#) for a detailed Commission report on LC 436.

9. Notice of Appeal in Juvenile Court Proceedings – LC 1361

LC 1361 requires court appointed counsel in termination of parental rights proceedings to file a notice of appeal if the party whose rights or duties are adversely affected by a final order requests counsel to do so. LC 1361 eliminates the need to file motions for delayed or late appeals because the party is waiting for new counsel to be appointed. See [Appendix H](#) for a detailed Commission report on LC 1361.

Public Body Statutory Definition – LC 1633

LC 1633 creates uniform definitions of the following terms to be used consistently in the Oregon Revised Statutes: public body, state government, executive department, executive department, legislative department, judicial department, local government, district and special government body.

CONCLUSION

During the 1999 – 2000 interim, the Oregon Law Commission, with the help of numerous dedicated and capable volunteers, completed work on ten pieces of proposed legislation. The Commission is also looking ahead to commence study on several other significant undertakings as described in this Report.

The Chair and Vice-chair of the Commission would like to thank the distinguished and very capable members of the Commission and its Work Groups for their extensive efforts on behalf of the Commission. The Chair and Vice-chair look forward to working with the members during the next two years in continuing the important work of this Commission in support of the Oregon Legislative Assembly.

Representative Lane Shetterly, Chair

Senator Kate Brown, Vice-chair



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APPENDIX A

REPORT ON THE REORGANIZATION OF OREGON CIVIL RIGHTS LAWS – LC 371



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THE CIVIL RIGHTS STATUTES

REPORT

From
The Office of the Executive Director
David R. Kenagy

Prepared by
Michael Hallinan
Research Assistant
Willamette University College of Law

**ADOPTED BY THE OREGON LAW COMMISSION
ON NOVEMBER 17, 2000**



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I. Introductory Summary

The Oregon Law Commission is pleased to present LC 371. LC 371 would reorganize Oregon's civil rights statutes to put them into more logical order, address unclear or inconsistent language relating to enforcement procedures, and make the statutes easier for the reader to understand and use. Most of the civil rights statutes are currently found in Oregon Revised Statutes (ORS) chapter 659 and relate to discrimination in housing, public accommodations, and employment on the basis of impermissible criteria such as race, religion, sex, marital status, color, national origin, age and disability. The reorganization would also include statutes outside chapter 659 over which the Bureau of Labor and Industries (BOLI) exercises jurisdiction.

LC 371 would create a new chapter in the ORS, chapter 659A, that would include all unlawful practices under BOLI jurisdiction. LC 371 would clarify the administrative process through which BOLI administers the civil rights laws. Current law does not detail this procedure in an orderly manner. By contrast, sections 1 through 15 of LC 371 would reorganize this statutory language to follow more closely the chronological order of the actual process. As a result, LC 371 would provide for the public, advocates, and administrators a much more useful and comprehensible authority.

The Commission has endeavored to fix the organizational problems of the current civil rights laws without changing the substance. Recognizing the sensitive nature of this area of the law, the Commission refrained from amending or clarifying provisions concerning remedies and statute of limitation periods for civil and administrative actions. Though some might feel that such amendments would further the goal of improving the civil rights statutes, the Commission left such changes to future legislatures so that the more basic reorganization matters can be achieved without substantial controversy.

II. History of the Project

Prior to the 1999 legislative session, BOLI planned to introduce a bill in the Oregon legislature to "patch up" the organizational problems in chapter 659. BOLI referred the concept to the Office of Legislative Counsel for drafting. Legislative Counsel advised a more comprehensive approach, and BOLI withdrew its proposal. After the 1999 legislative session, Legislative Counsel referred the concept of reorganizing chapter 659 to the Oregon Law Commission. On March 12, 1999, the Program Committee of the Commission voted to initiate a review of the idea.

The Commission formed a Civil Rights Workgroup, chaired by Jeff Carter, a Commission member and former Oregon State Bar President. Other members include David Heynderickx, Office of Legislative Counsel; Marcia Ohlemiller, BOLI's Legal Policy Advisor; Robert Joondeph, Oregon Advocacy Center; and Sandra Hansberger, Northwestern School of Law Legal Clinic. The workgroup has held seven meetings, beginning on November 8, 1999, to discuss and review initial drafts of the proposal. At each meeting workgroup members provided feedback regarding the draft to David Heynderickx, LC 371's draftsman, and the workgroup members discussed additional edits to incorporate into future drafts.

All meetings of the workgroup were open to the public; however, to ensure that notice of the chapter 659 reorganization went to Oregon State Bar members whose clients were most likely to be affected, the workgroup held its September 7, 2000, meeting at the Oregon State Bar headquarters after notice to the relevant Bar sections. Those in attendance included repre-

sentatives from the Oregon Law Center, the Oregon State Bar's Labor and Employment Law Section, Civil Rights Section, and Disability Law Section, and members of private law firms. The workgroup has also received and discussed written public comments submitted to the Commission.

III. Statement of the Problem

Reorganization of Oregon's civil rights statutes is long overdue. Many of those whose work frequently involves use of the civil rights statutes are aware of the need for reorganization. Those users include the public, advocates for those alleging violations, advocates for those cited for violations, those adjudicating cases brought under chapter 659 in courts and administrative proceedings, and BOLI administrators. Indeed, the difficulties of comprehending parts of chapter 659 have even been commented upon by at least one court.¹ The Commission identified the most major organizational deficiencies at two levels: 1) in the large-scale organizational framework and 2) in the provisions setting forth the administrative enforcement mechanism.

Before detailing the exact nature of those problems, a few comments on the importance of organizing statutes are in order. The general arrangement of the provisions of a statute, their relationship to each other, and the logical order in which they are grouped and presented, are all matters that greatly affect clarity and usefulness of legislation. This is especially true if a legislature groups several sets of statutes together to form a statutory scheme, as Oregon has done with the civil rights laws. A well-organized set of statutes serves as a visual aid for those familiarizing themselves with the statutes, adds clarity to the legislative intent motivating their enactment, and reduces uncertainty (and, consequently, litigation costs) for those who work with them. These goals are especially important in this circumstance given the importance of the civil rights protections. That importance is reflected in the policy statement in chapter 659: "It is declared to be the public policy of Oregon that practices of discrimination against any of its inhabitants * * * are a matter of state concern and that such discrimination threatens not only the rights and privileges of its inhabitants but menaces the institutions and foundations of a free democratic state."²

Oregon's current civil rights statutes do not meet this organizational standard in several respects. Although when enacted chapter 659 may have clearly set forth an orderly and sensible arrangement of statutory provisions, any such initial organization has been eroded over the years as new civil rights protections were added to chapter 659 and elsewhere in the ORS. These later protections were not always properly integrated into the existing statutes. Today, substantive provisions are scattered throughout the ORS and have been incorporated into the civil rights framework by reference to chapter 659. These cross references sometimes refer only to chapter 659, without delineating which enforcement mechanisms or remedies apply.

Similarly, the provisions setting forth the administrative enforcement authorities and procedures upon which BOLI relies are not presented in an orderly manner. Although the statute appears to proceed chronologically (beginning with the filing of a complaint, continuing with administrative processing of the complaint, and ending with the termination of the complaint), each provision incorporates other matters unrelated to the subject process. As a result, a reader may review each provision several times before discerning its meaning.

¹ See *Draper v. Astoria School District*, 995 F.Supp. 1122 (D Or 1998)

² ORS 659.020

IV. Objectives of LC 371

Framework: In reorganizing the civil rights statutes, the Commission adopted the framework generally encouraged by the Oregon legislature³ and leading authorities on legislative drafting.⁴ Definitions for commonly used terms within the statutes open the chapter, followed by a statement of purpose and a statement of the scope of the statutes. The substantive provisions, including the general rules of conduct, exceptions to those rules, consequences for violations, and enforcement provisions usually follow these introductory provisions. The statute may conclude with a severability clause, the effective date, or similar provisions.

How the Framework is Applied: LC 371 would create a new chapter in the ORS, chapter 659A, that would include all those statutes under BOLI jurisdiction. Section 1 of the new chapter would set forth the series of definitions that currently introduces chapter 659. Next would come the statement of purpose.

After that introduction the new chapter 659A would contain the substantive provisions regarding unlawful employment practices based on sex, race, etc.; unlawful discrimination against injured workers; unlawful employment practices relating to employee housing; family leave; whistleblowing; unlawful discrimination against disabled persons and miscellaneous unlawful employment discrimination. The substantive provisions conclude with the prohibitions against unlawful discrimination in places of public accommodation and in real property transactions.

Sections 2 through 15 of LC 371 would organize somewhat chronologically the provisions for filing and processing administrative complaints through BOLI. Sections 2 and 3 of the draft set forth requirements for filing a complaint with BOLI, effectively rewriting the language of current ORS 659.040. Jurisdictional limits on BOLI's authority to process complaints are clearly set forth in Section 4 of the draft, derived from current ORS 659.095 and 659.121(4),5(a). Sections 5 and 6 establish BOLI's authority to investigate, settle, or dismiss a complaint, pursuant to current ORS 659.050(1),(6) and 659.095(1),(2). Under Section 7, BOLI is charged with initiating a formal hearing should settlement efforts fail or the interest of justice require. Section 8 provides that the hearing is a contested case proceeding.

Sections 9, 10, and 11 provide civil penalties for certain complaints filed by the Commissioner of BOLI, give BOLI the authority to supervise settlement agreements, and prohibit retaliatory action against complainants. Section 15 deals with civil actions for unlawful discrimination.

V. The Proposal

Please see the attached LC draft.

VI. Conclusion

The Oregon Law Commission respectfully requests that the 71st Oregon legislature enact into law LC 371. The draft legislation represents the consensus of the Commission that this change will streamline Oregon's civil rights statutes and facilitate the administration of those statutes while avoiding to the greatest extent possible any change in their substance. The result is a more easily understood body of law for the use of the public, advocates, and administrators.

³ See OREGON LEGISLATIVE COUNSEL COMMITTEE, BILL DRAFTING MANUAL 63-68 (1968)

⁴ REED DICKERSON, LEGISLATIVE DRAFTING 57 (1954)



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APPENDIX B

REPORT ON CONFLICTS LAW APPLICABLE TO CONTRACTS – LC 2255



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CONFLICTS LAW APPLICABLE TO CONTRACTS

REPORT

From
The Office of the Executive Director
David R. Kenagy

Prepared by
Professor James A. R. Nafziger
December 13, 2000

**ADOPTED BY THE OREGON LAW COMMISSION
ON DECEMBER 15, 2000**



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REPORT ON THE CONFLICT OF LAWS PROJECT

I. Introductory Summary

This report accompanies a proposed bill to codify choice of law for Oregon-related contracts. The proposed codification provides rules and principles to determine which law or laws should govern issues that may arise in Oregon-related contracts involving transactions or relationships across state or national lines. The proposal is a year-long project of the Oregon Law Commission. The Commission's Reporter worked closely with a Study Group on Conflict of Laws that met seven times and included two members of the Oregon Legislature and the Deputy Legislative Counsel, *ex officio*, seven academic specialists from the three Oregon law schools, two judges, and four experienced attorneys.⁵

The bill specifies contract-related issues to which Oregon law applies; other issues to which either Oregon law or another law applies, according to the particular rule, unless the parties agree otherwise; and a detailed procedure for determining the applicable law when no rule has been specified by a statute or by the parties.

II. Explanation

Whenever a transaction or relationship transcends interstate or international boundaries, a question of the applicable law may arise. If, for example, the parties to a contract are domiciled in different states or their contract is negotiated and signed in one state but is to be performed in another, they may have to determine which of two or more divergent laws should govern issues in any dispute that may arise between them. If a dispute arises, a court of law, arbitral tribunal or other authoritative body may also have to decide which law applies. Potential conflicts, which are inherent in both the federal and international systems, may involve three general types of issues: adjudicative jurisdiction over parties or things in dispute; choice of law, that is, the determination of which of more than one state's or country's laws governs an issue; and enforcement of foreign judgments. Ancillary issues include, for example, pleading and proof of foreign law and inconvenience of the forum.

As with most aspects of civil procedure, statutory law largely prescribes the rules of adjudicative jurisdiction and enforcement of foreign judgments. That is because of the importance attached to ensuring that procedural rules be as stable and clearly expressed as possible. Choice of law is, however, an exception to this body of statutory law. It is largely governed by a mixture of judge-made formulas and a few generally worded statutes that are addressed to particular topics. The resulting approach varies widely from one country to another and among the American states. The Reporter's Memorandum to the American Law Institute Project on the Federal Judiciary Code notes as follows:

Choice of law by state courts is unruly and, in all but the rarest cases, essentially unregulated by the United States Supreme Court. The default tends to be the application of the law of the forum, and there are dramatic differences among states on frequently litigated issues of substantive liability.

⁵ The members of the Study Group have been: J. Michael Alexander, Wallace Carson, Mildred Carmack, Jonathan Hoffman, Maurice Holland, Douglas Houser, Hans Linde, Donald Large (later replaced by Gilbert Carrasco), James Nafziger, Eugene Scoles, William Snouffer, Symeon Symeonides, Dominick Vetri; *Ex officio*: Rep. Lane Shetterly, Chair, Oregon Law Commission; Sen. Kate Brown; and David Heynderickx, Oregon Legislative Counsel's Office. Dominick Vetri has served as Chair of the Study Group and James Nafziger as Reporter. In addition, Susan Grabe served as a liaison with the Oregon State Bar, in order to ensure full participation in the project by the Bar and to enlist the interest, expertise, criticism and suggestions of Bar committees and members.

Even when the choice of law is prescribed by statute, as, for example, in the Uniform Commercial Code, the choice-of-law rule is usually so broadly expressed as to require substantial judicial interpretation.

In Oregon, jurisdictional and enforcement issues are largely resolved, respectively, by long-arm statutes and reciprocal enforcement statutes, as well as uniform laws such as those governing interstate cooperation in matters of family law. Interpretative issues may arise, and some topics of enforceability are not specifically covered by statute – for example, tax judgments, fines or other penalties, and family support decrees – but common law plays a relatively insignificant role in resolving issues of jurisdiction and enforcement of judgments.

By contrast, choice of law is still largely the product of judicial decisions and is expressed in a variety of often vague formulations. Statutory choice-of-law rules govern some legal subjects in Oregon, such as commercial transactions, limitation of judicial actions, unclaimed property, child custody, family support, wills and gifts, environmental cleanup assistance, and transboundary pollution. But the choice-of-law approach to govern issues of contract, tort, product liability, property, and other significant topics of litigation is expressed in non-statutory formulations.

Courts and academic commentators have created a myriad of such formulations. Oregon courts nominally follow a combination of two approaches: governmental interest analysis and the most significant relationship provisions set forth in the American Law Institute's RESTATEMENT (SECOND) OF THE LAW OF CONFLICT OF LAWS. In practice, however, the approach taken by Oregon courts to resolving conflicts issues has not been highly disciplined. The result is a confusing, rather erratic line of decisions in which the courts have consulted a matrix of factors and generally selected those that would rationalize the application of Oregon law. As a result, Oregon courts have usually applied the law of the (Oregon) forum (*lex fori*).

III. The Objective of the Project

In response to the unsatisfactory state of existing law, this bill seeks to establish concrete, stable rules to resolve issues transcending jurisdictional boundaries. The Study Group rejected two alternative approaches to the necessary legislation. The first of these alternatives would have simply reiterated one or another *stated* methodology or a combination of them, presumably involving governmental interest analysis and most significant relationship assessment. The second rejected alternative would have been simply to codify the *actual* methodology of routinely applying the law of the forum (*lex fori*) except in unusual circumstances. Instead, the Study Group decided to consult a variety of alternative models in order to fashion a set of concrete rules to govern specific issues, followed by a general default rule.

Having achieved consensus on this approach, the Study Group examined provisions for choice of law in other legislation and academic formulations (see VI, below). The Reporter then began drafting new legislation. Six drafts reflect an evolution of thinking from the initial framework of borrowed legislation to the final version (VII, below) that has taken full account of a broad range of interests in formulating the choice-of-law rules. The final draft therefore accommodates a variety of interests that may be implicated in the resolution of multijurisdictional disputes before Oregon courts, arbitral tribunals, and other authoritative bodies.

During the Study Group's meeting and drafting process the following issues required the most deliberation: What types of contracts or contract-related issues should always be

governed by Oregon law? What law should govern insurance contracts? What limitations should be imposed on party autonomy (that is, on a choice of law by the parties to a contract)? What law should apply in the absence of an effective choice by the parties? In such a case, what should be the objective of a general default rule and what should be the normative standard for that rule? What presumptive rules should be applied for specific types of contracts or contract-related issues not otherwise covered by specific provisions in the proposed legislation? What should be the requirement or requirements for applying a general rule instead of a presumptive rule?

IV. Statement of the Current Problem in the Law

In order to understand the need to codify detailed rules for choice of law in Oregon, as this bill proposes to do, it is important to define the current problem in the law. A brief history of Oregon jurisprudence in this sphere will therefore be instructive.

Under the common law, a territorialist approach dominated choice-of-law analysis until the mid-twentieth century. This approach, which was adopted in 1934 by the American Law Institute's first RESTATEMENT OF THE LAW OF CONFLICT OF LAWS as well as by Oregon courts, was based on the vested-rights theory. According to that theory, rights vest and the governing law is determined on the basis of the location of a single connecting factor, such as the place or wrong in a tort case or the domicile of parties in a family dispute. Thus, for example, whenever a business transaction involves more than one jurisdiction, the location of a single, central element of the transaction, such as the making of a contract, controlled the choice of law.

This vested-rights approach led to the formulation of rather rigid, jurisdiction-selecting rules. Particularly significant and controversial have been the territorialist rules governing torts and contracts: law of the place of wrong (*lex loci delicti*) and law of the place of contracting (*lex loci contractus*). From a territorialist perspective, in resolving contract-related issues – the first phase of the Oregon Law Commission's project – it is necessary to identify either the place of making or place of performance of the contract and sometimes both.

Although territorialist rules continue to be applied by courts and other decision-makers in a few states and to dominate analysis in contexts other than torts or contracts in all states, they are of relatively little importance today in resolving torts and contracts-related disputes. Complex modern approaches have generally replaced the simple rules of the first RESTATEMENT, often to the consternation of busy attorneys and judges.

During the last four decades, Oregon courts have participated in the nationwide trend away from traditional, jurisdiction-selecting rules. The new approaches replace jurisdiction-selecting rules with rule-selecting factors. These approaches, and rules fashioned from them, characteristically require a more functional comparative analysis of significant features in the conflicting laws themselves. Courts therefore are no longer blind to the policies underlying conflicting laws in the interest of simply finding the "right" jurisdiction regardless of the content of its law. Unfortunately, these modern approaches are so flexible that the selection of one rule-selective approach over another is less important than the court's discretion to use whatever factors and considerations it can find to justify a desired result.

Oregon's rather complicated choice-of-law approach has been plagued by problems of application. Courts combine methodologies in hybrid or kaleidoscopic fashion. They also

indiscriminately cite cases, without sufficient regard to policy variations in them and the importance of considering each issue by itself. The resulting opinions are often confusing even though they typically lead to the application of the law of the forum.

V. History of the Project

In 1998, the Oregon Law Commission began to develop legislative initiatives and invited outside proposals for law reform projects. In response, the Reporter submitted a proposal in May 1998 to draft choice-of-law rules. This proposal to the Oregon Law Commission (see Annex I) noted the observation of Willis Reese, a distinguished conflicts expert who served as Reporter of the *SECOND RESTATEMENT*, that Oregon has the most confusing choice-of-law approach in the country. The proposal also cited the need for a more stable, concrete set of rules to guide judicial and other decision-makers. Following the examples of numerous foreign legal systems and the state of Louisiana, the proposal suggested that the Oregon Law Commission initiate a project to prepare a draft statute on choice of law for consideration by the Oregon Legislature. The Commission decided in September 1998 to undertake the project.

On the Commission's request, the Reporter met in December 1998 with two members of the Commission, Chief Justice Wallace Carson of the Oregon Supreme Court and Professor Dom Vetri of the University of Oregon School of Law, to begin planning the project. Because the Oregon Legislature was to convene the following month in its biennial session, it was too late to draft legislation for review by the 1999 session. Instead, the planning committee proposed the establishment of a study group that would meet for the first time in the early part of 2000. Accordingly, the Study Group on Conflict of Laws was organized on the basis of expertise, practical experience and representation of bench and bar.⁶

The Study Group met seven times, on January 21, April 28, June 1, June 29, August 11, September 12, and October 4. All meetings were held at the Willamette University College of Law. Also, a public meeting was held at the Oregon State Bar headquarters, October 30, 2000. Between meetings, members of the Study Group communicated with the Reporter and other members by e-mail, list serv, and written memos. Numerous attorneys communicated ideas and questions to the Reporter as well. The drafting process was assisted by a drafting committee that included David Heynderickx, Hans Linde, Symeon Symeonides, and the Reporter.

The Reporter prepared a study (Annex II) of Oregon's choice-of-law process in time for the April 28 meeting. This study analyzed modern Oregon case law during two periods of development: 1974-1986 ("the formative period") and 1986-2000. Revised versions of two paragraphs in the introductory ("Background") section of that report are incorporated in this report. An annex to the Reporter's study summarized each state court decision that has addressed choice-of-law issues during the period 1986-2000 and a sampling of relevant federal cases applying Oregon choice-of-law methodology during the same period of time. Particular attention was given to the consistency or not of the methodology actually applied in a case

⁶ The Study Group was fortunate to include seven members of the Commission itself. Their contributions to the project were extraordinarily helpful. Because this is the first project undertaken by the Commission on private initiative, that is, from outside the state government, Commission members seemed to view the project as a model for the future. Consequently, they were very conscientious in offering both theoretical and technical suggestions. They also provided a seasoned measure of procedural guidance to the project. Disagreements among members in the Study Group contributed a certain dynamic tension to the drafting process. At times non-Commission members of the Study Group tended to withhold comments in deference to Commission members. The Reporter has therefore recommended to the Commission that it establish guidelines by which its members will be encouraged to participate as actively and productively in the preparation of draft legislation, as this Study Group's phalanx did, without running the risk, by virtue of their position, of dominating substantive exchange or micro-managing the drafting process.

with the stated methodology. This analysis revealed profound inconsistencies and methodological variations from case to case. During the formative period, Oregon appellate courts nearly always applied the law of the forum to resolve conflicts of law. In more recent years, the courts have continued to apply Oregon law in most cases, though to a slightly lesser degree than during the formative period.

At its April 28 meeting, the Study Group confirmed the need for legislation that would establish governing rules for choice-of-law issues in Oregon as clearly and concretely as possible. Bearing in mind the possibility that the 2001 legislative session might be able to review the draft legislation, the Study Group decided to limit its agenda in 2000 to a formulation of choice-of-law rules to govern contract-related issues not otherwise covered by the Uniform Commercial Code.

VI. Review of Legal Solutions Existing or Proposed Elsewhere

After reviewing Oregon case law, as summarized in the report prepared for the April 28 meeting (Annex II), the Study Group consulted a broad range of contract-related provisions for resolving conflicts issues that have been adopted by other, mostly foreign legal systems; formulated by legal scholars; or found in the RESTATEMENT (SECOND) OF THE LAW OF CONFLICT OF LAWS. The Study Group was greatly assisted by lists of alternative provisions that Symeon Symeonides had prepared as Reporter of Louisiana's choice-of-law codification project and as Co-Reporter of Puerto Rico's project. Commentaries prepared by Dean Symeonides on the Puerto Rico draft were particularly helpful. The project's comparative analysis therefore focused primarily on the RESTATEMENT (SECOND), Louisiana, Puerto Rico and German laws, and European regional law. In particular, the Puerto Rico draft, which the Study Group adopted as a basis for detailed discussion and drafting, helped us to sharpen the Study Group's focus, identify issues, and generally organize the drafting process.

VII. The Proposal (Annex III)

VIII. Conclusion

The proposed legislation to codify choice-of-law rules to govern contract-related issues is the product of thorough deliberation, consultation with knowledgeable specialists and other interested parties, and an extensive process of drafting and redrafting. It is a substantial improvement over the case law of which it takes account but which it would largely replace. The legislation will serve a broad range of interests that were represented on the Oregon Law Commission's Study Group on Conflict of Laws or that were otherwise expressed during the drafting process. The bill conforms with the advice of experts, is methodologically sound, and will greatly facilitate the resolution of multijurisdictional disputes in Oregon. Enactment of the proposed legislation would revive Oregon's leadership in conflicts law, as demonstrated by appellate courts over a generation ago, and would help put Oregon in the forefront of a trend toward codification of conflicts law.

Respectfully submitted,

James A.R. Nafziger*
Reporter

* Thomas B. Stoel Professor of Law
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APPENDIX C

REPORT ON SIMPLIFICATION OF THE GARNISHMENT PROCESS – LC 1302



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STATE OF OREGON
Legislative Counsel Committee
October 5, 2000

To: Oregon Law Commission
From: Judgment\Garnishment Work Group
Subject: LC 1302—Garnishment Revision Overview

The accompanying draft is the product of the extensive and arduous efforts of the Judgment\Garnishment Work Group. You will note that this draft addresses only the garnishment portion of the work group's charge. While none of the work group members anticipated that a rewrite of the garnishment laws would be easy, an impressive number of meetings and drafts were needed to reach a consensus product. The work group would have preferred to present a comprehensive draft addressing all aspects of the effect and enforcement of civil judgments, but the commitment of time and energy needed for the garnishment revision prevented completion of the full project. The work group does intend to continue work on the balance of the task, with new meetings delayed until after the end of the upcoming legislative session.

GOALS OF THE WORK GROUP

The rewriting and reorganization of the laws governing garnishment is a most appropriate undertaking for the Oregon Law Commission. Garnishment is a complicated and confusing process, yet it is extremely important to the legal process. It is important to attorneys and courts, but it also touches almost every business in this state. It was the hope of the work group that clearer and simpler garnishment laws would benefit all parties to the garnishment process, including debtors.

The only party to the garnishment process who might be said to have received special attention is the garnishee. The garnishee is not involved in the dispute between the creditor and the debtor, yet a failure by the garnishee to properly respond to a writ of garnishment can result in liability. Fairness dictates that the forms served on the garnishee, and the substantive law governing those forms, be as clear and simple as possible.

While sensitive to the needs of all garnishees, the work group focused on small businesses. These businesses constitute a major percentage of all garnishees. Unlike banks and large corporations, a small business usually does not have in-house counsel who can assist with legal questions arising from a writ of garnishment. The garnishment usually seeks to garnish the wages owed by the garnishee to one of the employees of the business. Unfortunately, wage garnishments and the calculation of the exempt portion of wages is one of the most complicated aspects of garnishment law. Given this state of affairs, the work group felt that anything that would simplify the law and the forms would constitute a major benefit to the businesses of this state.

Other stakeholders represented on the work group were:

Attorneys, who have an obvious interest in the process for enforcement of judgments.

The courts, who are interested in the clarity of law governing garnishments and any changes that might lead to increases in judicial efficiency.

The Department of Justice, who collects on judgments both for state agencies and on behalf of persons to whom support is owed.

Financial institutions, who, along with employers, make up the bulk of garnishees.

Collection agencies, who probably issue more writs of garnishment than any other group.

Debtors, who have an interest in the laws governing exemptions and the process for challenging garnishments.

Given the interests of the various stakeholders, the goal of the work group can be easily stated: Clarification and simplification of the garnishment process.

APPROACH

LC 1302 represents a comprehensive rewrite of garnishment procedures and forms. A quick look at existing ORS chapter 29 will reveal the glaring need for such a rewrite. The statutes follow no recognizable sequence and many of the individual statutes contain a hodge-podge of unrelated provisions.⁷ There are four separate forms for writs of garnishment.⁸ The terminology used in the statutes varies from section to section without apparent reason and it is often difficult to identify the person addressed by the statute.⁹ The laws exhibit substantial confusion about the manner in which the garnishee needs to treat the payment of money to the creditor and the delivery of property other than money.¹⁰ The provisions on sales of property by the sheriff are split up between three or four statutes, and are anything but easy to understand. The procedures for adjudicating claims of exemption and claims against a garnishee are antiquated and needlessly complicated.

At first glance, LC 1302 will look like a substantial departure from the existing law on garnishment. This is not the case. The members of the work group, many of whom can claim to be true experts in both the law of garnishment and the practical application of that law, believe that there are only a few truly substantive changes. Nevertheless, the process looks substantially different because of some basic decisions made about the approach to be taken in rewriting ORS chapter 29. The most significant of these decisions was made early in the process: The draft would consolidate the four existing writ forms into a single form. The two forms for writs of continuing garnishment would disappear. The two existing forms for “snapshot”¹¹ writs would be consolidated into a single form.

⁷ One of the ongoing problems with looking at the draft was finding the source of some of the language. The members of the group who had labored long and hard in ORS chapter 29 knew that the language had its source somewhere in the chapter, but finding it was another matter.

⁸ ORS 29.145 (writ of garnishment issued by clerk of court); ORS 29.147 (writ of garnishment issued by attorney or support enforcement agency); ORS 29.411 (continuing writ of garnishment issued by clerk of court); ORS 29.415 (continuing writ of garnishment issued by attorney).

⁹ The statutes frequently use the undefined term “creditor,” but the term is sometimes used for a judgment creditor (i.e., the person to whom the debt is owed) and sometimes for the person issuing the writ (who may be the attorney for the creditor or a state agency attempting to collect a support obligation).

¹⁰ There are many statutes that make reference to delivery of property to the creditor, even though the only property that is ever delivered directly to the creditor is currency (very rare) and obligations that are payable in money.

¹¹ Continuing writs of garnishment affect only earnings, and act to garnish all wages owed to the debtor on the date the writ is delivered and all wages earned by the debtor during the 90-day period following the date the writ is issued. ORS 29.401. Continuing writs were authorized in 1989. Before that time, only the property held by the garnishee on the date of delivery was garnished (i.e., only wages owing on the date of delivery were garnished). As shorthand, the work group referred to these latter writs as “snapshot” writs. This memo uses the same shorthand.

The work group's intent was not to eliminate the availability of a writ that would garnish wages for a 90-day period. The question presented was whether a separate kind of writ, with a separate form, was needed. The solution adopted by the work group was to eliminate the separate writ but to declare in the substantive law that the new writ had the effect of garnishing wages for a 90-day period if the debtor was the employee of the garnishee. The writ would also garnish any other property that the garnishee might hold. In the case of a debtor who is an employee of a bank, it is quite possible that the writ would garnish both wages (for a 90-day period) and a bank account (snapshot).

This approach produces a major simplification of both the substantive law and the forms. Under existing law, creditors are frequently forced to deliver two writs (a snapshot writ and a continuing writ) when the creditor is unsure as to whether the garnishee employs the debtor or is unsure as to whether the garnishee holds property of the debtor other than wages. A garnishee who receives both writs could easily become confused about the significance of the two writs. The cost of delivering the second writ is added to the judgment owing against the debtor.

Before reviewing the individual sections of the bill, one other complication that currently exists in garnishment law must be mentioned. It is a complication that the work group agreed could not be eliminated. This complication arises out of the need to retain the clerk of the court as one of the persons who is authorized to issue a writ. Under the law currently in effect, the need to keep the clerk as an authorized issuer gave rise to the clerk-issued snapshot writ (ORS 29.145) and the clerk-issued continuing writ (ORS 29.411).

The reason the clerk-issued writ creates complexity arises out of the fact that, for the purposes of writs issued by attorneys or state agencies, the garnishee must deliver the garnishee answer, and make all payments under the writ, to the issuer (the attorney or state agency). If the clerk of the court is the issuer of the writ, the garnishee must deliver the garnishee answer, and make all payments under the writ, directly to the creditor.

The clerk-issued writ is primarily used by persons who acquire judgments in small claims actions. It would be fairly anomalous if the law prohibited a plaintiff in a small claims action from having an attorney at the trial, but then required the plaintiff to seek the services of an attorney to enforce the judgment. Nor did there seem to be support for allowing pro per litigants to issue writs themselves. As already noted, garnishment is one of the most complicated areas of the law and there is no way to do a "simplified" small claims writ of garnishment.

With this general description of the approach taken in the draft, this memorandum will now look at the individual provisions.

Section 1 (Definitions). Because of the substantive significance of the terms defined in this section, it is worthwhile to look at a few of them individually:

"Creditor." This term means only the person to whom the judgment or other debt is owed. It does not mean the person who is issuing the writ.

"Debt." Since the existing garnishment laws were based on the assumption that writs would only be issued to enforce judgments, the language throughout ORS chapter 29 refers to "judgments." But writs are now frequently issued to collect amounts in situations in which a court has never issued a judgment. For instance, writs issued to collect on agency orders and warrants¹² and writs issued pursuant to provisional process.¹³ Even if a judgment exists, some

amounts added after the judgment was entered may not have been part of the original judgment. ORS 29.367. In recognition of this expanded use of writs of garnishment, “debt” has been substituted for “judgment.”

“Garnishable property.” This term provides a simple way to describe property that is subject to garnishment. Some specific types of property (e.g., equitable interests in property) are simply not affected by a garnishment. Garnishable property should be compared to exempt property. A challenge to the garnishment must be made for the purposes of most exempt property other than wages.

“Garnishor.” This definition addresses the problem of the clerk-issued writ. Almost all of the substantive provisions of LC 1302 refer to the garnishor and not the creditor. For instance, payments under the writ are to be made to the garnishor. As you can see, the garnishor is the issuer of the writ, unless the clerk of the court has issued the writ, in which case the creditor is the garnishor. The term “garnishor” avoids the need to make this distinction throughout the rest of the draft.

Section 2 (Garnishment described). The significant aspect of this description is the statement that garnishment is “the procedure by which a creditor invokes the authority of a (court).” This language accurately reflects what agencies are doing when agencies issue writs for the enforcement of agency orders and warrants under ORS 205.126. It is also true of writs issued for the enforcement of a judgment, which may or may not be a judgment of that particular court. The concept of the court whose authority is invoked reappears throughout the draft.

Section 3 (Debts subject to garnishment). Subsection (1) of this section fleshes out the term “debt.” Subsection (2) provides the date on which a writ may first be issued for enforcement of the debt.

Section 4 (Form of writ). Writs of garnishment under the existing law consist of several distinct pieces, some of which are of interest to the garnishee but not the debtor, others of interest to the debtor but not the garnishee. LC 1302 segregates the various parts of the writ to ensure that each party receives only those parts of the writ that the party needs to see. For instance, the writs in the existing law start with a lengthy judgment calculation. This calculation is of interest to the debtor but is of no significance whatsoever to the garnishee, and may even cause substantial confusion to the garnishee. Under LC 1302, the debt calculation becomes a separate form that the garnishor must prepare and deliver to the debtor, but that the garnishee never sees. All that the garnishee gets is the bottom line.

Other parts of the existing writ forms that are now separate forms include the garnishee response, the instructions to the garnishee and the wage exemption calculation.

Section 5 (Validity of writ). Section 5 continues existing law in indicating that a writ is only valid for 60 days after the writ is issued. The work group discussed eliminating this provision but decided against the change. The language does clarify, by reference to section 10, that a writ served within the 60-day period continues in effect for the 90-day period specified for wages.

¹² ORS 205.126.

¹³ ORCP 84 D(2)(b).

Section 6 (Court with authority over writ). Subsection (1) of this section retains existing law. Subsection (2) is new, and establishes a rule for courts with authority over a writ issued to enforce an agency order. As you can see, only the court for the county in which the order is first recorded, or the county in which the debtor resides (the order still must be recorded in that county), has authority to issue the writ.

Section 7 (Garnishable property generally). This language restates existing law on property subject to garnishment. ORS 29.205 (1). Existing law uses the term “debts and other obligations” throughout ORS chapter 29. LC 1302 limits this terminology to section 7, because the work group was unsure as to what other “obligation” would not be a debt. Section 7 makes it clear that only the interest of the debtor in the property is garnished.

Section 8 (Property not subject to garnishment). This language is derived from existing law. ORS 29.205 (3) and (7).

Section 9 (Setoff). This is ORS 29.205 (8).

Section 10 (Duration of writ’s effect). This is an important provision establishing the distinction between the duration of the writ’s effect on wages (90 days from delivery) as opposed to other property (snapshot). Experienced practitioners will note that the work group decided to change the starting point of the 90-day period for wages. Under existing law, the 90-day period runs from the date of issuance. ORS 29.401. Except for the period of a writ’s validity under section 5, this is the only time under the existing law that the garnishee’s duties hinge on the date of issuance. On the other hand, almost all of the other significant timelines (time to make response, date on which writ attaches) are keyed to the date that the writ is delivered. While the work group realized that the change was a substantive change, the group felt that the change was justified as a means of eliminating potential confusion for the garnishee.

Subsection (3) of this section encapsulates existing ORS 29.373.

Section 11 (Multiple writs). This section fleshes out the rules for multiple writs currently enunciated in ORS 29.405. The members of the work group noted that problems with multiple writs frequently arise and this section attempts to clarify the rules applicable to these situations. Special attention should be given to the last sentence of subsection (2), which allows concurrent payments on two writs if one writ does not garnish all nonexempt wages.¹⁴

Section 12 (Who may issue writs of garnishment). This section restates existing law on persons who are authorized to issue writs of garnishment. Subsection (2)(c) (clerk-issued writ for certain agency orders) comes from ORS 205.126.

Sections 13 and 14 (Clerk-issued writs). This is current law. ORS 29.138.

Section 15 (Agency-issued writs). This is also current law. ORS 29.139 and 29.371.

Section 16 (Items required to be delivered). There was substantial discussion in the work group about whether an extra copy of the writ should be delivered to the garnishee. Because the garnishee is required to mail a copy of the writ to the court when the response is made, the representatives of financial institutions wished to continue the existing requirement found in ORS

¹⁴ The Department of Justice indicated that on some special garnishments only 10 percent of wages is subject to garnishment instead of the normal 25 percent.

29.155. The draft reflects the continuation of the requirement that an additional copy be delivered.

Section 17 (Manner of delivery). This is current law. ORS 29.165.

Section 18 (Proper person for receipt of writ). This is the language of ORS 29.185 except that subsection (1)(a) includes a new provision allowing for office service based on ORCP 7 D. The draft also eliminates ORS 29.185 (7), a confusing and apparently unnecessary provision addressing service on savings and loan associations.

Section 19 (Documents to be delivered to debtor). The language is based on ORS 29.215, but includes the requirement that the debtor receive a copy of the new debt calculation form.

Section 20 (Duties of garnishee). This language is derived from existing law. ORS 29.195 and 29.245 (1).

Section 21 (Immunity for garnishee). This provision renders consistent two existing laws that give immunity to the garnishee if the garnishee makes payment of garnished amounts to either the court or the garnishor or delivers garnished property to the sheriff. ORS 29.195 (1) and 29.275 (2).

Section 22 (Exceptions to garnishee's duties). This section is based on existing law. ORS 29.255 (1) and (2).

Section 23 (Personal representative as garnishee). This section is based on ORS 29.255 (5).

Section 24 (Garnishee response required). Subsection (3) of this section adjusts the deadline for a garnishee response to address the issue of weekends and holidays. Current law has no such provision.

Section 25 (When response not required). This is existing law. ORS 29.138 (2), 29.155 (2) and 29.365.

Sections 26 and 27 (Contents of response). The new garnishee response is divided into two parts. The second part need only be completed if the garnishee is the employer of the debtor. The required answers are based on the existing garnishee certificate in the four forms. As already noted, the garnishee response is now a separate form, which should cut down the amount of paper being mailed by the garnishee. For instance, the instructions to the garnishee, which previously were part of the writ, will no longer be delivered by the garnishee to the garnishor.

Section 28 (Delivery of garnishee response). Under existing law, the garnishee is required to deliver a copy of the garnishee response to the sheriff of the county if the garnishee has property other than a debt payable in money. In most cases, the garnishor does not pursue such property. The work group felt that it should be the duty of the garnishor to alert the sheriff if the garnishor is interested in pursuing this type of property. Therefore, section 28 relieves the garnishee of the duty of delivering a copy of the response to the sheriff.

Section 29 (Supplemental garnishee response). This section modifies the existing form that a garnishee must use when the garnishee receives an order to withhold income after filing

a response. ORS 29.282. The form will now also cover situations in which a bankruptcy is filed after the response is filed.

Section 30 (Challenge to garnishment). The existing “claim of exemption” is used for four separate purposes. First, it can be used by a debtor to claim an exemption. Second, it can be used by a debtor to claim that property is not subject to garnishment. Third, it can be used by a debtor to allege that the debt is calculated incorrectly. Finally, it can be used by a person who claims to have an interest in the property. ORS 29.245 (2). Because of these different uses, the work group decided to use the more generic term “challenge to garnishment.”

Subsection (4) is new language that makes it clear that a court may not collect any fee at the time a challenge to garnishment is filed.

Section 31 (Notice to garnishor and garnishee). This section reflects existing law. ORS 29.142.

Section 32 (Duties of garnishor when challenge filed). Subsection (3) of this section is new language that clarifies that the filing of a challenge to the garnishment does not stop the clock on the timeline set for seeking a sheriff’s sale of property. However, the provisions on sale by the sheriff make it clear that the sheriff is not to take the property into possession or sell any property pending the court’s decision on the challenge.

Section 33 (Duties of garnishee). Subsection (2) of this section clarifies the garnishee’s duty to hold property that would otherwise be subject to sale by the sheriff.

Section 34 (Hearing). The work group discussed at length whether the statute should set a time for the hearing. The Judicial Department had concerns about any firm timeline.

Section 35 (Allowance or denial of challenge). This is existing law. ORS 29.142 (6), (7) and (8).

Section 36 (Sanctions). Subsection (2) of this section is a substantial rewrite of ORS 29.215 (2). The new penalty is tied to the failure of the creditor to provide an address for the debtor.

Section 36a (Special rules for writs issued for past due support). This is existing law. ORS 29.371.

Section 37 (Claim by person other than debtor). Again, this is existing law. ORS 29.245 (2).

Sections 38 and 39 (Payment of money under writ). LC 1302 creates a sharp distinction between situations in which the garnishee must make payments of money under the writ and situations in which property must be held for sale by the sheriff. Sections 38 to 44 govern situations in which money will be paid under the writ. The work group decided not to change the timeline for the distinction made under current law between debts due within 45 days after delivery of the writ and debts due more than 45 days after delivery of the writ (debts due more than 45 days after delivery of the writ are sold by the sheriff).

Section 40 (Payment of wages subject to garnishment). This section substantially clarifies the statutory language that addresses when a garnishee must make payments of nonexempt wages to the garnishor. The section incorporates a common sense payment schedule that

authorizes the garnishee to make payments under the writ at the same time that the garnishee normally pays the debtor. Thus, the first payment under the writ is not due until the garnishee next pays the debtor after the writ is delivered (i.e., payment does not need to be made when the garnishee response is made). The garnishee then must make payments under the writ at the same time the garnishee pays the debtor during the 90-day period following delivery of the writ. The garnishee makes a final payment after the end of the 90-day period, at the time of the next payment to the debtor.

The work group noted that other law requires that pay periods in Oregon not exceed 35 days, so the group was not worried about a garnishee holding final payment under the writ for an extend period after the end of the 90-day period. ORS 652.120.

Finally, this section requires that garnishees complete a new wage exemption calculation form and mail the form with the wage payment if the garnishee's pay amount or pay period changes during the 90-day period. Also, the section requires that a final wage exemption calculation form be prepared and mailed with every final payment. The reason for this requirement is that the final payment will almost invariably be for a period of time that does not correspond to the normal pay period of the debtor. In order to assure that the correct exemption has been determined, the garnishee will have to perform a new calculation for the final payment.

Sections 41 and 42 (Payments made to clerk of court). In general, the only time that payments are made to the clerk is when a challenge to the garnishment is made or when the garnishee makes a mistake or wishes to take advantage of the safe harbor provided by making the payment to the court. These provisions reflect the existing law on such payments.

Sections 43 and 44 (Crediting of payments). These sections, governing the crediting of payments made under the writ, are existing law. ORS 29.138 (3) and 29.139 (3).

Section 45 (Property subject to sale by sheriff). This section describes the property of a debtor that is to be sold by the sheriff (generally, any obligation that is not payable in money or that is not due within 45 days after the writ is delivered). Subsections (2) and (3) reflect the current distinction found in the law between property that must be physically delivered to the sheriff and property that is to be held until the sale is completed and then delivered to the buyer. ORS 29.255 (4) and 29.265 (2).

Section 46 (Garnishee duties). This section reflects a clarification of the duties of the garnishee when the garnishee holds property subject to sale by the sheriff. Under LC 1302, a single rule will apply to all such property: The garnishee must hold the property for 30 days. If the garnishee does not hear from the sheriff before the end of the 30-day period, the garnishee can treat the property as though the writ was never served. In other words, the burden is on the garnishor to ensure that all steps are taken to set the sheriff's sale in motion and the garnishee has no duty to do anything except hold the property and wait.

Section 47 (Request for sale). This section sets out a new procedure for a garnishor who wishes to investigate a possible sale of property by the sheriff. Within 20 days after the garnishee delivers the garnishee response showing that the garnishee holds property subject to sale by the sheriff, the garnishor must deliver a request for sale to the sheriff and pay all sheriff fees required for the sale. The language contemplates that the garnishor may request a quote from the sheriff for those sales that are not handled by a standard schedule, in which case the sheriff must give the quote within five days. The section gives the sheriff flexibility with respect to whether the sheriff actually takes the property into possession or enters into an agreement with

the garnishee for the garnishee to hold the property pending sale.

Sections 48 and 49 (Sheriff's sale). These two sections retain the existing structure and timeline for sheriff sales. Section 49 clarifies the effect of a challenge to the garnishment after the garnishee response is delivered.

Section 50 (Release of garnishment). This section is based on ORS 29.365. The work group decided that a simple statutory form for release of a garnishment was needed and the draft contains that form. The section indicates that the garnishor must deliver a copy of the release to the sheriff and the clerk of the court under certain circumstances. Existing law indicates that the garnishor or the debtor will do this.

Section 51 (Liability of garnishee). Subsection (1) of this section is based on ORS 29.275 (1). Subsection (3) is new and allows the garnishor to collect costs when the garnishee fails to answer the writ. Subsection (4) is also new and makes it clear that money collected from the garnishee (other than costs) must be applied against the debt of the debtor.

Section 52 to 54 (Process). These sections, based on ORS 29.285 to 29.355, represent a simplification of the process for seeking sanctions against a noncomplying garnishee. Section 52 makes it clear that the garnishor may seek an order to show cause for an examination, as well as an on order requiring that the garnishee appear for hearing. Section 53 (4) modifies the language of ORS 29.235 (2) to allow a judgment against a defaulting garnishee for costs in addition to a judgment equal to the debt of the debtor.

Sections 55 to 56b (Financial institutions as garnishees). These sections bring together the various provisions of ORS chapter 29 that provide special rules for financial institutions. One of the goals of the work group was to segregate these special rules to avoid unnecessary detail for other garnishees (e.g., small employers). Consistent with this approach, the Instructions to Garnishee form contains a separate section that contains instructions to garnishees who are financial institutions—instructions that other garnishees may ignore.

Section 57 (Writs issued by state agencies). This section is based primarily on ORS 29.357. However, the language contains one significant modification of the existing rules. Under ORS 29.357, a garnishee does not file a copy of the garnishee response with the court (as is the case with other writs). The reason for this different approach lies in the fact that the court does not have any paperwork on the underlying adjudication at the time the writ is served (the order will have been recorded in the County Clerk Lien Record under ORS 205.125, but nothing will have been filed with the court). The problem with this arrangement is that the debtor is directed by current law to file a claim of exemption with the court and confusion can ensue at that point because of the lack of an underlying judgment.

The solution reflected in section 57 is to require that the debtor deliver a challenge to the garnishment to the agency. The agency is then given seven days to either release the property or file a complete set of documentation with the court, including copies of the writ, the response and other supporting documentation.

Section 58 (Writs issued for provisional process). ORCP 84D(2)(b) indicates that writs of garnishment must be used to enforce orders for provisional process if property is held by third parties. Section 58 gathers together the various provisions currently appearing in ORS chapter 29 relating to writs issued for provisional process (see, e.g., ORS 29.115).

Section 58b (Notice of garnishment). This section is based on ORS 29.375. Notices of garnishment are very similar to writs of garnishment. In fact, except as provided in ORS 29.375, all laws applicable to writs of garnishment apply to notices of garnishment. Notices of garnishment may be issued only by state agencies authorized to issue warrants to collect taxes and debts owed to the state (e.g., Department of Revenue) and by county tax collectors. The most significant difference between a writ of garnishment and a notice of garnishment is that the notice of garnishment garnishes wages until the debt is paid and is not subject to the 90-day limitation imposed on a writ of garnishment.

Section 58d (Wage exemption). Section 58d is a rewrite of ORS 23.185. The principal change is to establish a simpler schedule for calculation of the exemption. Under ORS 23.185, two calculations must be made for a debtor who is an employee of the garnishee. The first calculation, for the normal exemption, is simple: 75 percent of the debtor's paycheck is exempt. The second calculation is for a minimum exempt amount, and is required by federal law. This calculation is anything but simple. To help the garnishee, the law (and the form) will now have a schedule for the most common pay periods (weekly, biweekly, semi-monthly and monthly). In addition, a formula is provided for other periods.

Sections 59 to 65 (Forms). The work group spent a tremendous amount of time working on the new garnishment forms. The goal was simple: A set of clear and accurate forms that would simplify the work of both the garnishor and the garnishee. Some of the changes made to attain this goal are:

(1) All blanks that the garnishor needs to fill in are now in the writ (under the existing forms, some blanks appeared in the instructions).

(2) The debt calculation no longer is part of the writ, but is prepared as a separate document.

(3) All addresses needed by the garnishee are gathered in one place in the writ ("Important Addresses").

(4) The garnishee response was substantially rewritten to eliminate confusing and overlapping check-box options.

(5) The garnishee response starts with a blank for the date on which the writ was delivered, which highlights the significance of this date for the purposes of the response. As already noted, many of the substantive laws were changed to hinge the effect of the writ on this date.

(6) The instructions to the garnishee are in a separate form. The separate form will substantially reduce the amount of paper being mailed, because the garnishee will not have to return this form to the garnishor or the court (which is currently the case).

(7) The instructions to the garnishee are completely rewritten. For a small business receiving a writ, these instructions are crucial. In an effort to make these instructions as clear as possible, examples are provided (there are no examples in the current form). Instructions for financial institutions are segregated to avoid confusing other garnishees. Instructions for delivering the response are substantially simplified.



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(8) The wage exemption calculation form is made a separate form and specific instructions are provided for the minimum exemption calculation. A separate form is needed because the garnishee must complete and return at least two of these forms (once with the response, once with the final payment). The instructions are important (the current forms provide very little guidance).

(9) A form for the release of a garnishment is provided (existing law does not provide a form).

This concludes the overview of the draft. The work group hopes that the commission will approve the introduction of LC 1302 for consideration by the next Legislative Assembly.

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APPENDIX D

REPORT ON CHILD SUPPORT OBLIGATIONS – LC 1510



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support for the Commission.*

CHILD SUPPORT OBLIGATIONS

REPORT

From
The Office of the Executive Director
David R. Kenagy

Prepared by
John Richardson
Attorney at Law

**ADOPTED BY THE OREGON LAW COMMISSION
ON NOVEMBER 17, 2000**

**REPORT 2000-4
OCTOBER 27, 2000**

REPORT OF THE WORKGROUP ON THE REVISION OF THE JUVENILE CODE SUBGROUP ON CHILD SUPPORT OBLIGATIONS

I. Introductory Summary

Currently, the juvenile court may, after a hearing, require a parent or any person legally obligated to support a child who is within the jurisdiction of the juvenile court to pay child support. ORS 419B.400 and ORS 419C.590. The statutes do not identify the process for bringing support matters before the court, and do not identify the court's specific authority to review and modify support orders set by the juvenile court or another court of competent jurisdiction. Further, the statutes do not provide a system for review of past child support obligations and arrears when they are an impediment to reunification and stability of the family.

The subcommittee received various proposals and the full workgroup supported a legislative change to chapter 25.396 which will allow Services to Children and Families and the Oregon Youth Authority, as judgment creditors, to enter into payment agreements with child support obligors to reduce the monthly burden on obligors where appropriate. Further, the proposal does not require a legislative change to the already existing authority of judgment creditors to suspend enforcement or to forgive support obligations when appropriate. Both SCF and OYA have agreed to review administrative rules and internal policies to make those options available if deemed appropriate.

II. History of the Project

The OLC undertook Revision on the Juvenile Code in 1999. Commission members Senator Brown and Jeff Carter have worked to include a broad range of practitioners and administrators of juvenile law in the workgroup. The subgroup on Child Support is co-chaired by Ronelle Shankle on the Department of Justice Child Support Division, and John Richardson of the Oregon State Bar Juvenile Law Section. In addition to the co-chairs, the sub-group includes representatives from the Department of Human Resources State Offices for Services to Children and Families, the Oregon Youth Authority and Legal Aid Services of Oregon. The subgroup reviewed current Oregon practice regarding data collection and referral of child support cases, state statutes, administrative rules and agency policies, as well as federal law effecting the process of establishing and enforcing child support.

III. Statement of the Problem Area

The Juvenile Code currently allows the juvenile court to set and enforce child support judgments for the benefits of children and youths within the jurisdiction of the juvenile court. ORS 419B.400 and 419C.590. There was concern that although the code allows this process, most orders are set by administrative order, or already exist from a previous domestic relations order and are not set by the juvenile court where information about the parent's circumstances is readily available. Administrative orders are typically set when a child is placed in substitute care (e.g. foster care) through Services to Children and Families or when a youth is committed to the Oregon Youth Authority. Administrative orders typically take between 3-6 months to complete (on average, 129 days for OYA and 165 days for SCF). In many cases this creates an automatic arrearage for the parent paying support. The Division of Child Support then begins collecting the obligation both for the current month's support and the arrears.

Typically, this results in an income withholding of 120% of the ordered support amount. In a small number of cases, where reunification of a parent and child is possible, the child support order or arrears make it impossible to sufficiently stabilize the family to make final reunification possible. For example, parents may not be able to obtain housing because of a support arrears judgment or be able to afford rent without housing assistance, may not qualify for cash assistance or food stamps, or be able to maintain a sufficient income to meet the needs of the child.

The subgroup explored possibilities to: 1) Determine if it is possible to set initial support orders more quickly; 2) Provide better information to the agency or court setting order so that the child support amount accurately reflects the parents' current circumstances, 3) Determine if it is appropriate for SCF and OYA to participate in systems that could provide greater flexibility in collection and enforcement of child support orders, and 4) Determine if changes were necessary to clarify statutory provisions for setting or modifying child support orders through the juvenile court.

To meet these goals, the subcommittee reviewed data from OYA and SCF related to referral of cases to the Division of Child Support for establishment of support orders and reviewed enforcement data from the Division. The subgroup also reviewed the administrative policies of the agencies for conflicts or contradictions between referral policies as well as enforcement policies and reviewed the agencies' compliance with federal support guidelines. Four meetings were held to discuss the data and information collected before sending three proposals to the full workgroup.

IV. The Objectives of the Proposal

(See attached Draft LC1510)

Amending ORS Chapter 25.396 to allow an additional exception to wage withholding of support obligations allows the State Offices for Services to Children and Families (SCF) and the Oregon Youth Authority (OYA) to enter into payment arrangements with parent-obligors to meet their financial needs without forgiving the debt associated with state care of their children.

Both SCF and the OYA, as judgment creditors of the a support obligation, currently have the ability to satisfy or to suspend enforcement of support obligations. These options do not necessarily provide a family with immediate relief of the support obligation, and they do not encourage parents to be financially responsible for the support of their children, and although the agencies have this ability, they commonly do not use it or are reluctant to use these methods. Federal regulations require that child support obligations be collected by wage withholding unless a state has set a specific exception to that requirement. The Division of Child Support currently has no statutory authority to enter into such agreements. This proposal sets such an exception.

There was discussion that no statutory language would be necessary if SCF and OYA utilized their ability to suspend or to satisfy child support obligations. Review of the data and amounts collected suggested that this could have a substantial impact on current operating budgets for both agencies. For example, SCF currently projects that about \$7,000,000 of its operating budget will come from child support collections in the next biennium. Further, both OYA and SCF feel that it is inappropriate for front-line personnel with expertise in social work or probation matters to be saddled with financial decisions as well. Current policy allows a case worker to request a satisfaction or suspension of support, but it must go through management channels to be approved. Neither agency support a change in these policies, but both supported the concept of entering into payment arrangements to reduce the immediate impact of the obligation via an exception to wage withholding.

Likewise, there was discussion that the court could provide better information to DCS by collecting additional financial information from the parent when they initially appear in court. Both SCF and OYA discouraged any system that required the worker to be responsible for collection of this information, or to be responsible for sending the information to DCS. Parents currently complete an application for court appointed counsel in most cases. The application contains current financial information about the parent. It was thought that this information could be submitted to DCS so that they would have some current information about the parent's financial situation and could compare this against information that is collected by DCS. However, the indigent defense application has statutory restrictions on its use. It cannot be used as a discovery tool in this manner. There is continuing discussion about creating a form to be used for this purpose that either the court could submit to DCS, or that a parent could voluntarily submit to DCS.

Finally, the subgroup proposed that the courts set initial temporary support in every case at some minimum level. The rationale was to provide the parent with timely notice of the amount of the child support obligation and to avoid arrears by waiting several months before the support obligation was calculated. This system would allow the administrative order to recapture a higher support obligation later, but would avoid the 3-6 month delay in the current system. It would also allow DCS to take more time to investigate which could result in fewer default orders. Again, SCF and OYA objected to this proposal because of the impact to their budgets. Average support orders for both agencies are higher than the minimum child support order (SCF average order is between \$143-\$242, and OYA is between \$171-\$285). Both agencies disagreed with setting support at a lower amount without the ability to collect retroactively if a higher level of support were later determined to be the appropriate level of support.

V. Review of Legal Solution Existing or Proposed Elsewhere

There were no other proposals examined by the workgroup other than the alternative discussed above.

VI. The Proposal

Please see the attached LC draft.

VII. Conclusion

The Workgroup on Juvenile Code Revision respectfully requests that the Oregon Law Commission adopt the draft LC1510. The draft legislation represents the consensus of the Workgroup that this change will allow SCF and OYA to enter into payment arrangements with a child support obligor and will stop income withholding to reduce monthly payment obligations in those cases where it is necessary to stabilize the financial situation of the family and effect reunification with the child or children. This solution has the minimum impact on the workload of each caseworker, and does not significantly change the management system or policies of each of the three systems responsible for referral or enforcement of child support obligations.



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APPENDIX E

REPORT ON THE OREGON RULES OF JUVENILE COURT PROCEDURE – LC 1665



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OREGON RULES OF JUVENILE COURT PROCEDURE:

REPORT

From
The Office of the Executive Director
David R. Kenagy

Prepared by
Nicole L. Brugato
Extern
Willamette University College of Law

**ADOPTED BY THE OREGON LAW COMMISSION
ON NOVEMBER 17, 2000**



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**REPORT 2000 – 1
October 27, 2000**

OREGON RULES OF JUVENILE COURT PROCEDURE:

A REPORT

EXECUTIVE SUMMARY

Imagine playing a board game in which each player is given a different set of rules. While some sort of game may ensue, the outcome is unpredictable and the participants are frustrated. Even if this imaginary game is eventually governed by only one set of rules suppose those rules are for Monopoly and the board on the table is for Checkers. In that instance, even though the rules are certain, they just don't work. The situation for the participants is little improved.

Juvenile dependency proceedings in Oregon face challenges similar to those illustrated above. The procedural rules governing juvenile dependency proceedings are drawn from multiple sources, including the Oregon Rules of Civil Procedure (ORCP) and the juvenile dependency law itself, but without certainty as to which rules apply in a given instance. When a recent ruling on a pre-appeal motion applied the ORCP, Rule 71, the question of whether the ORCP would be applied in its entirety to juvenile dependency proceedings was raised.¹⁵ Many practitioners were concerned about the practical workability of many parts of the ORCP in dependency and termination of parental rights proceedings.

In light of these developments, the Oregon Law Commission's Juvenile Code Revision Work Group drafted the Oregon Rules of Juvenile Court Procedure (ORJCP). This Report highlights the procedural concerns in juvenile dependency and termination of parental rights proceedings and describes the Work Group's effort culminating in a set of rules for these two types of juvenile proceedings. The ORJCP address the need for process predictability and uniformity, timeliness and administrative efficiency.

INTRODUCTION

Juvenile dependency proceedings begin with the removal of a child from a home after reported neglect or abuse. The State Office for Services to Children and Families (SCF) is responsible for removing the child and initiating a petition with the circuit court to establish the court's jurisdiction over that child's case. The court is charged with deciding and overseeing the steps that must be taken before that child can safely return home. When a child cannot be returned home a separate proceeding may be initiated within the dependency proceeding to terminate parental rights so the child may be adopted. Proceedings of this sort are common throughout Oregon, however, a lack of certainty as to which procedural rules apply at each stage risks similar cases producing dissimilar results. Lack of clear procedures also creates confusion, inefficiency and diminished trust in the system.

The rules used in juvenile dependency proceedings vary from case to case and from county to county. The majority of counties have traditionally limited the applicability of the ORCP in juvenile dependency and termination of parental rights proceedings. In the ruling on pre-brief-

¹⁵ ORCP Rule 71 governs motions for relief from judgments.

ing motions in State ex rel v. Clark, the Oregon Court of Appeals “motions panel” concluded that ORCP 71 applies in juvenile court cases. The pre-briefing ruling states, in relevant part:

“The court determines that ORCP 71 is applicable to juvenile court cases, because: (1) ORCP 1 A provides that the [ORCP] apply in all circuit courts of the state, including proceedings of statutory origin, except where a different procedure is specified by statute or rule; (2) the juvenile court proceedings are statutory proceedings in a circuit court; (3) while ORS 419A.200(6)(a) addresses the authority of a juvenile court to exercise jurisdiction by reason of matters transpiring subsequent to the order being appealed, neither ORS 419A.200(6)(a) nor any other provision of the Juvenile Code addresses the authority of a juvenile court to grant relief from a judgment on the grounds specified in ORCP 71.”¹⁶

Although the question of the applicability of the ORCP to juvenile dependency and termination of parental rights proceedings has been raised, neither the Oregon Court of Appeals nor the Oregon Supreme Court have decided whether the ORCP apply generally in juvenile dependency and termination of parental rights proceedings.¹⁷ Since the ruling in Clark, the use of ORCP motions has increased dramatically in some counties.¹⁸

In his Oregon Law Review article, Professor Fredric R. Merrill explained that the ORCP do not apply generally to juvenile proceedings:

The ORCP apply only when necessary to achieve the purpose of the juvenile proceeding. In general, this would not include application of the ORCP or other general procedural statutes. The juvenile proceedings are comprehensively regulated by their own statutory procedures, which specifically incorporated only specific sections of civil procedure rules.¹⁹

Proponents of the general applicability of the ORCP to juvenile dependency and termination of parental rights proceedings point to ORCP 1A, which provides in part:

These rules govern procedure and practice in all circuit courts of this state except the small claims department of circuit courts, for all civil actions and special proceedings[,] whether cognizable as cases at law, in equity, or of statutory origin except where a different procedure is specified by rule or statute.²⁰

The uncertainties raised by the Clark case emphasize the need to clarify what rules apply in

¹⁶ State ex rel Juvenile Dept. v. Lucinda Clark, Multnomah County Circuit Court, No. 9011-831712, CA A108606, April 10, 2000. Multnomah County termination of parental rights appeal. The Juvenile Court denied the motion to set aside the termination judgment. This case is now being briefed in the Court of Appeals and the state in its brief will again raise the ORCP question.

¹⁷ See State ex rel Upham v. McElligott, 326 Or 547, 554-55, 956 P2d. 170 (1998), (even assuming that the Oregon Rules of Civil Procedure generally govern such proceedings, the advisory jury procedure authorized by ORCP 51D does not apply in juvenile delinquency proceedings, because ORS 419C.400 specifies a different procedure); State ex rel SOSCF v. Cox, 152 Or App 756, 763, 954 P2d 1227 (1998), (because the state did not contend at trial that the juvenile court was without authority to grant the mother’s ORCP motion for directed verdict or to dismiss the case under ORCP 54 B(2), the Court of Appeals did not consider the merits of the state’s arguments on appeal challenging the juvenile court’s application of these ORCP provisions); State ex rel Juv. Dept. v. Charles, 123 Or App 229, 233, 859 P2d 1162 (1993), *rev den* 318 Or 326 (1993) (“[a]ssuming, without deciding, that ORCP [discovery rules] apply ***, mother points to no evidence that was withheld from her or to any on her ORCP motions”).

¹⁸ State ex rel Juvenile Department v. Lucinda Clark, Multnomah County Circuit Court, No. 9011-831712, CA A108606, April 10, 2000. Multnomah County termination-of-parental-rights proceeding. The juvenile court denied the motion to set aside the termination judgment. Clark is now being briefed in the Court of Appeals and the state in its brief will again raise the ORCP question.

¹⁹ Fredric R. Merrill, *The Oregon Rules of Civil Procedure - History and Background, Basic Application, and the “Merger of Law and Equity,”* 65 Or Law Rev 527, 566-67(1986).

²⁰ ORCP Rule 1A

juvenile dependency and termination of parental rights proceedings. The rules drafted by the Juvenile Code Revision Work Group incorporate existing procedural sections of Oregon Revised Statutes Chapter 419B and adopt many of the provisions of the ORCP.

JUVENILE CODE REVISION WORK GROUP HISTORY

In 1997, the Oregon State Bar created the Juvenile Law Section, which developed a legislative project of improving the procedural provisions of the juvenile code. In 1998, representatives of the Section approached the Oregon Law Commission and proposed that the Law Commission take on the project of revising the procedures of the juvenile code. The Law Commission agreed and appointed a Juvenile Code Revision Work Group.²¹ Senator Kate Brown chairs the Work Group, which is charged with exploring statutory improvements in both the juvenile dependency code and the juvenile delinquency code. The Work Group focused its energies on several topic areas, each of which was organized into a Sub-Work Group²². One such Sub-Work Group took on the task of drafting the new ORJCP.

To begin the ORJCP drafting process the Sub-Work Group first looked at the ORCP. Each rule was independently scrutinized and selected for possible addition, either verbatim or with modifications, to the proposed new rules. Rules were carefully modified to be consistent with juvenile court practices. Next, the Sub-Work Group examined ORS Chapter 419B. After extracting the procedural aspects of Chapter 419B, these provisions and the selected ORCP rules were combined into one set of rules. The Sub-Work Group also considered juvenile code models from Alabama, Tennessee, and Ohio. Finally, the Sub-Work Group took into account input from interested parties.²³

Objectives of the ORJCP

The Work Group's objective in producing the ORJCP is threefold. The rules are designed to promote process predictability and uniformity, timeliness, and administrative efficiency as described below:

Process predictability and Uniformity. Although the Clark decision provided certainty, in doing so, it eliminated the procedural flexibility that is important in juvenile dependency proceedings. The ORJCP achieves the uniformity and certainty of the ORCP with the added benefit of predictable outcomes based on uniformly applicable rules. Because the ORJCP apply only in

21 Juvenile Code Revision Work Group Membership:

Senator Kate Brown - Chair, Karen Brazeau, Chief Justice Wallace P. Carson, Jeff Carter, Ann Christian, Kingsley Click, Lee Coleman, Honorable Deanne Darling, Lee Ann Easton, Susan Grabe, Elinor Hall, Pat Hinrichs, Lonnie Jackson, Bob Joondeph, Emily Knupp, Honorable Terry Leggett, Michael Livingston, Julie McFarlane, Maureen McKnight, Nancy Miller, Carl Myers, Larry Oglesby, Kathie Osborn, Karen Quigley, John Richardson, Ronelle Shankle, Angela Sherbo, Susan Svetky, Bradd Swank, Ingrid Swenson, Timothy Travis, Honorable Elizabeth Welch, and Bill Taylor.

²² Sub-Work Groups: Child Support Enforcement, ORJCP, Termination Petition, Pre-trial Placement, Tribal Court Transfers, Notice of Appeal, Word Usage, and Work Groups on Criminal Delinquency Issues.

²³ The Sub-Work Group charged with this project was led by Julie McFarlane. The Juvenile Code Revision Work Group and Sub-Work Group met 8 times: May 8, June 7, July 12, July 21, August 2, August 29, September 5 and September 29, 2000. Prior to May 8th, the entire Work Group reviewed and edited the early drafts of the rules.

Sub-Work Group Membership:

Senator Kate Brown, Bill Taylor, Judiciary Committee Counsel; Julie McFarlane, Juvenile Rights Project; Claude Derr, Family Preservation; Lea Ann Easton, Native American Program with Oregon Legal Services; Mike Livingston, Department of Justice; Maureen McKnight, Legal Aid Services of Oregon; Nancy Miller, State Court Administrator's Office; John Richardson, attorney at law; Ingrid Swenson, Oregon Criminal Defense Lawyers Association; Tim Travis, State Court Administrator's Office; Jeff Carter, attorney at law; Amy Holmes-Hehn, Multnomah County District Attorney's Office.

juvenile dependency and termination of parental rights proceedings, these specialized matters can anticipate similar outcomes in similar cases without the risk of confusing the law in areas governed by the ORCP.

Timeliness. The ORJCP addresses the concern of timeliness in the prompt resolution of dependency cases. In a juvenile dependency or termination of parental rights proceeding, timeliness is measured from a child's perspective in which even a few months represent a significant percentage of the child's entire life. By excluding civil litigation procedures that would hamper or delay dependency proceedings, the new rules address the needed balance between just, informed results and a prompt resolution of the case.

Administrative Efficiency. The ORJCP reduces procedural guesswork by providing consistency in juvenile dependency proceedings. Efficient administration of these proceedings requires the informed involvement of multiple participants: judges, lawyers, SCF caseworkers, parents and others. Standardizing the procedures used in juvenile dependency and termination of parental rights proceedings reduces confusion and creates consistency among courts and participants thus promoting integrity and fairness of the process.

CONCLUSION

The ORJCP is the result of the efforts of the Oregon Law Commission's Juvenile Code Revision Work Group. The rules address three objectives: process predictability and uniformity, timeliness and administrative efficiency. The ORJCP are presented by the Work Group to the Oregon Law Commission for recommendation to the 71st Oregon Legislative Assembly.



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SECTION BY SECTION ANALYSIS HOUSE BILL 2611-1

**Adopted by the Oregon Law Commission
on April 24, 2001**



*The Oregon Law Commission
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support for the Commission.*

**Section by Section Analysis
House Bill 2611- 1
1/30/01 Amendments¹**

INTRODUCTION

House Bill 2611 codifies procedures to be followed in juvenile dependency cases. The Bill reorganizes existing procedural provisions of Chapter 419B. with the goal of having all procedural provisions in a section of ORS 419B. that is organized in a generally chronological order, ie. from the beginning of the case to the end of the case.² The Bill resolves once and for all the question of whether the Oregon Rules of Civil Procedure (ORCP) applies in juvenile dependency proceedings by excluding such proceedings from the ORCP. Because many ORCP reflect current practice in juvenile dependency cases, a number of provisions have been adopted from the ORCP and included in the Bill. A few provisions adopted from the ORCP may not reflect current practice in all counties and are adopted to address specific procedural issues that need resolution, such as how to handle motions for relief from orders or judgments (Sections 32 and 33).

The next paragraph summarizes which sections of the Bill fall into one of the following five categories that comprise the Bill: 1.) New provisions; 2.) Reorganized and renumbered existing provisions of ORS 419B.that are unchanged; 3.) Existing provisions of ORS 419B. that have been amended and reorganized; 4.) Provisions adopted from the ORCP that codify current practice or address specific issues; and 5.) Sections that serve a technical

¹ The Oregon Law Commission Workgroup on Juvenile Code Revision approved of and adopted this Section by Section Analysis of HB 2611 on March 16, 2001. The Workgroup wishes to acknowledge the assistance of Oregon Law Commission Research Assistant Jonathan Clark in the preparation of this Analysis.

² The bill itself does not however organize provisions into chronological order. Rather the bill follows legislative drafting protocols and is divided into three major parts: provisions new to the juvenile code; amended sections of existing statutes; and statutes which are unchanged but added to the other sections of the bill and will appear in chronological order when printed in statute. So, for example, in understanding the import of Section 23, which adopts ORCP procedures for depositions, one must note that Section 55 adds ORS 419B.315, which limits depositions in juvenile cases to perpetuation depositions, to the other sections of the bill and when printed in statute will precede Section 23.

legislative or editorial function. A more detailed section by section analysis of the Bill follows the Summary.

SUMMARY

- 1. New provisions** are contained in Sections 3, 4(8), 7, 19(2), 24(3), 25(2), 31 and 33(7).
- 2. Reorganized and renumbered existing provisions of ORS 419B.** are listed in section 55.
- 3. Existing provisions of ORS 419B. that have been amended and reorganized** are in sections 4, 5, 6, 13, 21, 22, 36 through 41, 46, through 51, 53 and 54. Other miscellaneous statutes are amended in sections 42, 43, 44, 45 and 52.
- 4. Provisions adopted from the ORCP that codify current practice and address specific issues** are in sections 8 through 12, 14 through 18, 19(1), 20, 23 through 30, and 33 through 35.
- 5. Provisions that serve a technical legislative or editorial function** are contained in sections 1, 2, 56.

SECTION BY SECTION ANALYSIS

Section 1: This new Section adds HB 2611-1 to ORS Chapter 419B.

Section 2: This new Section governs the scope and applicability of the bill and the ORCP in dependency proceedings.

Subsection (1) provides that the ORCP do not apply in juvenile dependency proceedings and adds the bill to ORS chapter 419B.

Subsection (2), derived from ORCP 1C, provides that the procedures established by HB 2611-1 apply to all proceedings under Chapter 419B after the effective date of the bill except when a court finds application would not be feasible or would work an injustice.

Subsection (3), derived from ORCP 1D, allows courts to regulate pleading, practice and procedure consistent with the act.

Section 3: This Section codifies current law and practice and specifies when the Juvenile Court obtains personal jurisdiction.

Subsection (1)(a) provides that personal jurisdiction is routinely obtained through service of summons (see ORS 419B.265 et seq.).

Subsection (1)(b) provides that the court is deemed to have personal jurisdiction is over children under twelve, not required to receive summons, when they are the subject of a petition (see ORS 419B.271(4)).

Subsection 1(c) provides that the court has personal jurisdiction over anyone with party status (see ORS 419B.115(1)).

Subsection (2) incorporates currently applicable law providing that the jurisdiction of the juvenile court is subject to the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) (ORS 109.701 to 109.834).

Section 4: This Section governs the form, content and dismissal of petitions. Provisions of current ORS 419B.233, ORS 419B.236, ORS 419B.239, ORS 419B.242 and ORS 419B.245 are combined to create a section regarding juvenile court petitions - their form, content and dismissal. There are no significant changes from current practice, although pleading requirements of the UCCJEA are now specified and a new form petition is included in Subsection (8).

Subsection (1) is ORS 419B.230(1) verbatim.

Subsection (2) is ORS 419B.239 verbatim except the phrase "or the petitioner's attorney", is added to allow petitioner's attorneys as well as petitioners to sign the petition, which is the current practice in many counties.

Subsection (3) is ORS 419B.230(2) verbatim except the phrase "or employee of the Oregon Youth Authority" is added to allow OYA workers to file petitions based on information and belief.

Subsection (4) is ORS 419B.242 verbatim with the added transitional phrase: "The petition shall".

Subsection (4)(a) is ORS 419B.242(1) verbatim.

Subsection (4)(b) is ORS 419B.242(2) rewritten and adding the phrase "including sufficient information to put the parties on notice of the issues in the proceeding" and deleting "as provided in ORS 419B.100".

Subsection (4)(c) is ORS 419B.242(3) verbatim.

Subsection (4)(d) is ORS 419B.242(4) verbatim with "indicate" added.

Subsection (4)(e) is ORS 419B.242(5) substantially verbatim.

Subsection (4)(f) and (g) are new and codify the pleading requirements of the UCCJEA by requiring the petition to indicate whether the petitioner has participated in or knows of other proceedings concerning the child and if so indicating the court, case number and date of the proceeding.

Subsection (5) is ORS 419B.233 verbatim.

Subsection (6) is ORS 419B.245 verbatim.

Subsection (7) - The first sentence is new and codifies appellate case law that prohibits dismissal of a petition prior to a party having the opportunity to investigate and present a case. The second sentence is ORS 419B.236 verbatim.

Subsection 8 is new and provides a form petition to encourage more uniform practice statewide.

Section 5: This Section governs issuance and service of summons.

Subsection (1) is a rewrite of current ORS 419B.265(2) concerning true copies of summons.

Subsection (2) is a rewrite of current ORS 419B.265(1). The rewrite shortens to 30 days, from 60 days, the time allowed for issuance of the summons, which is more consistent with the shortened time frames now required by the federal Adoption and Safe Families Act (ASFA).

Subsection (3) liberalizes unnecessary restrictions of ORCP 7E prohibiting parties from serving summons and allowing any person over 18 to perform that task, including parties and attorneys. This section replaces ORS 419B.274 which is repealed by Section 56. ORS 419B.274 applied the ORCP to summons in juvenile court.

Subsection (4) expanding ORCP 7H allows a summons to be transmitted (not served) not only by telegraph but also by facsimile.

Section 6: This section combines provisions of ORCP 7 with current ORS 419B.268 and ORS 419B.271 to better state current law and practice relating to form and contents of summons.

Subsection (1)(a) combines ORS 419B.268(1) and ORCP 7C(1)(a) and (c) in specifying the title of the summons and name and address of the person to be summoned. The provision of ORS 419B.268(1) requiring that the summons contain a statement of the substance of the facts of the petition is deleted because the bill requires a copy of the petition to be served with the summons.

Subsection (1)(b) combines ORS 419B.271(1) and ORS 419B.521(1) concerning the date and time for hearing contained in the summons. A provision is added to require, when summons is posted, that the purpose of the proceeding be stated in the summons.

Subsection (1)(c) rewrites part of ORS 419B.271(1) directing the summoned person to appear before the court and bring the child if so directed.

Subsection (1)(d) is an expansion of parts of ORS 419B.268(1)(b) and ORS 419B.515 requiring a notice in the summons that if the summoned person fails to appear the court may take jurisdiction or terminate parental rights.

Subsection (1)(e) rewrites part of ORS 419B.515 requiring a notice of the right to counsel and to court-appointed counsel if indigent. This notice, not currently required for jurisdictional summons, will now be required for all summons.

Subsection (1)(f) adds a notice in the summons concerning the ORS 419B.305(2)(a)(B) requirement that the person admit or deny allegations within 30 days.

Subsection (1)(g) is ORS 419B.268 (1)(c) verbatim.

Subsection (1)(h) is ORS 419B.268(1)(a) verbatim.

Subsection (2) is new and requires that the summons be signed.

Section 7: This Section is new and provides a form summons to promote uniformity of practice. The form conforms to the requirements of Sections 5 and 6.

Section 8: Adopted from ORCP 7(D) and consistent with current practice, this section lists the acceptable methods of service of summons. This Section replaces ORS 419B.274 which is repealed.

The introductory paragraph of this Section is taken from ORCP7(D)(1).

Subsection (1) is taken from ORCP 7(D)(2)(a) and provides for personal service.

Subsection (2) is from ORCP7(D)(2)(b) and provides for substituted service.

Subsection (3) is from ORCP 7(D)(2)(c) and provides for office service.

Subsection (4) is from ORS 419B.277 and provides for alternative service.

Section 9: Adopted from ORCP 7(D) and consistent with current practice, this section provides the requirements for personal, substituted, office and alternative service and service by publication.

Subsection (1) is taken from ORCP 7(D)(2)(a) and requires that personal service be made by delivery of a true copy of the summons and petition to the person to be served.

Subsection (2) is from ORCP7(D)(2)(b) and requires that substituted service be served to any person 14 years and older residing in the dwelling house or usual abode of the person to be served. When substituted service is used a copy of the documents must also be mailed to the summoned person.

Subsection (3) is from ORCP 7(D)(2)(c) and requires that office service be done by leaving the documents at the office the summoned person maintains for conducting business, left with the person

apparently in charge during normal business hours. When office service is used a copy of the documents must also be mailed to the summoned person.

Subsection (4) is reworks ORS 419B.277 governing alternative service. The statute is changed to allow the court to combine methods of alternative service and to add that methods of alternative service must, under the circumstances, be most reasonably calculated to notify the parent or guardian of the existence and pendency of the action. Methods of alternative service are specified to be by registered or certified mail; by posting or by publication. If alternative service is ordered the court must specify a time for a response.

Subsection (5) combines ORS 419B.277(2) and ORCP

Section 10: Adopted from ORCP 7(F)(1) and consistent with current practice, this section requires the filing of proof of service.

Section 11: Adopted from ORCP 7(F)(2) and consistent with current practice, this section specifies the requirements for proof of service, and provides a form affidavit of publication.

Subsection (1)(a) adopts ORCP 7(F)(2) and 7(F)(2)(a)(i), governing the certificate of service of a non-sheriff server, substantially verbatim, omitting the requirement that a server of summons not be a party.

Subsection (1)(b) adopts ORCP 7(F)(2)(a)(ii), governing the sheriff's certificate of service, substantially verbatim

Subsection (2) adopts the form Affidavit of Publication of ORCP 7(F)(2)(b) substantially verbatim.

Subsection (3) adopts ORCP 7(F)(2)(c), regarding notarization of the Affidavit of Publication, substantially verbatim.

Subsection (4) adopts ORCP 7(F)(2)(d), regarding making the proof of service on the summons or a separate document, substantially verbatim

Subsection (5) adopts ORCP 7(F)(4), providing failure to make adequate proof of service does not invalidate service, substantially verbatim

Section 12: Adopted from ORCP 7(G) and consistent with current practice, this section allows the court to disregard errors in summons if actual notice has been provided and allows court to amend service documents and disregard non-material errors. ORCP 7(G) is adopted substantially verbatim.

Section 13: This section is a rework of ORS 419B.271 specifying to whom summons must be issued.

Subsection (1) reorganizes ORS 419B.271(2) specifying to whom summons must be issued. Added to subsection (1)(c) is the phrase "or was prevented from doing so by the mother of the child", applying to Stanley putative fathers. already in ORS 419B.271(1) but have been prevented from doing so by the mother of the child.

Subsection (2) is from ORS 419B.271(4). Language from that statute concerning certification of summons is relocated.

Subsection (3) is a revision of ORS 419B.271(1) changed to allow, rather than require, the court to summons the child before the court, consistent with current practice.

Subsection (4) allowing summoning of any person the court deems necessary is ORS 419B.271(3)(a) verbatim. Note: ORS 419B.271(3)(b) which required summons for persons subject to a juvenile court restraining order was deleted because such persons are not necessarily parties to the proceeding and receive notice pursuant to ORS 419B.190.

Section 14: Adopted from ORCP 8 and consistent with current practice, this section provides for service of process and adds a new provision for transmittal of process by facsimile.

Subsection (1) governs issuance of process and is ORCP 8(A) substantially verbatim.

Subsection (2) governs when process may be served and is ORCP 8(C) substantially verbatim.

Subsection (3) governs transmission of process for service and is ORCP 8(D) substantially verbatim. A new phrase is added allowing transmission by facsimile.

Subsection (4) governs proof of service of process and is ORCP 8(E) verbatim.

Section 15: Adopted from ORCP 9 and consistent with current practice, this section sets out the rules for service and filing of pleadings and other papers.

Subsection (1) governing what documents must be served is a part of ORCP 9(A).

Subsection (2) providing for service of documents on attorney and specifying methods of service is ORCP 9(B) substantially verbatim.

Subsection (3) governing filing and proof of service of documents is ORCP 9(C) substantially verbatim.

Subsection (4) governing the clerk's indorsement of filed documents and listing reasons documents need not be accepted by the clerk for filing is ORCP 9(E) substantially verbatim.

Subsection (5) providing for service by facsimile is ORCP 9(F) substantially verbatim.

Section 16: Adopted from ORCP 10 and consistent with current practice, this section specifies how to compute required time periods.

Subsection (1) governing the computing of any time period is ORCP 10(A) substantially verbatim.

Subsection (2) providing for additional time after service by mail is ORCP 10(C) verbatim.

Section 17: Adopted from ORCP 12 and consistent with current practice, this section requires that pleadings be liberally construed and that errors in process and papers that do not affect the substantial rights of parties be disregarded.

Subsection (1) provides for liberal construction of all pleadings and is ORCP 12(A) substantially verbatim

Subsection (2) provides for disregard of errors in pleadings that do not affect the substantial rights of the adverse party and is ORCP 12(B) substantially verbatim.

Section 18: Adopted from ORCP 14 and consistent with current practice, this section contains requirements for motions.

Subsection (1) requires motions to be in writing and to state factual and legal grounds and relief sought. This subsection revises ORCP 14(A).

Subsection (2) applies other rules regarding form to motions and is ORCP 14(B) substantially verbatim.

Section 19: Adopted from ORCP 16(A) and consistent with current practice, this section relates to captions of pleadings.

Subsection (1) of this section, governing requirements for the captions of pleadings is adopted from ORCP 14(A).

Subsection (2) of this section is new and provides pleading directions for when the name of a party is not known.

Section 20: Adopted from ORCP 17(A) and consistent with current practice, this section requires signature of attorney or unrepresented party for answers, motions, and other papers,

Subsection (1) requires attorney signature of answers, motions and other papers if a party is represented and party's signature if not represented. Provides that only petitions need be verified and that motions must be accompanied by an affidavit unless the parties agree otherwise. See ORCP 17(A).

Subsection (2) provides for striking of unsigned documents and is ORCP 17(B) substantially verbatim.

Subsection (3)(a) provides that attorney by filing or submitting argument in support of a pleading certifies the pleading or argument is based on reasonable knowledge, information and belief based on an inquiry that is reasonable under the circumstances. This subsection is ORCP 17(C)(1) substantially verbatim.

Subsection (3)(b) provides that attorney certifies that pleading is not presented for improper purpose. This subsection is ORCP 17(C)(2) substantially verbatim.

Subsection (3)(c) provides that attorney certifies that claims and legal positions in pleadings are warranted by current law or are a nonfrivolous argument for new law. This subsection is ORCP 17(C)(3) substantially verbatim.

Subsection (3)(d) provides that a party or attorney certifies that factual assertions in pleadings are supported by evidence or specifically identifies allegations they believe will be supported by evidence after investigation. This subsection is ORCP 17(C) substantially verbatim.

Section 21: ORS 419B.305(2)(a)(B) requiring persons about whom allegations are made in a petition to admit or deny the allegations no later than 30 days after the petition is filed, is moved to this section and modified.

Subsection (1) contains the ORS 419B.305(2)(a)(B) requirement to make admission or denial. This provision is changed to require only parties to admit or deny and to specify that admissions and denials may be made orally in court or in writing.

Subsection (2) is new and provides that allegations that are neither admitted nor denied are denied.

Section 22: ORS 419B.310(2) requiring the court to inquire as to whether the case is an ICWA case and ordering tribal notification is moved here and a provision is added requiring, in cases where ICWA status is uncertain, the court to treat the case as being under the ICWA until a further determination is made.

Section 23: Adopted from ORCP 41 to govern objections during process of conducting perpetuation depositions, which are currently authorized by ORS 419B.315. This section is current practice and does not expand depositions in juvenile dependency proceedings.

Subsection (1) provides that objections in perpetuation depositions as to competency, relevancy or materiality are not waived by failing to make them during deposition unless objection might have been obviated by making at the time. This subsection is ORCP 41(C)(1) substantially verbatim.

Subsection (2) lists objections which are waived unless seasonable objection is made and is ORCP 41(C)(2) substantially verbatim.

Subsection (3) delineates when errors as to completion and return of deposition are waived and is ORCP 41(D) substantially verbatim.

Note: When codified, this section will follow ORS 419B.315 which will be renumbered.

Section 24: Adopted from ORCP 54(B)(2) and consistent with current practice, this section provides for motion of dismissal at the end of the proponent of the petition's case and also provides for settlement conference or mediation.

Subsection (1) adopts most of ORCP 54(B)(2), substantially verbatim, governing motion for dismissal at the end of the proponent's case for insufficiency of evidence.

Subsection (2) adopts ORCP 54(B)(4) verbatim providing that dismissal unless otherwise specified is without prejudice.

Subsection (3) is new and provides that the court may order a settlement conference or, if funds are available, mediation.

Section 25: Adopted from ORCP 55(A) and consistent with current practice, this section provides rules for subpoenas.

Subsection (1) is ORCP 55(A) verbatim and provides for subpoena of witnesses, documents and other things for a trial, hearing or perpetuation deposition and requires payment of witness fees.

Subsection (2) is new and provides that any party may have compulsory attendance of witnesses or production of records.

Section 26: Adopted from ORCP 55(B) substantially verbatim and consistent with current practice, this section governs subpoenas for documents, etc. (subpoena duces tecum), and allows documents and other

things to be subpoenaed for trial or before . This Section requires production of subpoenaed items within 14 days after service, provides for objection, order to compel production, order to quash or modify the subpoena, or order to advance costs of producing subpoenaed item.

Section 27: Adopted from ORCP 55C and consistent with current practice, this section governs issuance of subpoenas.

Subsection (1) is ORCP 55(C)(1) substantially verbatim and provides for subpoena to compel attendance of a person or for documents and other things before a court, at a trial or for a perpetuation deposition. The subpoena can be issued by the clerk or an attorney of record.

Subsection (2) is ORCP 55(C)(2) verbatim and allows the clerk to issue subpoenas in blank.

Section 28: Adopted from ORCP 55(D) and consistent with current practice, this section governs service of subpoenas.

Subsection (1) is substantially similar to ORCP55(D)(1) specifying who may serve a subpoena, service of subpoenas for documents, etc. on other parties seven days before service on person to produce documents, etc. Requirements for witness fees to be paid in advance and allowing 14 days for production are deleted.

Subsection (2) is ORCP 55(D)(2) substantially verbatim and provides the procedure for subpoena of law enforcement personnel.

Section 29: Adopted from ORCP 55(E) and consistent with current practice, this section provides for subpoena of incarcerated individuals with new provision for testimony by telephone or closed circuit television

Subsection (1) and (3) are ORCP 55(E) substantially verbatim and provide for prisoner witness subpoenas to be served on custodian for production of the witness in court or for a deposition at the place of confinement.

Subsection (2) is new and provides for a prisoner witness to testify by telephone or closed circuit television.

Section 30: Adopted from ORCP 55(G), this section codifies the court's authority to hold in contempt a person who refuses to obey a subpoena.

Section 31: A new provision, this section specifies the court's authority to proceed in a summoned party's absence, when that party has failed to appear.² In current practice these are commonly referred to as default proceedings. This rule rejects the concept of default which is more appropriate in purely civil proceedings, but provides a procedure for the court to proceed when summoned parties fail to appear. It also provides

² This provision is similar ORS 419B.285, which is retained by Section 55 of the bill and allows the court to proceed when a required person has not been summoned,

that if a summoned party wishes to change a court date, the summoned party must personally appear to request the change so that they may be served with the new date and the petitioner does not “lose service” when a set over is granted. Subsection (2) of this section provides that a party may not waive appearance or appear through counsel for a jurisdictional hearing or a hearing on a petition to terminate parental rights.

Section 32: This section is a re-write of ORS 419B.285(3) allowing a new hearing if a person entitled to be summoned was not summoned or was summoned on such short notice as to be unfair, and imposes a new requirement that the motion for a new trial be made within 10 days adopting the timeline of ORCP 64F.

Section 33: This section substantially reworks the provisions of ORS 419B.420 and ORCP 71 to specify procedures for relief from judgments and orders.

Subsection (1) allows a motion to set aside an order for reasons including but not limited to clerical error, excusable neglect and newly discovered evidence.

Subsection (2) requires the movant to state with particularity the facts and legal basis for the motion.

Subsection (3) requires the motion to be made within a reasonable time

Subsection (4) incorporates current ORS 419B.423(1) governing notice and hearing on modifications with no substantive change.

Subsection (5) is current ORS 419B.423(2)(b) requiring Indian Child Welfare Act (ICWA) notice.

Subsection (6) is ORS 419B.423(2)(a) exempting notice and hearing requirements when effect of modification is transfer of child from one foster home to another. ICWA notice provision is added to this subsection.

Subsection (7) is new and governs motions to set aside when an appeal is pending.

Subsection (8) is adopted from ORCP 71C and allows the court to exercise its' inherent power to modify or set aside for fraud on the court.

Section 34: A new provision codifying current practice, this section provides for stays pending appeal. Subsection (2) adopts ORCP 72(B) substantially verbatim and provides that subsection (1) does not limit rights of parties to stays otherwise provided for by law.

Section 35: Adopted from ORCP 78(B), substantially verbatim, this section governs use of the contempt power to enforce an order or judgment requiring an party to perform a specific act.

Section 36: This section includes all of current ORS 419B.260, which is reorganized, some minor word changes are made, and a new provision is added to subsection (6) clarifying that a juvenile court order can be final for purposes of appeal even though other issues in cases consolidated with the one in juvenile court may remain unresolved. This Section will be renumbered and added to the procedural portion of Chapter 419B pursuant to Section 55.

Section 37: This section includes all of current ORS 419B.190, pertaining to restraining orders issued in juvenile court. Several minor word changes are made, persons other than a sheriff are allowed to serve a restraining order, and a new subsection (9) is added providing that a person subject to a restraining order does not violate it by serving legal papers on the protected person if the restrained person is not represented by counsel, serves by mail and does not intend the contents of the served documents to harass or intimidate the person served. This Section will be renumbered and added to the procedural portion of Chapter 419B pursuant to Section 55.

Section 38: Amends ORS 419B.245(1) governing amendment of petitions. The new language allows a petition, answer, motion or other paper to be amended by a party within a reasonable time prior to adjudication and requires service on all parties of any such amendments that are filed. If the interests of justice require the court shall grant additional time to the parties to prepare. Subsection (2) of Section 38 is ORS 419B.245(2) unchanged. This Section will be renumbered and added to the procedural portion of Chapter 419B pursuant to Section 55.

Section 39: Amends portions of current ORS 419B.115, which specifies parties and their rights in a juvenile action. There are some minor wording changes. A Stanley putative father and Indian Tribes that have intervened, both of which are entitled to party status under case law and federal law are added to the list of those who are parties. Subsection (2) is new and requires the court to appoint a guardian ad litem for a parent or guardian who is mentally or physically disabled and unable to adequately act in their own interests or give direction to their counsel. Such a guardian ad litem is also added to the list of those who are parties. This new provision originates from a recent Oregon State Bar Association Ethics Opinion that

states that an attorney cannot ethically represent such a disabled client and a guardian ad litem must be appointed. This Section will be renumbered and added to the procedural portion of Chapter 419B pursuant to Section 55.

Section 40: Amends ORS 419B.300, relating to discovery in juvenile dependency cases. There are minor word changes. Subsection (1)(c) is clarified to require that parties are only entitled to reports of experts if they are to be called as witnesses. Timelines for discovery are added to subsection (2). Subsection 8 is new and specifies that only parts of material subject to disclosure must be disclosed. Subsection 9, current law and only moved from (6) to a new subsection by this amendment, specifies what the court may do if there is a breach of the duty to disclose. This Section will be renumbered and added to the procedural portion of Chapter 419B pursuant to Section 55.

Section 41: ORS 419B.285 is unchanged except for the deletion of subsection (3) which is now included in Section 32. This Section will be renumbered and added to the procedural portion of Chapter 419B pursuant to Section 55.

Sections 42 through 53 are amended only to change references to statutes that have been changed and will be renumbered by the bill. Only Section 48 containing ORS 419B.282 will be renumbered and added to the procedural portion of Chapter 419B pursuant to Section 55.

Section 54: Amends ORS 419B.310 to delete requirement of ICWA inquiry and notification that was moved to Section 13.

Section 55: This section lists procedural statutes that are currently in ORS Chapter 419B that are to be reorganized and renumbered along with the provisions of the bill into a separate section of Chapter 419B..

Section 56 This section lists ORS Chapter 419B statutes that are to be repealed.



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APPENDIX F

REPORT ON TERMINATION OF PARENTAL RIGHTS – LC 1509



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TERMINATION PETITION

REPORT

From
The Office of the Executive Director
David R. Kenagy

Prepared by
Julie McFarlane
Juvenile Rights Project

**ADOPTED BY THE OREGON LAW COMMISSION
ON NOVEMBER 17, 2000**



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**REPORT 2000 – 5
October 27, 2000**

REPORT TO OREGON LAW COMMISSION
on
Proposed Changes to ORS 419B.350 and ORS 419B.343(2)(a)

I. Introduction

The Termination of Parental Rights Subcommittee proposed two minor changes to ongoing case processes to improve results at the termination phase.

A. Keeping parents' contact information updated.

The cases of children whom the state wishes to have adopted, are often delayed because of the necessity of searching for parents, who may have long been uninvolved in the child's life, in order to serve them with termination of parental rights petitions. These delays are harmful to the children who need to know where they will be growing up and need to be adopted while they are still young enough to be adoptable. Further, the searches and costs of service by publication, when parents cannot be found, are costly. The proposed amendment of ORS 419B.350 which follows is designed to help keep parents' contact information updated and would add a new section to ORS 419B.350:

(5) At any review conducted under ORS 419A.106 or at any court hearing, the court or local citizen review board shall inquire of those present as to the parents' current addresses, phone numbers and the name, current address and phone number of a contact person for each parent, if the parent has a contact person. Where appropriate the court may enter a protective order limiting disclosure of this information.

B. Codifying the letter of expectations.

The State Office for Services to Children and Families (SOSCF) is required by statute and policy to develop a service plan for each child in foster care. Parents are asked to participate in the development of the service plan and to sign a service agreement. If parents fail or refuse to sign the service agreement, SOSCF policy requires the agency to send a letter of expectations setting out what services the agency expects the parents to participate and the timeline in which services must be completed to make return of the child to the parents' home possible. SOSCF Policy I-B.3.1. The proposed amendment of ORS 419B.343(2)(a) encourages court hearings to resolve disputes over the service agreement so that cases may proceed without delay and would add three new subsection to ORS 419B.343(2)(a):

(i) If the parent claims to be unable or refuses to comply with the service agreement, and the parties are unable to resolve the disagreement, SOSCF shall take reasonable steps to provide the parent a letter clearly setting out what is expected of the parent to make return of the child possible.

(ii) If the parties agree, they may enter into mediation, if it is available, to resolve conflicts concerning the service agreement.

(iii) If within a reasonable time after providing the parent the letter clearly setting out what is expected of the parent, the parent continues to be unable or unwilling to comply with the expectations, SOSCF shall request that the court review and approve or disapprove the case plan.

II. History of the project.

The Workgroup on the Juvenile Code Revision identified the issue of whether termination of parental rights should be revised to be a motion within the dependency proceeding rather than a separate proceeding. A subcommittee attended by Timothy Travis, CRB, Esther Cronin, SOSCF, Ingrid Swenson, OCDLA, Diane Lancaster, SOSCF, Nancy Popkin, DDA - Multnomah County, Michael Livingston, AAG, Bill Taylor, Committee Counsel, and Julie McFarlane, JRP was appointed to study the issue and met on May 8, 2000. The subcommittee did not come to consensus and recommended that the workgroup take no further action on the issue of treating termination of parental rights as a motion rather than a separate proceeding. The subcommittee did propose two minor changes to improve handling of ongoing cases. Following review of the substance of the above proposals by the workgroup, the subcommittee met again to discuss placement in the code and specific language. The draft was reviewed by the workgroup on September 15, 2000 and some changes to the wording were made.

III. Conclusion.

These proposed amendments, improve the process for ongoing dependency cases and can easily be achieved within the current court, citizen review board and SOSCF structure.

Respectfully submitted,
Julie H. McFarlane, Senior Attorney
TPR Subcommittee Convenor



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APPENDIX G

REPORT ON POST ADJUDICATION RELIEF ON JUVENILE COURT DELINQUENCY PROCEEDINGS – LC 436



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POST-ADJUDICATION RELIEF IN JUVENILE COURT DELINQUENCY PROCEEDINGS

REPORT

From
The Office of the Executive Director
David R. Kenagy

Prepared by
Michael Livingston
Assistant Attorney General

**ADOPTED BY THE OREGON LAW COMMISSION
ON NOVEMBER 17, 2000**



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**Report 2000 - 6
October 27, 2000**

THE PROBLEM:

Recently, on direct appeal from a juvenile court order finding him to be within the jurisdiction of the court, under ORS 419C.005 (delinquency), a juvenile sought to challenge the adequacy of his appointed counsel.²⁴ *State ex rel Juv. Dept. v. Curtis Jones*, CA 106772. Implicit in the statutory right to appointed counsel in delinquency proceedings, ORS 419C.200, is the right to adequate counsel, and, *if no statutory procedure exists for vindicating the statutory right*, the appellate court may fashion one.²⁵ See *State ex rel Juv. Department v. Geist*, 310 Or 176, 185, 796 P2d 1193 (1990). Moreover, the Due Process Clause of the United States Constitution and Article I, section 20, of the Oregon Constitution would appear to require that a person adjudicated delinquent under ORS 419C.005, be afforded some procedure to have the adjudication set aside, if it appears that the adjudication is the result of a constitutional violation that would constitute grounds for post-conviction or habeas corpus relief in an adult criminal case.²⁶

In the *Curtis Jones* appeal, the juvenile relied on the decision in *State ex rel Juv. Department v. Geist*, *supra*, 310 Or at 186-87, to support his contention that he could challenge the adequacy of his counsel (and have his delinquency adjudication set aside on that ground) on direct appeal. In *Geist*, the Oregon Supreme Court concluded that the unique exigencies of termination-of-parental-rights cases required review of such challenges on direct appeal:

We conclude that after an adjudication terminating parental rights, appellate courts must not permit children to remain in the limbo of impermanent foster care (which we believe often will be detrimental to their best interests) any longer than is absolutely necessary. Because of the importance of expeditious resolution of termination proceedings, and absent statutes providing otherwise, we hold that any challenges to the adequacy of appointed trial in such proceedings must be reviewed on direct appeal.

The Court of Appeals has applied the holding in *Geist* in juvenile court *dependency* proceedings. See, e.g., *State ex rel Juv. Dept. v. Charles*, 106 Or App 628, 633-34, 810 P2d 389, *rev den* 312 Or 150 (1991). However, the considerations that require resolution of inadequacy-of-counsel claims on direct appeal in termination-of-parental-rights cases and juvenile court dependency cases do not exist in delinquency proceedings.

²⁴ The juvenile asked the Court of Appeals to hold the appeal in abeyance and “remand[*] this case to the trial court for an evidentiary hearing on the issue of the adequacy of his court-appointed counsel.”

²⁵ A youth in a delinquency proceeding also has a constitutional right to appointed counsel in delinquency proceedings. See *In re Gault*, 387 US 1, 87 S Ct 1428, L Ed 2d 527 (1967).

²⁶ A person’s juvenile court delinquency adjudications under ORS 419C.005 are used to determine the person’s “criminal history” for purposes of sentencing, if the person is convicted of a crime when he or she becomes an adult.

Juvenile Code Work Group Membership:

Senator Kate Brown - Chair, Karen Brazeau, Chief Justice Wallace P. Carson, Jeff Carter, Ann Christian, Kingsley Click, Lee Coleman, Honorable Deanne Darling, Lee Ann Easton, Susan Grabe, Elinor Hall, Pat Hinrichs, Lonnie Jackson, Bob Joondeph, Emily Knupp, Honorable Terry Leggert, Michael Livingston, Julie McFarlane, Maureen McKnight, Nancy Miller, Carl Myers, Larry Oglesby, Kathie Osborn, Karen Quigley, John Richardson, Ronelle Shankle, Angela Sherbo, Susan Svetky, Bradd Swank, Ingrid Swenson, Timothy Travis, Honorable Elizabeth Welch, and Bill Taylor.

Sub-Work Groups: Child Support Enforcement, ORJCP, Termination Petition, Pre-trial Placement, Tribal Court Transfers, Notice of Appeal, Word Usage, and work groups on criminal dependency issues.

419A.200 (4) is a new section that protects the appellate rights of parties whose parental rights have been terminated. The provision requires court appointed counsel to file a notice of appeal if the party whose rights or duties are adversely affected by a final order requests counsel to do so.

ORS 419C.610, which the juvenile the *Curtis Jones* case did not cite or discuss, authorizes the juvenile court to “modify or set aside any order made by it.” The broad grant of authority in ORS 419C.610 appears to provide a vehicle for setting aside adjudications of delinquency, based on claims of inadequate counsel and other constitutional violations, after a juvenile has exhausted his direct appeal rights, as in adult post-conviction proceedings under ORS 138.510 to ORS 138.687. However, ORS 419C.610 does not expressly provide for such “post-adjudication relief,” much less resolve the question whether a juvenile seeking to set aside an adjudication because of inadequate representation by counsel first must pursue a direct appeal.

HISTORY: (to be added)

SOLUTION:

The Work Group proposes that ORS 419C.610 be amended to state expressly that a person under the age of 18 or currently within the jurisdiction of the juvenile court under ORS 419C.005 may petition the juvenile court to set aside a delinquency adjudication on the same grounds that may be asserted by an adult to set aside a criminal conviction under ORS 138.510 to ORS 138.687, and that, where appropriate, the same limitations apply.



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APPENDIX H

REPORT ON NOTICE OF APPEAL IN JUVENILE COURT PROCEEDINGS – LC 1361



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NOTICE OF APPEAL IN JUVENILE COURT PROCEEDINGS

REPORT

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**ADOPTED BY OREGON LAW COMMISSION
ON NOVEMBER 17, 2000**



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**REPORT/COMMENT 2000 - 3
October 27, 2000**

THE PROBLEM:

In a number of counties in Oregon the attorney appointed to represent a parent in juvenile court dependency proceedings, under ORS chapter 419B, is not the attorney who will be appointed to represent the parent in an appeal from a juvenile court order. This is particularly true in termination-of-parental-rights cases. For example, in such a county, the appointment of the attorney representing the parent in the termination case ends when the juvenile court enters its final order. If the order terminates the parents rights to the child and the parent wishes to appeal, the parent must apply for appointment of new counsel and meet the 30-day deadline for filing a notice of appeal from a juvenile court order, as required by ORS 419A.200(3). If, for some reason, new counsel is not appointed in time to file a timely notice of appeal, counsel in these cases frequently file motions for “delayed” appeals or “late” appeals with the Oregon Court of Appeals. The court’s ruling in a given case depends on the particular circumstances — e.g., whether the delay in filing the notice of appeal is attributable to the parent’s actions. In any event, whenever these delayed appeal requests are filed, the Department of Justice must respond to them, and the Court of Appeals must decide them, which delays the decision on the merits of the case, or, if the court denies the motion, results in dismissal of the parent’s appeal. Neither ORS 419A.200, which governs appeals in juvenile court cases, nor the provisions of ORS chapter 419B that authorize appointment of counsel in juvenile court dependency proceedings currently provide a solution for this problem.

JUVENILE CODE WORK GROUP HISTORY:

In 1997, the Oregon State Bar created the Juvenile Law Section. This Section was charged with examining the procedural statutes governing juvenile dependency proceedings. In 1998 the Oregon Law Commission, in cooperation with the Juvenile Law Section, created a Juvenile Code Revision Work Group. Senator Kate Brown chairs the Work Group, which is charged with exploring two areas of juvenile law, dependency and delinquency. The Work Group focused its energies on several topic areas, each of which is organized into a Sub-Work Group.

The Notice of Appeal Sub-Work Group was formed when the Appellate Division of the Oregon Department of Justice reported its finding that the amount of requests for “delayed appeals” in termination-of-parental rights cases had increased substantially in recent years. The Sub-Work Group undertook the task of drafting legislation to resolve the problem in juvenile court proceedings where an aggrieved party is left unrepresented at the time the 30-day period for filing a notice of appeal begins to run.

Michael Livingston with the Oregon Department of Justice and Ann Christian with the Judicial Department Indigent Defense Services work directly with parties affected by the notice of appeal deficiency. Together they urged Senator Kate Brown to adopt a legislative proposal amending ORS 419A.200(1) to say that a parent’s juvenile court trial counsel is responsible for filing a timely notice of appeal. Virginia Vanderbilt with Legislative Counsel has been responsible for drafting the proposed amendment.

SOLUTION:

The Work Group suggests that an amendment be made to ORS 419A.200. This amendment would require court appointed counsel to file a notice of appeal if the party whose rights or duties are adversely affected by a final order requests counsel to do so. The proposed language of the amendment is as follows:

419A.200 (4) The counsel in the proceeding from which the appeal is being taken shall file those documents necessary to commence an appeal if the counsel is requested to do so by the party the counsel represents.

CONCLUSION:

The proposed amendment to ORS 419A.200 would correct the appointment-of-counsel practice in some counties, which leaves an aggrieved party unrepresented at the time a juvenile court's final order is entered and the 30-day period for filing a notice of appeal from the order begins to run. Aggrieved parties will not have the right to file a notice of appeal, but will be assured counsel to file such appeal.



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Marilyn Odell
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APPENDIX I

WORK GROUP MEMBERSHIP AND INTERESTED PARTY LISTINGS



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OREGON LAW COMMISSION WORK GROUP MEMBERSHIP AND INTERESTED PARTY LISTINGS



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Joondeph, Bob
Ohlemiller, Marcia

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McKean, Doug
Prestwich, Travis

Interest Parties:

Altenhofen, Patrice
Baker, Brian
Bell, Johnnie
Bottomly, Leslie
Brainard, Barbara
Carlson, Eric
Chicoine, Jeff
Corbett, Gordon
Dale, Michael
Grabe, Susan
Haim, Pat
Hennagin, Roger
Hoffman, Lorraine
Kisch, Victor
Mark, Stacey
Nebel, David
Peck, Kathy
Reeves, Ed
Westerband, Rudy
Whitfield, Janet
Whitfield, Trent

Conflict of Laws

Vetri, Dom – Chair
Carmack, Mildred
Carrasco, Gilbert
Carson, Wallace P.
Grabe, Susan
Hoffman, Jonathan
Holland, Maury
Houser, Doug
Linde, Hans
Nafziger, James
Scoles, Gene
Snouffer, William
Symeonides, Symeon

Staff:

Heynderickx, Dave

Interested Parties:

Carlson, Eric
Alexander, Michael
Barker, Talina

Elective Shares/Community Property

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Carter, Jeff
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Grabe, Susan
Mangan, John
Pagnano, Richard
Symeonides, Symeon
Vail, Bernie
Yates, Michael

Staff:

Heynderickx, Dave

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Carlson, Eric
Graham, Kathy
Barker, Talina

Judgments/ Garnishments

Williams, Max – Chair
Chisholm, Craig
Comstock, Mark
Gervais, John
Hasson, Jeff
Jordan, Randall
Koch, Jacqui
Markee, Jim
McGalliard, Janet
McKnight, Maureen
Mowe, Greg
Nebel, David
Rask, Tom
Shankle, Ronelle
Sherman, Jr., Ken
Slottee, Dick
Sola, Robert

Stolpman, Preethi
Swank, Bradd

Staff:

Heynderickx, Dave
McKean, Doug
Odell, Marilyn
Taylor, Bill

Interested Parties:

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Fogarty, Jean
Grabe, Susan
Martinez, Tim
Munro, Jack

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Benner, Richard
Burdick, Ginny
Cannon, Robert
Coleman, James
Kellington, Wendie
Linde, Hans
Parker, Scott
Schell, Steve
Schradle, Philip
Shetterly, Lane

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Heynderickx, Dave
Odell, Marilyn
Taylor, Bill

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Grabe, Susan
Krem, Janice
Monson, Christy
Snider, Paul

Juvenile Code Revision

Brown, Kate – Chair
Brazeau, Karen

Juvenile Code Revision (cont.)

Booth, Cindy
Buckley, Mary Claire
Carson, Wallace P.
Carter, Jeff
Christian, Ann
Click, Kingsley
Coleman, Lee
Congleton, Vic
Darling, Deanne
Derr, Claude
Doell, Steve
Easton, Lea Ann
Felton, Aaron
Grabe, Susan
Goldman, Muriel
Hinrichs, Pat
Holmes-Hehn, Amy
Jackson, Lonnie
Joondeph, Bob
Knupp, Emily
Lancaster, Dianne
Leggert, Terry
Livingston, Michael
Loewen, Tim
Lowe, Kathy
McFarlane, Julie
McKnight, Maureen
Miller, Nancy
Myers, Carl
Oglesby, Larry
Osborn, Kathie
Poppen, Doug
Quigley, Karen
Richardson, John
Sanders, Paulette
Serice, Mickey
Shankle, Ronelle
Sherbo, Angela
Svetkey, Susan
Swank, Bradd
Swenson, Ingrid
Travis, Timothy
Welch, Elizabeth

Staff:

Taylor, Bill
Vanderbilt, Virginia

Interested Parties:

Barker, Talina
Carlson, Eric
Fuller, Marilyn
Caryanne Connor
Foley, Ramona

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Shetterly, Lane

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Taylor, Bill

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Carlson, Eric
Grabe, Susan

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Schradle, Philip
Swank, Bradd

Staff:

Heynderickx, Dave

Interested Parties:

Barker, Talina
Carlson, Eric

**Status Trichotomy –
Landowner Liability**

Heynderickx, Dave
Linde, Hans
Mowe, Greg
Vetri, Dom

**Statute of
Limitations/Ultimate Repose**

Blackhurst, Steve – Chair
Carter, Jeff
Symeonides, Symeon

**Prevailing Parties Attorneys
Fees**

Greg Mowe
Myers, Hardy

Constitutional Reform

Carson, Wallace P.
Linde, Hans
Williams, Max