OREGON LAW COMMISSION

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BIENNIAL REPORT OF THE OREGON LAW COMMISSION

2001 – 2003

From
David R. Kenagy
Executive Director

and

Wendy J. Johnson
Assistant Executive Director

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.

Cover photo courtesy of Office of Communications, Willamette University

OREGON LAW COMMISSION

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From 2001-2003, the Oregon Law Commission, with the help of over two hundred dedicated and capable volunteers, completed work on fourteen pieces of proposed legislation for the 2003 Legislative Assembly. At the time of the printing of this Report, several other pieces of proposed legislation are near completion and are pending Commission approval for recommendation to the 2003 Legislative Assembly. In addition, the Commission is already looking ahead to 2005 and will commence study or continue study of several other significant law reform projects 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, its Work Groups, and the Executive Director's office 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 the Commission in support of the Oregon Legislative Assembly.

Representative Lane Shetterly
Chair of Oregon Law Commission

Senator Kate Brown
Vice-chair of Oregon Law Commission

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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, entered into a public-private partnership with Willamette University. The Commission is composed of thirteen Commissioners and is staffed by the Executive Director's office which is housed at Willamette University College of Law. The College of Law provides executive, administrative and legal research support for the Commission and the Commission's Work Groups. The College of Law also facilitates law student and faculty participation in support of the Commission's work.

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 a long-term commitment and an impartial approach. Oregon statute requires that 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 21, 2001.

The Commission assists the legislature in keeping the law up to date and by proposing good law reform bills. Oregon statute provides that the Commission was established to "conduct a continuous substantive law revision program ..." (ORS 173.315). The Commission's process for engaging in good law reform involves identifying and selecting appropriate law reform projects, researching the area of law at issue, and seeking input from those who may be affected by proposed reforms. The goal of the law reform process is both proposed legislation and comments on the proposed legislative provisions in an explanatory report detailing the law reform project's objectives and decision-making process.

The purpose of the Commission's Program Committee, chaired by Attorney General Hardy Myers, is to review the law reform projects brought to the Commission that have been identified as needing reform, and then make recommendations to the Commission for the final decision regarding which law reform projects 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 7). 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.

Once a law reform project has been presented to the Program Committee and then approved by the Commission for study and development, a Work Group is established. Currently over two hundred volunteers serve on the Commission's Work Groups. Work Groups are chaired by a Commissioner and often have a designated Reporter to assist with the project. 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, make up the balance of the Work Group. The Commission works to produce reform solutions of highest quality by drawing on a wide range of experience and interests.

With the help of the many dedicated volunteers serving on the Commission's Work Group's, the Commission has prepared and approved 14 bills for recommendation and introduction in the 2003 Legislative Session. Several more bills are near completion and are pending Commission approval for the 2003 Legislative Session. One of the things that makes the Commission unique and at the forefront of good law reform is that all bills recommended by the Oregon Law Commission to the Legislative Assembly have accompanying explanatory reports. Appendices to this Report contain the available explanatory reports for the 2003 bills. The Commission presents its recommended bills to the 2003 Legislative Assembly anticipating careful consideration and enactment of the bills.

This Biennial Report documents the Commission's work from January 1, 2001 through December 31, 2002. It is our hope that the materials give you a clearer insight into the Commission's law reform process, its good law reform work, and its potential for the future. We wish to again extend our thanks to the many volunteers who have given of their time to make the Commission's 2003 legislative package a success.

David R. Kenagy
Executive Director

Wendy J. Johnson
Assistant Executive Director

Commissioners of the Oregon Law Commission

Representative Lane P. Shetterly, Chair — **Appointed by Speaker of the House**
Attorney at Law, Shetterly, Irick, Shetterly and Ozias; Dallas, Oregon

Senator Kate Brown, Vice-Chair — **Appointed by Senate President**
Attorney at Law; Portland, Oregon

Steven K. Blackhurst — **Appointed by Speaker of the House**
Attorney at Law, Ater Wynne LLP; Portland, Oregon

Chief Justice Wallace P. Carson Jr. — ***Ex officio***
Chief Justice of the Oregon Supreme Court; Salem, Oregon

Jeff J. Carter[1] — **Designee of Board of Governors of Oregon State Bar**
Attorney at Law, Jeff J. Carter PC; Salem, Oregon

Sandra A. Hansberger — **Designee of Board of Governors of Oregon State Bar**
Clinical Professor, Lewis and Clark Northwestern School of Law; Portland, Oregon

Professor Hans Linde — **Appointed by Governor of State**
Distinguished Scholar in Residence, Willamette University College of Law; Salem, Oregon

Gregory R. Mowe — **Designee of Board of Governors of Oregon State Bar**
Attorney at Law, Stoel Rives LLP; Portland, Oregon

Attorney General Hardy Myers — ***Ex officio***
Attorney General of the State of Oregon; Salem, Oregon

Dean Symeon C. Symeonides — **Dean of Willamette University College of Law**
Dean of Willamette University College of Law, Salem; Oregon

Professor Bernard F. Vail — **Designee of Lewis & Clark Law School Dean**
Professor, Lewis and Clark Northwestern School of Law; Portland, Oregon

Professor Dominick Vetri — **Designee of University of Oregon Law School Dean**
Professor, University of Oregon School of Law; Eugene, Oregon

Martha L. Walters[2] — **Designee of Board of Governors of Oregon State Bar**
Attorney at Law, Walters Romm Chanti & Dickens PC; Eugene, Oregon

Representative Max Williams — **Appointed by Senate President**
Attorney at Law, Miller Nash Wiener Hager & Carlsen; Portland, Oregon

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[1] Commissioner from September 24, 1997 to August 31, 2002 when his term expired
[2] Term initiated on September 1, 2002

Staff of the Oregon Law Commission

Willamette University College of Law Staff

David R. Kenagy
Executive Director

Wendy J. Johnson
Assistant Executive Director

Rosalie M. Schele
Administrative Assistant

State of Oregon Staff

Gregory A. Chaimov
Legislative Counsel

David W. Heynderickx
Senior Deputy Legislative Counsel

William Taylor
Judiciary Committee Counsel

Law Student Participation

One of the goals of the Law Commission is to bring the legal academic community into the law reform process together with legislators, lawyers, judges, and other interested parties. Law students have been assisting the Commission in a variety of ways, including researching new law reform projects, writing legal memoranda, attending Commission meetings, and writing final reports. The following law students, all from Willamette University College of Law, served the Oregon Law Commission from 2001-2002. The Commission anticipates that the University of Oregon and Lewis & Clark law schools will participate in the future.

Alexa Crutchfield – Extern
Spring 2001

Kristin Flickinger – Extern
Spring 2001

Daniel Deering – Research Asst.
Summer 2001

Charles Malone – Research Asst.
Summer 2001

Bridget Musgrave – Research Asst.
Summer 2001 to Present

Daeleen Chesley – Research Asst.
Fall 2001

Tiffany Davidson – Research Asst.
Fall 2001 to Spring 2002

Robin Rebers – Research Asst.
Spring 2002

Dennis Koho – Research Asst.
Summer 2002 to Present

Lauren Rhoades – Research Asst.
Summer 2002 to Present

Oregon Law Commission Meetings

The Commission held twelve meetings from January 1, 2001 through December 31, 2002. Committees and Work Groups established by the Commission held numerous additional meetings. The Commission meetings were held on the following dates:

January 26, 2001	State Capitol
February 22, 2001	State Capitol
April 24, 2001	State Capitol
July 13, 2001	State Capitol
September 21, 2001	Seaside, Oregon
December 14, 2001	State Capitol
March 8, 2002	State Capitol
June 7, 2002	State Capitol
September 6, 2002	State Capitol
October 11, 2002	State Capitol
November 22, 2002	State Capitol
December 18, 2002	State Capitol

Minutes for the twelve Commission meetings are available both at the Oregon Law Commission's office and the Archives Division of the Secretary of State. They also may be viewed at the Oregon Law Commission web site, www.willamette.edu/wucl/oregonlawcommission/home/pubs-minutes.html

The Commission is required to hold quarterly meeting. (ORS 173.328). The meetings for 2003 have been tentatively set for the following dates:

February 6, 2003	State Capitol
February 24, 2003	State Capitol
June 13, 2003	State Capitol
September 19, 2003	State Bar Convention
December 12, 2003	State Capitol

Please check the Commission's Master Calendar web page at the following URL: www.willamette.edu/wucl/oregonlawcommission/home/calendar.html to confirm dates and times or contact the Commission at 503-370-6973.

Program Committee
2001-2003

Commissioners:

Attorney General Hardy Myers, Chair
Steve Blackhurst
Chief Justice Wally P. Carson, Jr.
Professor Hans Linde
Greg Mowe
Representative Lane Shetterly

The Program Committee held seven meetings from January 1, 2001 through December 31, 2002 on the following dates:

February 26, 2001	Attorney General's Conference Room
June 25, 2001	Attorney General's Conference Room
August 13, 2001	Attorney General's Conference Room
September 19, 2001	State Capitol
November 19, 2001	State Capitol
March 4, 2002	State Capitol
April 29, 2002	State Capitol

The Program Committee meets as necessary to review proposed law reform projects for the Oregon Law Commission. No meetings for 2003 have been set. Please check the Commission's Master Calendar web page at the following URL:
www.willamette.edu/wucl/oregonlawcommission/home/calendar.html
to confirm dates and to see future meetings or contact the Commission at 503-370-6973.

Program Committee

The purpose of the Program Committee is to review law reform projects that have been submitted to the Law Commission, and then make recommendations to the Commission regarding which laws should be studied and developed by the Commission. (See the following page for guidance on how to draft a law reform project proposal for submission to the Commission.) In additions to the guidance of ORS 173.338, the Commission has approved the following criteria for the selection of law reform projects for development 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:

A. Source of Work Proposals (Priorities)
   1. Legislative Assembly proposals approved by resolution, legislative leadership or committee chair;
   2. Judicial branch proposals approved by the Chief Justice of the Supreme Court, Judicial Conference or State Court Administrator;
   3. Legislative Counsel proposals;
   4. Law school proposals;
   5. Oregon State Bar section proposals;
   6. Commission member proposals; and
   7. Other sources.

B. 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.

C. 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.

D. 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.

E. 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.

Program Committee

Do you or does your organization have a law reform project that would be well suited for the Oregon Law Commission?

A proposal seeking involvement of the Oregon Law Commission in a project should be addressed to the Program Committee for consideration and contain the following preferred sections:

1. PROBLEM: Identify the specific issue to be studied or addressed by the Law Commission and explain the adverse consequences of current law. An illustration from real life might be helpful.

2. HISTORY OF REFORM EFFORTS: Explain past efforts to address the problem and the success or limits of those efforts.

3. SCOPE OF PROJECT: Explain what needs to be studied, evaluated or changed to fix the problem.

4. LAW COMMISSION INVOLVEMENT: Explain why the issue is a good subject for law reform of broad general interest and need (as opposed to an issue likely to be advanced by a single interest group or lobby).

5. PROJECT PARTICIPANTS: Identify individuals who are willing to serve on a Work Group, and a "Reporter" who will work with the Chair of the Work Group to draft a Report and Comments. The Chair of the Work Group should be a Commissioner. The Proposal may state a preference for a Chair.

OREGON LAW COMMISSION

173.315 Oregon Law Commission created; duties; membership; chairperson. (1) The Oregon Law Commission is established to conduct a continuous substantive law revision program, including but not limited to the subjects stated in ORS 173.338.

(2) The Oregon Law Commission shall consist of:

(a) Two persons, at least one of whom is a Senator at the time of appointment, appointed by the President of the Senate;

(b) Two persons, at least one of whom is a Representative at the time of appointment, appointed by the Speaker of the House of Representatives;

(c) The deans of Oregon's accredited law schools, or their designees;

(d) Three persons designated by the Board of Governors of the Oregon State Bar;

(e) The Attorney General or the Attorney General's designee;

(f) The Chief Justice of the Supreme Court or the Chief Justice's designee; and

(g) One person appointed by the Governor.

(3) The term of office of each appointed member of the Oregon Law Commission is two years. Before the expiration of the term of a member, the appointing authority shall appoint a successor whose term begins on September 1 next following. A member is eligible for reappointment. If there is a vacancy for any cause, the appointing authority shall make an appointment to become immediately effective for the unexpired term. A member shall be removed from the commission if the member misses three consecutive meetings without prior approval of the chairperson.

(4) The Oregon Law Commission shall elect its chairperson and vice chairperson from among the members with such powers and duties as the commission shall determine.

(5) A majority of the members of the commission constitutes a quorum for the transaction of business. [1981 c.813 §1; 1997 c.661 §1]

173.320 [1963 c.292 §3 (173.310 to 173.340 enacted in lieu of 173.155); repealed by 1979 c.472 §2]

173.325 Compensation and expenses of members. A member of the Oregon Law Commission who is not a member of the Legislative Assembly shall receive no compensation for services as a member but, subject to any other applicable law regulating travel and other expenses for state officers, may receive actual and necessary travel and other expenses incurred in the performance of official duties, providing funds are appropriated therefor in the budget of the Legislative Counsel Committee. [1981 c.813 §2; 1987 c.879 §3; 1997 c.661 §2]

173.328 Commission meetings. The Oregon Law Commission shall meet at least once every three months at a place, day and hour determined by the commission. The commission also shall meet at other times and places specified by the call of the chairperson or of a majority of the members of the commission. [1997 c.661 §5]

173.330 [1963 c.292 §4 (173.310 to 173.340 enacted in lieu of 173.155); repealed by 1979 c.472 §2]

173.335 Commission staff; duties. (1) The Legislative Counsel shall assist the Oregon Law Commission to carry out its functions as provided by law.

(2) The Legislative Counsel pursuant to subsection (1) of this section shall:

(a) Coordinate research for, and preparation of, legislative proposals, as requested by the commission.

(b) Examine the published opinions of any judge of the Supreme Court, the Court of Appeals and the Oregon Tax Court of this state for the purpose of discovering and reporting to the commission any statutory defects, anachronisms or omissions mentioned therein.

(c) Receive suggestions and proposed changes in the law from interested persons, and bring such suggestions and proposals to the attention of the commission.

(d) Perform such other services as are necessary to enable the commission to carry out its functions as provided by law. [1981 c.813 §§3,4; 1997 c.661 §6]

173.338 Law revision program; drafting services. (1) The specific subject areas to be part of the law revision program of the Oregon Law Commission include but are not limited to:

(a) The common law and statutes of the state and current judicial decisions for the purpose of discovering defects and anachronisms in the law and recommending needed reforms.

(b) Proposed changes in the law recommended by the American Law Institute, the National Conference of Commissioners on Uniform State Laws, any bar association or other learned bodies.

(c) Suggestions from judges, justices, public officials, lawyers and the public generally as to defects and anachronisms in the law.

(d) Such changes in the law as the commission considers necessary to modify or eliminate antiquated and inequitable rules of

law and to bring the law of Oregon into harmony with modern conditions.

(e) The express repeal of all statutes repealed by implication or held unconstitutional by state and federal courts.

(2) The Legislative Counsel shall provide necessary drafting services as legislative priorities permit. [1997 c.661 §3]

173.340 [1963 c.292 §5 (173.310 to 173.340 enacted in lieu of 173.155); repealed by 1979 c.472 §2]

173.342 Commission biennial report to Legislative Assembly. (1) The Oregon Law Commission shall file a report at each regular session of the Legislative Assembly that shall contain recommendations for statutory and administrative changes and a calendar of topics selected by the commission for study, including a list of the studies in progress and a list of topics intended for future consideration.

(2) The commission shall also study any topic that the Legislative Assembly, by concurrent resolution, refers to it for such study. [1997 c.661 §4]

173.345 Cooperation with bar associations or other associations. The Oregon Law Commission may cooperate with any bar association or other learned, professional or scientific association, institution or foundation in a manner suitable to fulfill the functions of the commission. [1997 c.661 §7]

173.347 Appearance of commission members or staff before Legislative Assembly. The Oregon Law Commission by its members or its staff may appear before committees of the Legislative Assembly in an advisory capacity, pursuant to the rules thereof, to present testimony and evidence in support of the commission's recommendations. [1997 c.661 §8]

173.350 [1965 c.397 §1; repealed by 1979 c.472 §2]

173.352 Advisory and technical committees. (1) To aid and advise the Oregon Law Commission in the performance of its functions, the commission may establish such advisory and technical committees as the commission considers necessary. These committees may be continuing or temporary. The commission shall determine the representation, membership, terms and organization of the committees and shall appoint their members.

(2) Members of the committees are not entitled to compensation, but in the discretion of the commission may be reimbursed from funds available to the commission for actual and necessary travel and other expenses incurred in the performance of their official duties. [1997 c.661 §10]

173.355 Solicitation and receipt of gifts and grants. The Oregon Law Commission may solicit and receive funds from grants and gifts to assist and support its functions. [1997 c.661 §9]

173.357 Disposition of moneys collected or received by commission. All moneys collected or received by the Oregon Law Commission shall be paid into the General Fund of the State Treasury. Such moneys are continuously appropriated for and shall be used by the commission in carrying out the purposes for which the funds are received. [1997 c.661 §11]

OREGON LAW COMMISSION

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August 23, 2001

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Oregon Law Commission
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2001 SESSION SUMMARY:

Bills Presented by Oregon Law Commission

During the 2001 Legislative Session, the Oregon Law Commission successfully advanced nine bills through the Legislature. The following is a brief summary of the nine bills which were advanced by the Law Commission and signed into law by the Governor:

1. House Bill 2352 reorganized Oregon's civil rights statutes to put them in a more logical order. It clarified unclear or inconsistent language relating to enforcement procedures and made the statutes easier for the reader to understand and use. The Oregon Law Commission endeavored to fix the organizational problems of the current civil rights laws without changing substance.
2. House Bill 2355 provided that an individual 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.
3. House Bill 2386 represented a comprehensive rewrite of garnishment procedures and forms. The bill did not substantively change existing garnishment law but simplified and clarified the garnishment process. The bill consolidated the four existing writ forms into a single form, the two forms for writs of continuing garnishment were eliminated and the two existing forms for "snapshot" writs were consolidated into a single form.
4. House Bill 2388 required 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. The bill eliminated the need to file motions for delayed or late appeals because the party is waiting for new counsel to be appointed.
5. House Bill 2391 assisted in keeping parental contact information updated by tracking the current address of the parent throughout the termination of parental rights proceedings. The bill 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.
6. House Bill 2392 allows for 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.
7. House Bill 2414 codified choice-of-law for Oregon-related contracts. The 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.
8. House Bill 2425 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.
9. House Bill 2611 created 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 Oregon Revised Statutes Chapter 419B.

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Statesman Journal
Legislature
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WEDNESDAY, JANUARY 10, 2001

Law Commission aims to clarify statutes

A group of legal experts files bills to revise unclear or conflicting Oregon laws.

BY DAN MEISLER
Statesman Journal

Legislators searching for an example of bipartisanship need only look across State Street to the Willamette University College of Law.

That's the home of the Oregon Law Commission, created by the 1997 Legislature and fully funded last year. Its mission: to revise unclear or conflicting statutes.

The group, made up of lawmakers, attorneys, law professors, Attorney General Hardy Myers and Supreme Court Chief Justice Wallace Carson, already has filed several bills with the state Legislature.

Commission Executive Director David Kenagy, also the law school associate dean, said lawmakers should be thrilled to have the opportunity to pass the group's bills.

"These are all efficiency bills," he said, "the kind of thing legislators will enjoy saying yes to."

No interest groups or lobbyists have rallied around the subjects the commission has taken on, such as clarifying rules on paycheck garnishment, juvenile justice procedural code, civil rights complaint processes or interstate conflicts of law.

"These are not sexy issues," said Sen. Kate Brown, D-Portland, a member of the commission.

To learn more

To find out more about the Oregon Law Commission, check its Web site: www.willamette.edu/wucl/oregonlawcommission/

But lawyers and ordinary citizens have been stymied for years over confusing statutes, she said.

"The goal is to make technical changes to the statutes and make the process work better," she said.

For example, when the state removes children from abusive parents, grandparents often want to become involved in the legal case, Brown said. But the confusing rules of juvenile court procedure make it nearly impossible for nonlawyers to understand the process.

"It's frustrating," Brown said. "We want a grandma to be able to pick up the statute and understand what's happening in court."

Kenagy said the commission has 10 bills ready for the Legislature to consider, and he emphasized the goal is not to change the laws, but to improve their functioning.

He said he hopes the bills don't become "lightning rods" for competing interests.

But that's not to say the bills are completely noncontroversial. For example, Kenagy said, when trying to make juvenile court procedures more efficient, lawmakers risk cutting short the opportunity to gather evidence.

As far as any special strategy for getting the bills through the Legislature, Kenagy pointed to the detailed reports — some written by the nine Willamette students assisting the commission — that will accompany the proposals. He said those will provide ample justification for their passage.

The three legislators on the commission, Brown, Rep. Lane Shetterly, R-Dallas, and Rep. Max Williams, R-Tigard, likely will provide support for the bills. Williams is chair of the House Judiciary Committee, which will consider the proposals first.

Regardless, getting lawmakers to focus on such technical matters may be a struggle, Brown said.

"Legislators are just not going to get excited," she said. "But they won't be passionately opposed either."

Kenagy said the commission's bills won't necessarily distract from the more divisive, and exciting, budget battles.

"You don't have to set anything aside to do good lawmaking," he said.

Dan Meisler can be reached at (503) 399-6651 or dmeisler@StatesmanJournal.com.

Illustrative Outline of a Report to the Oregon Law Commission

One of the things that makes the Commission unique and at the forefront of good law reform is that all bills recommended by the Oregon Law Commission to the Legislative Assembly have accompanying explanatory reports.

The following is an outline of a typical report to the Oregon Law Commission for Work Groups to consider when preparing their own reports to the Commission. Of course, each Work Group's issue is unique and certain sections outlined below may not be necessary for every report. Therefore, the following outline is only a guide.

I. Introductory summary

This section briefly identifies the problem area, the reason why it needs attention, and the overall objective of the proposal. The introductory summary may be followed by the actual text of the proposal, if the text is quite brief, otherwise by a summary of its provisions.

II. History of the project

This section recounts when the Oregon Law Commission undertook the project, who led it, who participated in the research and the design of the proposal (much like the Reporters and Co-Reporters of ALI drafts), as well as the process of consultation with experts and interested participants. This section should mention participating members of the relevant specialty sections of the Oregon State Bar as well as participating lawyers or others with a stake in the legal field under consideration.

III. Statement of the problem area

This section should explain in some detail the problems in existing law. For example, the problem may be uncertainty and lack of clear standards, inconsistent or self-contradictory standards, or standards that are outmoded, inefficient, inadequate, or otherwise unsatisfactory.

IV. The objectives of the proposal

The preceding sections set the stage for identifying the objectives of the proposal concretely (as distinct from general goals of "clarification," "simplification," or "modernization") in advance of explaining the choice of legal means to achieve those objectives. This section should identify propositions that are uncontroversial and those on which both participants have disagreed. If one objective of the proposal is to craft an acceptable compromise among competing views, this section would candidly state the opposing positions that were argued in the consultations, and why the proposal represents the best and most principled accommodation of the legal arguments with merit.

V. Review of legal solutions existing or proposed elsewhere

This section should describe models of existing or proposed legal formulations that were examined in preparing the proposal. For example, explain what other states have done and describe any uniform laws that address the issue.

VI. The proposal

The report should next set forth the whole proposal verbatim, except for revisions of a lengthy statute that is better attached as an appendix. In such a case, the report would proceed by setting out significant parts of the proposal section by section (or by multi-section topics), followed by explanatory commentary on each item. Again, ALI statutory projects offer an illustrative model. If statutes that exist or have been proposed elsewhere have not already been discussed (see section V), they should be discussed in the comments to the proposal. In the alternative, it may be appropriate to have a separate document, entitled "Comments," that provides the section-by-section commentary.

On occasion, a Work Group may choose to offer alternative drafts. This can be appropriate when the Work Group considers it important that a statute (or rule) provide clear and consistent guidance on a legal problem while leaving to the political decision-makers the choice of which among competing policy objectives should prevail.

VII. Conclusion

The conclusion summarizes the reasons why the proposal should be adopted.

VIII. Appendices

This section would contain a list of persons who were consulted in preparing the proposal, a bibliography of sources, and perhaps relevant statutory texts or excerpts from other relevant documents or published commentary bearing on the proposal.

NOTE: Form of publication

A formal report of the Oregon Law Commission should be reproduced in a format suitable for preservation by the Commission, Legislative Counsel, and other appropriate entities. The report should be suitable for distribution to libraries and other interested subscribers. Ideally the report would also be suitable for publication in one of Oregon's academic law reviews. The Executive Director's office should be given an electronic copy for website use and distribution.

Apart from the formal report, the experts who worked on the project should be encouraged to publish their own articles analyzing and commenting on the subject of the report in more detail. Publication in these two different forms was the common practice for scholarly reports to the Administrative Conference of the United States.

OREGON LAW COMMISSION

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MEMORANDUM

To: Commissioners of the Oregon Law Commission
From: David Kenagy
Date: Sept. 6, 2001
Re: Managing Mid-Session Amendments to Law Commission recommended bills.

Our experience in the 2001 Legislative Session taught that even the most carefully drafted Law Commission legislative recommendations will be amended during the legislative process. We also learned that the amendments may be proposed from many sources for reasons some of which may not even be known or revealed until after an amendment has been adopted.

Other Law Commissions around the country have faced the same issue. In general they favor maximum flexibility for those charged with guiding the legislation on behalf of the Commission. They do not adopt policy constraining the process but follow understood practices that have developed over their years of experience. I suggest that we do the same. This memo displays the broad outlines of the approach used by the Executive Director's office, which we intend to use in the future, subject to further guidance from the Commission.

You will recall that in light of the experiences of the 2001 Session, the Commission discussed at its July 13, 2001 meeting how to best process the inevitable amendments to Law Commission bills. This discussion included a desire to see Commission recommendations enacted, unless the content of the final enactment departs fundamentally from the original recommendation.

The Commission's Executive Director is responsible for guiding the Commission's recommendations through the legislative process. In that capacity the Executive Director is expected to exercise an initial judgment when faced with a proposed legislative amendment to a Law Commission bill. That initial judgment is to distinguish between amendments that make either "material" or "immaterial" changes to the Law Commission bill. Technical text changes and corrections which do not alter the purpose and function of a bill are examples of immaterial changes.

In the exercise of this initial judgment concerning materiality, the Executive Director will resolve doubts in favor of assuming materiality in order to engage the wider consultation and discussion about the amendment as detailed below. Consultation with either the Commission Chair, Vice-Chair or others usually would be a part of the Executive Director's initial decision making process.

If an amendment is immaterial, the Executive Director will continue to guide the amended Law Commission bill as would be the case without amendment. Making clear, however, that the amendment does not carry formal Law Commission approval.

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If an amendment is material, the Executive Director will take steps from among those listed below. The steps selected will naturally depend upon the stage of the legislative process in which the amendment is proposed or made.

Generally, early in the Session there is more time for broad-based discussion, reflection and review. Later in the Session faster responses are needed, requiring a more confined and efficient discussion. Regardless of the step chosen, the Executive Director will consult with the Chair of the Commission in order to take such other necessary steps or combinations of steps as may not be contemplated at this writing. The keys are good communication and flexibility in approach.

The hierarchy of steps in managing mid-session amendments is as follows:

1. In consultation with the Commission Chair or Vice-Chair, present the amendment to the full Law Commission for formal consideration and a vote on taking a position on the amendment. Only this first approach would authorize the Executive Director to affirmatively report support or rejection of an amendment "on behalf of the Commission."
   This approach, however, requires both an assessment of the time available for such action and the nature and scope of the amendment itself. Experience has shown that some amendments, while fairly judged "material", are of lesser scope and effect than others and may therefore be better addressed in a less formal manner.

2. In consultation with the Commission Chair or Vice-Chair, present the amendment to the full Work Group responsible for the Commission's draft at a meeting of the Work Group or informally by email or otherwise where necessary.

3. In consultation with the Commission Chair or Vice-Chair, present the amendment to the responsible Work Group Chair, to the Work Group Reporter, and to any members of the Work Group known to the Executive Director to be most knowledgeable on the subject raised by the amendment.

4. In consultation with the Commission Chair or Vice-Chair, present the amendment to the Work Group Chair, Reporter or other most knowledgeable Work Group member.

Following each of the above actions the Executive Director will carry out the steps next reasonably necessary to implement the guidance obtained from the process. In no case shall the views of any person or group of persons be reported by the Executive Director as the views of the Law Commission unless supported by a vote of the Commission affirming those views.

OREGON LAW COMMISSION

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To: Commissioners of the Oregon Law Commission
From: David Kenagy, Executive Director of the Oregon Law Commission
Date: November 9, 2001

Re: Memorandum of Understanding: Reminding Work Group Members to Act on Their Independent Professional Judgment

The Oregon Law Commission exists to provide clarification and improvement of Oregon law. ORS 173.315; ORS 173.338. For this purpose, the Commission must rely on knowledgeable committees, known as Work Groups, to pursue the various substantive projects that are the Commission's task. ORS 173.352 (1) provides that the commission shall determine the membership and organization of the committees and "shall appoint their members." Work Groups generally are made up of Commissioners and volunteers who bring either professional expertise to the law reform project or familiarity with community interests that are particularly affected by the project.

The goal of a Commission project is to produce what the Commission, in its professional judgment, determines to be the best feasible improvement in the law, taking into account that different people and groups have divergent views on and interests in the subject matter. This goal is furthered by finding a way for knowledgeable advisors who will express those views and interests to inform the Commission's Work Groups, while leaving the decisions on the substantive issues to the disinterested professional judgment of the regularly appointed members of the Work Group. The work of these committees can only be hampered if some members subordinate their judgment of the public interest to the interests of a particular private party or client. I therefore recommend that the Commission accept a practice by the Executive Director's office of communicating to Work Group members that they are to speak and vote on the basis of their individual and professional convictions and experience in the exercise of independent judgment.

Other commissions and committees in Oregon and throughout the United States have addressed the issue of membership criteria in this context. Some have promulgated statutes, rules, or policies to require or encourage members to contribute solely on the basis of their personal experience and convictions. For example, Congress passed the Federal Advisory Committee Act in 1972. A section of the statute speaks to membership. 5 U.S.C.A. app. 2 § 5 (West 1996). See Attachment 1 for full text of statute. That Act arose out of the growing number of advisory groups in the nation and growing concern that special interests had captured advisory committees, exerting undue influence on public programs. H.R. REP. NO. 1017, 92d Con., *reprinted in* 1972 U.S.C.C.A.N. 3491, 3495; Steven P. Croley & William F. Funk, *The Federal Advisory Committee Act and Good Government*, 14 YALE J. ON REG. 451, 462 (1997). The Act also requires advisory committees to keep minutes, including a record of persons present. In short, the goal of the Act was to establish openness and balanced representation but also prevent the surreptitious use of advisory committees to further the interests of any special interest. H.R. REP. NO. 1017, 92d Con., *reprinted in* 1972 U.S.C.C.A.N. 3491, 3500.

Another example comes from the National Assessment Governing Board, appointed by the Secretary of Education, for the purpose of formulating policy guidelines for the National Assessment; the Board has twenty-five members. 20 USCA § 9011 (West 2000). The statute

establishing the Board contains the following provision limiting membership: "The Secretary and the Board shall ensure at all times that the membership of the Board reflects regional, racial, gender, and cultural balance and diversity and that the Board exercises its independent judgment, free from inappropriate influences and special interests." Id. at §9011(b)(3). Still another example is found in ORS 526.225; that Oregon statute authorizes the State Board of Higher Education to appoint a Forest Research Laboratory Advisory Committee composed of fifteen members. Composition of the Committee is to include three members from the public at large, but they may not "have any relationship or pecuniary interest that would interfere with that individual representing the public interest." See Attachment 2 for full text of statute.

Less formal examples are found in other law reform organizations. The American Law Institute, it its Rules of Council, provides guidelines for membership in the Institute. Rule 9.04, titled Members' Obligation to Exercise Independent Judgment, was added at the December, 1996, meeting of the Council. That Rule communicates that members are to "leave client interests at the door." See Attachment 3 for full text of Rule. Finally, the Louisiana State Law Institute has a philosophical policy statement, dating back to 1940, that encourages "thorough study and research, and full, free and non-partisan discussion." See Attachment 4 for text of statement (John H. Tucker, Address at Louisiana State University on the Philosophy and Purposes of the Louisiana State Law Institute (Mar. 16, 1940)).

Instead of a formal rule or statute to express an ideal that Oregon Law Commission Work Group members should leave their client interests at the door, the Executive Director's office suggests the Commission accept this Memorandum of Understanding and the following statement:

"To maintain the Oregon Law Commission's professional non-partisan analysis of legal issues in support of law reform, Commissioners and those individuals appointed by the Commission to serve as Work Group members are expected to exercise independent judgment when working on Oregon Law Commission projects by speaking and voting on the basis of their individual and professional convictions and experience. Recommendations to and from the Law Commission must be the result of thoughtful deliberation by members dedicated to public service. Therefore, Work Group members are not to subject their individual and professional judgment to representation of client or employer interests when participating in the Work Group's decisions."

Unless otherwise directed, the Executive Director's staff will incorporate the above statement into the Work Group letters of appointment as a means of communicating to Work Group members the Commission's important mission and expectations.

QUICK FACT SHEET

Oregon Law Commission

What does the Oregon Law Commission do?

The Commission assists the Oregon State 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;
- Drafting proposed legislation, comments and reports for legislative consideration.

How was the Oregon Law Commission formed?

The 1997 Legislative Assembly adopted legislation creating the Oregon Law Commission. (ORS 173.315) The Legislative Emergency Board approved funding in April 2000 to support the Commission's work.

How does the work of the Oregon Law Commission compare to the work of other groups who may have ideas about changing Oregon laws?

The Commission identifies and considers needs that are not likely to be advanced by traditional interest groups. The Commission gives 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.

What is the role of Willamette University?

Willamette University has entered into a public-private partnership with the state through the Office of Legislative Counsel that allows the Oregon Law Commission to recommend law reform, revision and improvement to the legislature while providing opportunities for student and faculty involvement in support of the Commission's work. The Commission is housed at the Willamette University College of Law where the Executive Director and Assistant Executive Director have their offices.

Who makes up the Commission?

The Commission is composed of four legislators or their designees, the Chief Justice of the Oregon Supreme Court, the Attorney General, the Governor's appointee, the deans or representatives from each law school in Oregon and three representatives from the Oregon State Bar. (ORS 173.315)

WILLAMETTE  *UNIVERSITY*

The First University in the West

Looking Ahead ...
2003-2005 Calendar of Law Reform Topics

Many of the Commission's Work Groups that have proposed legislation for 2003 are likely to continue for the 2005 session to handle deferred issues and other issues that arise out of this session's bills. The Program Committee will continue to receive law reform project proposals in 2003 and 2004 for legislation aimed for submission to the 2005 Legislative Assembly. The Commission also is striving to work more closely with the Commission on Uniform State Laws and may work on uniform act proposals for the 2005 Legislative Session.

The formation of several Work Groups has already been approved by the Oregon Law Commission. Each of the following approved Work Groups are at different developmental stages of their respective law reform project. Most expect to have a legislative proposal and report for the 2005 Legislative Assembly.

1. Civil Rights
This Work Group has identified several civil rights sections of Chapter 659 of the ORS with legal ambiguities, including unclear statute of limitations and remedies provisions. Clarifying these sections are the central focus of the Work Group's effort.

2. Conflict of Laws; chaired by Commissioner Symeon Symeonides
During the 2001 Legislative Session, the first phase of a project on Conflict of Laws resulted in new law on choice of law for contracts. See ORS 81.100-81.135. The Work Group has reconvened, this time with a focus on choice of laws for torts. Litigation involving torts and tort actions that transcend state and national boundaries is frequent and economically significant. Indeterminate Oregon case law, over a period of some thirty-five years, is the main impetus for codified rules. The Group plans to draft such choice of law rules for torts. At the request of the Legislative Counsel's office, the Work Group will also study the terms "resident of state" and "domicile" as used in the Oregon Revised Statutes, potentially developing definitions for prospective use.

3. Juvenile Code Revision; chaired by Commissioner Kate Brown
In 1998, the Oregon Law Commission, in cooperation with the Oregon State Bar's Juvenile Law Section, created a Juvenile Code Revision Work Group. This Group remains active with regular monthly meetings working on improvements to juvenile law. Three approved Sub-Work Group projects include:

a. Delinquency Procedures Code
Presently there are no procedural rules in the delinquency section of the Juvenile Code, making the statutes difficult for the bench, bar, and non-lawyers to follow. Instead, the Oregon Revised Statutes incorporate rules of procedure in the Juvenile Code by reference back to the Criminal Code. However, there are some rules of criminal procedure that have not been incorporated in the Juvenile Code, even though the rules are routinely followed in juvenile courts. This Sub-Work Group is considering clearing up the confusion by creating a code of procedure for juvenile delinquency actions.

b. Expunction Statute
Present juvenile expunction statutes (ORS 419A.260-419A.262) are confusing to the bench and bar. Additionally, there are statutes in the Criminal Code that refer to the juvenile expunction statutes, but there is no mention in the juvenile expunction statutes of the Criminal Code. Considering that many juvenile court expunctions are handled *pro se*, this Sub-Work Group is considering restructuring the statutes so they are complete and more logical.

c. Juvenile Psychiatric Security Review Board (PSRB)
Although juveniles have a right to raise a mental disease and defect defense in a delinquency proceeding, presently Oregon has no procedure to follow if the defense is successfully raised. This Sub-Work Group hopes to provide a recommended solution for the limited number of juveniles who will successfully raise the defense, and has looked at federal provisions for funding ideas and to other states for models. Oregon courts amend the delinquency petition to a dependency petition and put the youth in the custody of SCF, or courts use ORS 419C.507, which allows placement with the Oregon Youth Authority (OYA), to try to fashion a remedy. However, OYA is not well suited to treat youth offenders with severe mental illnesses, even though the number of those youth in the OYA close custody system has been increasing. The Group is near completion of drafting legislation for a PSRB-type process and hopes to finish in time for submission to the 2003 Legislative Assembly.

4. Landowner Liability/Status Trichotomy; chaired by Commissioner Dom Vetri

This Work Group is looking at reform of Oregon's traditional common law model for landowner liability. The model presently varies the standard of care owed by the possessor or occupier of land depending on the status of the person entering the land. At common law, the courts developed a status trichotomy of invitees, licensees and trespassers with the highest standard of care owed to invitees and the lowest to trespassers. The traditional approach has presented problems for social visitors and trespassing children, and has invited litigation over status to

avoid harsh results. The Work Group is considering a model that focuses on whether the land occupier created or failed to correct a dangerous condition, rather than on the visitor's status. More than two-thirds of the states have modified the status trichotomy doctrine in one form or another.

5. Spousal Elective Share; chaired by Commissioner Bernard Vail
Commissioner Bernard Vail and Jacqui Koch gave a presentation at the Family Law Fall Conference at Salishan on November 2, 2001. The presentation, entitled "Uniform Marital Property Act: Point and Counterpoint" gave the Family Law Section of the Bar a chance to look at the positive and negative aspects of the proposed Uniform Martial Property Act. In January 2002, the Oregon Law Commission in conjunction with the Oregon State Bar also sent letters to various Bar Section leaders requesting comments on Oregon's current marital property laws and on the Uniform Marital Property Act. After reviewing the comments and considering the various bar sections' responses to the adoption of the Uniform Marital Property Act in Oregon, Commissioner Vail proposed changing the scope of the Work Group's law reform project. He suggested changing the project from a focus on the Uniform Marital Property Act to a focus on the problems with Oregon's spousal elective share statute (ORS 114.105 *et seq*). On June 7, 2002, the Oregon Law Commission approved the new project proposal submitted by Commissioner Vail. The proposal is aimed at fixing the elective share problems (*i.e.* the perceived inequity in property distribution at death of a spouse compared to that at the time of dissolution of marriage).

6. Non-profit Social Service Delivery
This Work Group is examining the Charitable Choice provisions of the 1996 Welfare Reform Act, with the task of recommending what steps, if any, should be taken to facilitate the participation of additional charitable organizations with delivering social services to Oregonians. The request for a Work Group to research this area of law came to the Oregon Law Commission from Senator Frank Shields with the support of the Director of the Department of Human Services, Bob Mink. The request was based upon Senate Joint Resolution 39 from the 2001 Legislation Session, a resolution that passed the Senate but did not advance through the House. A Sub-Work Group led by Willamette University College of Law Professor Steven Green is identifying and summarizing the various laws, regulations, rules, and official policies and procedures (both state and local) that govern participation in or access to government programs, grants, contracts, and facilities by non-profit social service organizations and other community-based organizations. A report will be assembled to present the findings.

2003 Oregon Law Commission

Legislative Package at a Glance

Bill Number	Work Group	Commissioner Chairing Work Group	Drafter of Report for 72nd Session's bill(s)
HB 2277, LC 1587	**1. Administrative and Judicial Child Support**	Sandra Hansberger	Sandra Hansberger
HB 2275, HB 2276	**2. Civil Rights**	Jeff Carter	Wendy J. Johnson, Lauren Rhoades
HB 2273	**3. Eminent Domain**	Greg Mowe	Bridget Musgrave
HB 2274, LC 1090	**4. Judgments/Enforcement of Judgments: Garnishments Bill Judgments Bill**	Rep. Max Williams	Randy Jordan David Heynderickx
LC 1564	**5. Judicial Review of Government Action**	Attorney General Hardy Myers	Phil Schradle
	6. Juvenile Code Revision	Sen. Kate Brown	
	Sub-Work Groups: (They are not chaired by a Commissioner; rather, Sub-Work Groups report back to the full Juvenile Code Revision Group chaired by Sen. Kate Brown)		
	a. Continuing HB 2611(2001)		
SB 67	1. Telephone Testimony	Ted Meece	Ted Meece
SB 68	2. Reference Corrections	Ted Meece	Ted Meece
SB 71	3. Service by Mail	Ted Meece	Ted Meece
SB 72	4. Intervenor/ Limited Participation	Ted Meece	Linda Guss
HB 2272	5. Summons	Ted Meece	Michael Livingston, Judge Terry Leggert
SB 70	b. Guardianships	Lisa Kay	Lisa Kay
LC 1095	c. Juvenile PSRB	Mary Claire Buckley	Kathie Osborn Berger
SB 69	d. Word Usage	Timothy Travis	Timothy Travis
HB 2278	**7. Public Body**	Prof. Bernie Vail	Dennis Koho
HB 2284	**8. Saving Statute**	Prof. Dom Vetri	Prof. Maury Holland

Note: LC numbers are used for those bills that, at the time of printing of this Report, had not been approved by the Oregon Law Commission and thus had not been assigned a bill number.

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Legislative Package Summary for the 72nd Legislative Assembly

The following is a brief summary of each bill. Please see the attached Appendices for the available Reports that give a more detailed description of each bill. The actual bills recommended by the Law Commission are not attached to the Report but copies are available at the State Capitol.

SENATE BILLS:

1. SB 67 Juvenile Code Revision: Telephone Testimony (LC 391)
This bill is a fix-it bill from last session's HB 2611. The bill would restore language permitting telephone testimony in juvenile court proceedings under ORS chapter 419B, subject to the same safeguards applicable to civil trials. This is a cost-saving bill as elimination of telephone testimony from juvenile proceedings, if enforced, would cause a major change in current practice, particularly in rural areas. It is common for expert witness, particularly medical doctors, psychologists, and drug and alcohol counselors, to be permitted to testify by telephone. The court has discretion to deny such telephone accommodation when the court finds that personal attendance is critical to the fact-finding process.

2. SB 68 Juvenile Code Revision: Reference Corrections (LC 402-1)
This bill is it a clean-up bill from last session's HB 2611. HB 2611 repealed various statutory provisions, and new provisions were enacted. However, some cross-references in various statutes presently refer to the repealed provisions rather than the new provisions; this bill would remedy the cross-reference problems.

3. SB 69 Juvenile Code Revision: Word Usage Corrections to ORS 419A (LC 1094)
The problems with wording that are fixed in this bill stem from an artifact of the time when all people found to be within the jurisdiction of the court were called "children." Now, a "child" is defined as a person within the jurisdiction of the court pursuant to the child abuse and neglect statutes. A "youth" is a person under the age of 18 who is alleged to be within the jurisdiction of the court pursuant to a juvenile delinquency action. And, a "youth offender" is a person at least 12 years of age who has been found to be within the jurisdiction of the court pursuant to a juvenile delinquency action. This bill fixes those places where these terms were used incorrectly or were incomplete. This bill fixes other word usage inconsistencies and ambiguities.

4. SB 70 Juvenile Code Revision: Juvenile Court Guardianships (LC 1096)
This bill provides a much-needed tool for juvenile courts in assisting those children who cannot return home safely within a reasonable time, but for whom adoption and termination of parental rights are inappropriate. This bill creates another permanent plan alternative for those children who are within the jurisdiction of the juvenile court —a guardianship. The bill specifies standards and procedures to establish, modify, review, and vacate such guardianships. This bill also amends the present permanent

guardianship statute to require use of the same procedures as that of the new guardianship provisions rather than using the probate guardianship procedures.

5. SB 71 Juvenile Code Revision: Service by Mail (LC 1097)
This bill would permit return receipt service by mail without requiring a court order in dependency and termination of parental rights proceedings. Last session, HB 2611 unintentionally moved service by mail into the list of "alternative service" methods.

6. SB 72 Juvenile Code Revision: Intervenor/ Rights of Limited Participation (LC 1098)
This bill would clarify that ORS 419B.116 is the only statute governing the process for intervening in a juvenile dependency proceeding. The bill reforms and clarifies the process for seeking to intervene. The bill also clarifies and further develops the process by which a person may seek rights of limited participation in a juvenile court proceeding.

HOUSE BILLS:

1. HB 2272 Juvenile Code Revision: Summons (LC 402)
This bill recognizes and incorporates the summons practices of all counties in the state. Last session's HB 2611 codified a modified form of the Multnomah County Local Rule requirements for summonses and has resulted in added expenses for the state.

2. HB 2273 Eminent Domain (LC 964)
The bill makes the deadlines for initial offers that are required prior to filing an action for condemnation consistent throughout the statutes. The bill also extends the existing right to immediate possession that road authorities possess, found in ORS 35.348, to all condemners in the case of certain emergencies. The bill replaces ORS 281.010 with a more thorough new statute governing procedures and notice requirements for exercising pre-condemnation rights of entry for inspections, surveys, and testing. This bill consolidates all of the existing pre-condemnation rights of entry statutes, eliminating the confusion caused by the many different statutes currently in force. The bill codifies procedures for a judicial determination of liability and damages for pre-condemnation entry and testing. The bill consolidates ORS Chapters 35 and 281 to provide one location for most of the eminent domain provisions.

3. HB 2274 Judgments / Enforcement of Judgments: Garnishments (LC 965)
This bill continues to clarify and simplify the garnishment process. The primary changes are technical corrections and procedural changes to further simplify the garnishment process. Additional changes continue the clarification process by eliminating ambiguities and unsettled areas of garnishment law, as well as eliminating inconsistent terminology.

4. HB 2275 Civil Rights: Age (LC 968)
This bill cleans up a problem that arose from the 2001 ORS Chapter 659 reorganization bill when "age" was unintentionally removed from certain provisions. The bill would clearly include "age" as a protected class in the public accommodations provisions, complete with the remedies other protected classes hold when an individual is aggrieved with an "unlawful practice" by a place of public accommodation.

5. HB 2276 Civil Rights: Remedies for Workers' Rights (LC 968-1)
This bill reinstates the availability of compensatory and punitive damages in a civil rights action for violation of certain injured worker rights. The ORS Chapter 659 reorganization bill unintentionally removed provisions, and the bill reinstates the status quo.

6. HB 2277 Administrative and Judicial Child Support Orders (LC 977)
This bill helps prevent the issuance of multiple child support orders (orders issued from both administrative and judicial fora) for the same family by requiring litigants to notify the judicial forum or the Administrator of existing orders or pending support proceedings involving the same children. In addition, in some cases, the DOJ will be required to inform the court and parties of existing orders or pending proceedings. This is a cost-saving bill aimed at preventing re-litigation of child support orders.

7. HB 2278 Public Body: Special Districts (LC 986)
This bill is a continuation from the 2001 Legislative Session's HB 2425. The Public Body Work Group continued its project to clean up the large number of laws that contain unclear or obsolete terminology for public bodies, using definitions from the 2001 bill. This session's bill focuses on the several chapters governing "special districts." Presently the law governing special districts contains much obsolete language relating to the nature of the special district involved. For example, the bill cleans-up unclear statutory provisions that declare that special districts are public bodies "corporate and politic."

8. HB 2284 Saving Statute (LC 1106)
This bill rewrites Oregon's saving statute, ORS 12.220. The bill would provide that when an original action is involuntarily dismissed without prejudice on any ground not adjudicating the merits of the action or on grounds of ineffective service, for a period of 180 days following dismissal of the original action a newly filed action would relate back to the filing of the original action for limitations purposes if the defendant had actual notice of the filing of the original action. This 180-period is regarded as a sufficient time within which the plaintiff should be able to commence a new action and rectify whatever procedural problem prompted the original dismissal.

UNASSIGNED BILLS:
(Pending Commission Approval)

1. Administrative and Judicial Child Support Orders (LC 1587)
This bill would provide a process for determining which terms in child support orders govern when multiple or inconsistent orders are entered by the administrator and/or judicial forums for the same obligor child.

2. Judgments / Enforcement of Judgments: Judgments (LC 1090)
This bill is a large comprehensive bill on judgments and it modernizes the statutes governing judgments, recognizing that today we are in a world of computers and technology. Terms including "docket" and "book register" are obsolete. The bill consolidates ORS Chapters 18 and 23, deleting Chapter 23. The bill gives clarity by redefining "judgment" and "appealable judgment." Statutory language regarding the expiration of judgments is fixed. For example, criminal judgments do not "expire" at the end of 10 years. The bill updates obsolete statutes governing the writ of execution procedure and the sheriff's duties. Confusion in statutes between "execution" and "writ of execution" is cleaned up.

3. Judicial Review of Government Actions (LC 1564)
This bill provides a uniform set of procedures and standards of review for court challenges to state and local government action. While the principle of judicial review is clearly established, the rules under which Oregon courts exercise judicial review comprise a patchwork of old writs, inconsistent statutes, and case law.

Appendices

OREGON LAW COMMISSION

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JUVENILE CODE REVISION:
Telephone Testimony

REPORT
(SB 67)

Prepared by
Ted Meece
Assistant Attorney General
Family Law Section

From
The Offices of the Executive Director
David R. Kenagy
and
Assistant Executive Director
Wendy J. Johnson

Report Approved at
Oregon Law Commission Meeting on
October 11, 2002

Juvenile Code Revision Work Group
Telephone Testimony Report

I. Introductory Summary

ORS 45.400, relating to telephone testimony, was revised by the 2001 legislature. Of significance to juvenile proceedings is that the language of ORS 45.400(1), describing the proceedings to which telephone testimony is authorized, was amended to delete "juvenile dependency proceeding or termination of parental rights proceeding." Instead, ORS 45.400(1) provides for telephone testimony "in any civil proceeding." Thus, telephone testimony is no longer specifically authorized in juvenile court proceedings. This proposed legislation would restore language permitting telephone testimony in juvenile court proceedings under ORS chapter 419B, subject to the same safeguards applicable to civil trials.

2. History of the Project

This proposal was first considered by the Juvenile Code Revision Work Group on January 18, 2002, and referred to a Sub-Work Group led by Ted Meece, Department of Justice, AAG. The Sub-Work Group has approved this proposal. The members include the following: Linda Guss, AAG (General Counsel, DHS); Lisa Kay, Juvenile Rights Project attorney; Amy Holmes Hehn, Multnomah County district attorney; Judge Terry Leggert (Marion County); Michael Livingston, AAG (Appellate); Leslie Nelson, attorney at Metropolitan Public Defenders Services Inc. of Portland; and Timothy Travis, attorney at Juvenile Court Improvement Project. Members of the full Juvenile Code Revision Work Group[1] also expressed their support of the bill at the August 16, 2002 meeting.

3. Statement of the Problem Area

Elimination of telephone testimony from juvenile proceedings, if enforced, would cause a major change in current practice, particularly in rural areas. It is common for expert witnesses, particularly medical doctors, psychologists and drug and alcohol counselors, to be permitted to testify by telephone. Without telephone testimony, such experts would be required to spend hours away from their practices to attend court hearings. The court has discretion to deny such accommodation, when the court finds that personal attendance is critical to the fact-finding process.

The Sub-Work Group believes that the change affecting juvenile court was inadvertent and was caused by the enactment in the same legislative session of

[1] Senator Kate Brown, an Oregon Law Commissioner, chairs the Juvenile Code Revision Work Group.

ORS 419B.800 through 419B.929 (Juvenile Court Dependency Procedure). Those provisions distinguish juvenile court proceedings from civil proceedings by specifically providing that the Oregon Rules of Civil Procedure do not apply to juvenile court proceedings. See ORS 419B.800(1). ORS Chapter 419B makes no direct reference to ORS 45.400 making it either applicable or not, but 45.400(1) specifically deletes any reference to juvenile proceedings, leaving the section as referring only to "civil proceedings." Moreover, ORS 419B.884(2)(a) continues to contemplate that telephone testimony is available, requiring that a motion to take a deposition be supported by an affidavit explaining why telephone testimony at the time of the hearing would not be possible.

4. Objective of the Proposal

The objective is to clarify the scope of ORS 45.400. Telephone testimony continues to be taken in juvenile court, despite the ambiguity created by the simultaneous enactment of Oregon Laws chapters 398 and 622 by the 2001 Legislature. Passage of this legislation would make it clear that, where appropriate, telephone testimony continues to be a valuable cost-saving tool of juvenile court procedure. This amendment is uncontroversial and was unanimously adopted by the Juvenile Code Revision Work Group

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JUVENILE CODE REVISION: Reference Corrections

REPORT (SB 68)

Prepared by
Ted Meece
Assistant Attorney General
Family Law Section

From
The Offices of the Executive Director
David R. Kenagy
and
Assistant Executive Director
Wendy J. Johnson

Report Approved at
Oregon Law Commission Meeting on
October 11, 2002

Juvenile Code Revision Work Group
Reference Corrections Report

I. Introductory Summary

Oregon Laws 2001, chapter 624, created a new section, codified at ORS 419B.116, setting forth the standards for allowing intervention in juvenile court proceedings. ORS 419B.116(8) provides that any order granting intervention or limited participation rights may be modified according to three repealed sections: ORS 419B.420, 419B.423, and 419B.426. ORS 419B.923 now governs modification of juvenile court orders and judgments and should be substituted for the aforementioned repealed sections.

Oregon Laws 2001, chapter 360, created a new section, codified at ORS 419B.389, and provides that a parent may seek relief under ORS 419B.420 when the parent is unable due to financial, health or other problems, to comply with an order of the court. ORS 419B.420 was repealed and ORS 419B.923 now contains procedures for modifying juvenile court orders; ORS 419B.923 should be substituted for ORS 419B.420.

2. History of the Project

This project was suggested by Legislative Counsel at the January 18, 2002 meeting of the Juvenile Code Revision Work Group and referred to the Sub-Work Group reviewing the Oregon Juvenile Court Dependency Procedure sections enacted by the 2001 legislature. Ted Meece, Chair of the Continuing HB 2611 Sub-Work of the Oregon Law Commission's Juvenile Code Revision Work Group, carried this project through at the request of Sen. Kate Brown. This legislation has the endorsement of the Juvenile Code Revision Work Group, chaired by Sen. Brown, which is composed of some fifty members.

3. Statement of the Problem Area

This proposal is a housekeeping amendment.

4. Objective of the Proposal

There were no dissenters to this proposed housekeeping legislation. It is intended to be entirely uncontroversial as it is intends to only clarify and correct ORS references.

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JUVENILE CODE REVISION:
Word Usage Revision

REPORT
(SB 69)

Prepared by
Timothy Travis
State Court Administrator's Office
Juvenile Court Improvement Project

From
The Offices of the Executive Director
David R. Kenagy
and
Assistant Executive Director
Wendy J. Johnson

Report Approved at
Oregon Law Commission Meeting on
November 22, 2002

Juvenile Code Revision Work Group
Word Usage Revision Report

1. Introductory Summary

This project of the Word Usage Sub-Work Group of the Juvenile Code Revision Work Group is an attempt to finish work that was begun when the Juvenile Code was revised in the wake of Senate Bill 1 in 1995. Senate Bill 1 provided landmark legislation that revised the delinquency system as the result of the passage of Ballot Measure 11 in 1994 (see Measure 11 codified at ORS 137.700 (2001)). At that time, a new system was adopted for referring to various people under the age of 18 who are subject to the chapters of the ORS that make up the "juvenile code." Not all such references were conformed to this new scheme in Chapter 419A, the so-called "introductory" or "administrative" chapter (the other two chapters, ORS 419B and ORS 419C, respectively, deal separately with dependent and delinquent persons under the age of 18). The proposed bill (SB 69) remedies these defects in word usage.

2. History of the Project

This particular project of the Word Usage Sub-Work Group was undertaken this interim because it was considered to be among the most straightforward of the word usage projects that should be undertaken. The Sub-Work Group was staffed by Timothy Travis of the Oregon Judicial Department and Virginia Vanderbilt from the Office of Legislative Counsel. The Sub-Work Group included Linda Guss and Jean Fogarty, both of the Department of Justice, Mickey Serice from the Department of Human Services, Lisa Kay from the Juvenile Rights Project, Inc., Bradd Swank from the Oregon Judicial Department, Cindy Booth from the Oregon Youth Authority, Kent Fisher from the Umatilla County District Attorney's Office, and Tim Loewen from the Juvenile Director's Association. This project was first approved by the Sub-Work Group, and later by the Juvenile Code Revision Work Group, on November 15, 2002.

3. Statement of Problem Area

Like so many of the problems that exist with the language of the ORS that comprise what is called the "juvenile code," the problem addressed by this proposal is the potential for applying policy deemed appropriate for one group of persons under the age of 18 to a different inappropriate group. Most common with ORS Chapter 419 was the use of the word "child" when the proper term should have been "youth" or "youth offender," or when all three terms should have been used.

The problems with wording that are fixed in this bill stem from an artifact of the time when all people found to be within the jurisdiction of the court were called "children." Now, however, a "child" is defined as a person within the jurisdiction of the court pursuant to the child abuse and neglect statutes. (ORS 419A.004(2)). A "youth" is a person under the age of 18 who is alleged to be within the jurisdiction of the court pursuant to a juvenile delinquency action. (ORS 419A.004(31)). And, a "youth offender" is a person at least 12 years of age who has been

found to be within the jurisdiction of the court pursuant to a juvenile delinquency action. (ORS 419A.004(32)).

As currently written, many provisions of ORS Chapter 419A appear to not apply to youth or youth offenders because the statutes containing those provisions do not refer to youth or youth offenders.

4. Objective of Proposal

The proposal inserts the proper terms where appropriate, ensuring that when a statute applies to only one category of person that only the term of art denoting that person is used, and that when a statute applies to more than one of them each is listed.

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Juvenile Code Revision:
Guardianship

Report
(SB 70)

Prepared by
Lisa Kay
Attorney, Juvenile Rights Project
Chair, Guardianship Sub-Work Group

From
The Offices of the Executive Director
David R. Kenagy
and
Assistant Executive Director
Wendy J. Johnson

Report Approved at
Oregon Law Commission Meeting on
November 22, 2002

Appendix D-1

Juvenile Code Revision Work Group
Guardianship Report

I. Introductory Summary

When Congress passed the Adoption and Safe Families Act in 1997 (ASFA), it was intended that abused and neglected children who could not be safely sent home should have a permanent home. Among the permanent plan alternatives envisioned by AFSA was a "general guardianship," that was intended to be permanent in the sense that efforts to send the child home would cease and the child protection agency would no longer be involved in the life of the child. The Oregon Juvenile Code lacks procedures for such a general guardianship.

This proposal creates a general guardianship for children who are within the jurisdiction of the juvenile court and specifies standards and procedures to establish, modify, review and vacate such guardianships. This proposal also amends the existing permanent guardianship statutes to require use of the same procedures for permanent guardianships as for general guardianships.

II. History of the Project

In 2001, the Juvenile Code Revision Work Group discussed the need to resolve issues around guardianships for children who are within the jurisdiction of the juvenile court. The project was referred to a Sub-Work Group[1] of the Juvenile Code Revision

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[1] **Sub-Work Group Members:**

Lisa Kay, Chair	Juvenile Rights Project
Timothy Travis, Vice-Chair	State Court Administrator's Office
John Anderson	Oregon Criminal Defense
Judge Richard Barron	Coos County Circuit Judge
Ann Christian	Indigent Defense Services
Judge Deanne Darling	Clackamas County Circuit Judge
Cheri Emahaiser	Services to Children and Family
Kathryn Garrett	Department of Justice, Family Law Section
Linda Guss	Department of Justice, Human Resources Section
Ann Holmes Hehn	Multnomah County District Attorney, Juvenile Division
Barbara Johnson	CASA of Clackamas County
Tim Loewen	Yamhill County Juvenile Department
Julie McFarlane	Juvenile Rights Project
Ted Meece	Department of Justice, Family Law Section
Mickey Serice	Services to Children and Family
Bradd Swank	State Court Administrator's Office
Judge Elizabeth Welch	Multnomah County Circuit Judge
Judge Merri Wyatt	Multnomah County Circuit Judge

Work Group,[2] the Guardianship Sub-Work Group, to formulate legislation. The Guardianship Sub-Work Group met for the first time in December 2001 and continued to meet monthly through October 2002. The Sub-Work Group regularly reported on its progress to, and sought input from, the full Juvenile Code Revision Work Group during the Juvenile Code Revision Work Group's monthly meetings.

III. Statement of the Problem Area

The Oregon Juvenile Code for dependent children provides for two types of guardianships: permanent guardianship pursuant to ORS 419B.365 and temporary guardianship pursuant to ORS 419B.370. A permanent guardianship provides for the few children whose parents are unfit by termination of parental rights standards but for whom adoption is not appropriate. The temporary guardianship allows the court to grant the duties and authority of a guardian to persons or agencies with temporary custody of the child.

The Oregon Juvenile Code lacks a provision for a "general" guardianship. A general guardianship is needed for children who cannot safely return to the care of a parent within a reasonable time, yet for whom termination of parental rights and adoption are not appropriate. A general guardianship established by the juvenile court would be similar to a probate guardianship, but would provide for more safeguards to protect children, such as judicial review if the guardianship is vacated.

Due to the lack of a general guardianship in the code, the juvenile court is forced either to implement a less than optimum permanent plan for the child or to follow a less than optimum procedure for appointing a guardian. Some juvenile court judges will not grant a guardianship due to the lack of clear statutory grounds to establish, review and vacate a guardianship, even though a guardianship is the most appropriate plan for the child. Alternatively, when a juvenile court does grant a general guardianship, it is forced to rely on the temporary guardianship statute or the Probate Code.

The temporary guardianship provisions merely state that the court may grant a guardianship "if it appears necessary to do so in the interests of the child." While such a standard is sufficient for a temporary guardianship when coupled with the provisions to grant temporary custody of the child to a person or agency, it is insufficient for a general guardianship. To ensure the requirements of due process are satisfied, a general guardianship, which deprives a parent of specific parental rights, must contain clear standards to establish, modify and vacate the guardianship. Also, to ensure the ongoing safety and well-being needs of the child are met, a guardianship must be reviewed

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Virginia Vanderbilt, Senior Deputy Legislative Counsel, has assisted the Sub-Work Group with drafting services. Oregon Law Commission Law Student Research Assistant, Dennis Koho, a second year law student at Willamette University College of Law, assisted the Group with research and writing.

[2] Senator Kate Brown, an Oregon Law Commissioner, chairs the Juvenile Code Revision Work Group.

periodically. The temporary guardianship statute falls short of these demands because it lacks standards to establish, review, modify and vacate the guardianship.

The Probate Code can also fall short of meeting the ongoing safety and well-being needs of juvenile court wards. The Probate Code calls for limited court review of guardianships for minors. While guardians of adults are required to submit annual reports, there is no such requirement for guardians of minors. See ORS 125.325. Some local court rules require annual reports from guardians of minors. However, some probate departments vacate guardianships, without judicial review, when a guardian fails to file an annual report. A motion to terminate a guardianship may be filed at any time. See ORS 125.325. Upon filing a motion to vacate, the guardian must prove that the guardianship is still necessary and the guardian may be required to obtain a visitor's report, at their expense. See ORS 125.325. This procedure allows a parent, who remains unable to adequately care for the child, to file a motion to vacate simply because they are dissatisfied with the guardianship.

It is important to note that the above analysis of the failures of the Probate Code to adequately protect juvenile court wards may be moot. The recent appellate decision in *Kelley v. Gibson,* 184 Or. App. 343, 56 P.3d 925 (2002), states that the juvenile court lacks the authority to hear or grant a guardianship petition brought under the Probate Code.

ORS 419B.365 governs the establishment and monitoring of a permanent guardianship. This guardianship is appropriate when the grounds for terminating a parent's parental rights exist, but adoption is not appropriate. Once established, a parent cannot move the court to vacate the guardianship. The current statute requires the court to follow the Probate Code procedures to establish and review a permanent guardianship.[3] As described above, the Probate Code procedures are ill-suited for children within the jurisdiction of the juvenile court.

The juvenile code needs a procedure for general guardianships, which contains clear standards and procedures to establish, review, modify and vacate such guardianships. Furthermore, courts should not follow the procedures of the Probate Code when granting a permanent guardianship. The Oregon Law Commission Juvenile Code Revision Work Group and the Guardianship Sub-Work Group recommend the proposed legislation (SB 70). The proposal satisfies the requirements of due process by clearly stating the standards and procedures for establishing, modifying and vacating general guardianships for children who are within the jurisdiction of the juvenile court and monitors children's ongoing safety and well-being needs with periodic judicial review.

[3] ORS 419B.365(2)

IV. Objectives of the Proposal

This proposal seeks to create a general guardianship in the juvenile code. The bill specifies the standards and procedures to establish, modify, review and vacate general guardianships for children who cannot safely return home within a reasonable time, yet for whom termination of parental rights is not appropriate. This proposal also seeks to amend the permanent guardianship statute to require courts to follow the procedures in the proposed general guardianship statutes instead of the probate guardianship procedures.

V. Review of Legal Solutions Existing or Proposed Elsewhere

Members of the Guardianship Sub-Work Group reviewed existing statutory schemes in several states, including New York, California, Arizona, Washington, Delaware and Idaho.[4] The members also reviewed the Adoption and Safe Families Act of 1997 and several articles on guardianships.

VI. The Proposal: See SB 70 (2003).

VII. Conclusion

This bill provides a much-needed tool for juvenile courts in assisting those children who cannot return home safely within a reasonable time, but for whom adoption and termination of parental rights are inappropriate. The bill creates the necessary standards and procedures for juvenile courts to establish, modify and vacate general guardianships for children within the court's jurisdiction, and provides for periodic review. The bill also amends the permanent guardianship statutes to require courts to follow the new proposed procedures as opposed to the probate guardianship procedures.

[4] Oregon Law Commission Law Student Research Assistant, Tiffany Davidson, then a third year law student at Willamette University College of Law, assisted the Group with research of other state statutes from January to May 2002.

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JUVENILE CODE REVISION:
Service by Mail

REPORT

(SB 71)

Prepared by
Ted Meece
Assistant Attorney General, Department of Justice
Family Law Section

From
The Offices of the Executive Director
David R. Kenagy
and
Assistant Executive Director
Wendy J. Johnson

Report Approved at
Oregon Law Commission Meeting on
November 22, 2002

Juvenile Code Revision Work Group
Service by Mail Report

I. Introductory Summary

Last session, HB 2611 (2001)[1] created the "Juvenile Court Dependency Procedure Code." It made a number of changes and clarifications in statewide juvenile court practice. Sections 8 and 9 of the 2001 bill revised and recodified provisions providing for service of summons in both dependency and termination of parental rights proceedings. In making these changes, the legislature clearly placed service by mail in the category of "alternative service" which requires a court order before such service may be attempted. The Continuing HB 2611 Sub-Work Group of the Oregon Law Commission's Juvenile Code Revision Work Group recognizes that court intervention prior to service by mail is not constitutionally mandated and is an unnecessary impediment; the Sub-Work Group recommends legislative amendment.

2. History of the Project

This project was initiated by the Continuing HB 2611 Sub-Work Group of the Juvenile Code Revision Work Group whose task was to compile necessary amendments to the new dependency procedures enacted as part of HB 2611 (2001). The Sub-Work Group considered the proposal regarding service by mail at a meeting on September 5, 2002. The meeting was attended by Ted Meece from the Oregon Department of Justice; Mickey Logan from the Oregon Department of Justice; Timothy Travis from the State Court Administrator's Office; and Lisa Kay from the Juvenile Rights Project. Ted Meece drafted the bill proposal. Virginia Vanderbilt, Senior Deputy Legislative Counsel, also provided the Sub-Work Group with drafting services. The draft bill and report were presented to the full Juvenile Code Revision Work Group[2] on September 20, 2002 and were approved on November 15, 2002.

3. Statement of the Problem Area

Former ORS 419B.277 (1999) was ambiguous as to whether court approval was required for service by mail because it was written in the passive voice.[3] In

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[1] 2001 Or. Laws Ch. 622.

[2] Senator Kate Brown, an Oregon Law Commissioner, chairs the Juvenile Code Revision Work Group.

[3] That statute provided in part:

419B.277 Alternative service

(1) If any parent or guardian required to be summoned as provided in ORS 419B.271 cannot be found within the state, summons may be served on the parent or guardian in any of the following ways: (a) If the address

practice, it had not been considered necessary to obtain a court order prior to serving a parent by certified mail, since it is clear that under Oregon civil practice rules, service by certified mail is constitutionally adequate so long as a return receipt signed by the responding party is obtained. *See, e.g. Lake Oswego v. Steinkamp,* 298 Or 607, 614, 695 P2d 565 (1985). The new statute, ORS 419B.824 (2001), classifies service by mail, whether or not a signed receipt is obtained, as one form of "alternative service" that must be "ordered by the court" under ORS 419B.821(4). As such, the statute mandates an unnecessary procedure that requires more attorney and judicial time that equates to more expense.

4. Objective of the Proposal

The proposal seeks to allow the maximum flexibility in fulfilling constitutionally adequate service before having to use service that requires obtaining court approval. Under current law, the petitioner may choose from only three methods of service that do not require seeking a court order: personal service, substituted service upon another member of the household, or office service. All three of these methods of service are described in terms virtually identical to ORCP 7D (2)(a), (b) and (c). Service by mail on individuals, as described in ORCP 7D (3)(a)(i), was not included among those methods in the 2001 legislation even though service by mail was used previously under the authority of former ORS 419B.277.

The proposed bill does not simply re-enact the previous statutory provision to permit service by mail but instead provides clarity and uses language drawn in relevant part from ORCP 7D(2)(d) and D(3)(a)(i). Under the proposal, service by mail would require that the respondent sign the return receipt in order for the service to be effective.

The proposal makes two other changes. The first is to clarify what showing is required before "alternative service" may be obtained. Under current practice, court approval for service by publication, an alternative service method, can be granted only when it is clear that an extensive search, documented in an affidavit prepared by a DHS employee, demonstrates that the parent cannot be found. The proposal would make no distinction between service inside and outside the state. The current statute, ORS 419B.824(5), implies that alternative service by publication may be authorized if the parent cannot be found *within the state.* This is a meaningless distinction. If a parent can only be found *outside* the state, they must nevertheless be served. No responsible practitioner would seek an order of publication if they had reason to think that the parent could be served without

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of the parent or guardian is known, by sending the parent or guardian a copy of the summons by registered or certified mail with a return receipt to be signed by the addressee only.

alternative service. For that reason, the proposed amendment simply requires that the inability to effect service as specifically provided for in the preceding subsections be demonstrated to the court before alternative service may be used.

The second change revises the provisions for mailing the summons when done pursuant to court order, presumably in connection with publication. The amendment would delete the reference to the parent or guardian's address *"if known"* since it is presumed that the address is *not* known, and provides that certified and first class mail may be sent to any address the court specifies, deleting the requirement for service by addressee only. The "addressee only" language is deleted for the reason that it is presumed that either such service has already been attempted as specified in subsection (4) or was considered a useless attempt. Furthermore, it was thought that once the other forms of service had been abandoned, any mailing should have the maximum probability that it would be opened rather than returned as undeliverable. Directing the certified mail to the "addressee only" simply reduces the chance that it will be delivered and seen by anyone.

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JUVENILE CODE REVISION:
Intervenor/Rights of Limited Participation

REPORT

(SB 72)

Prepared by
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General Counsel Division, Child Welfare Program

From
The Offices of the Executive Director
David R. Kenagy
and
Assistant Executive Director
Wendy J. Johnson

Report Approved as Amended at
Oregon Law Commission Meeting on
December 18, 2002

Juvenile Code Revision Work Group
Intervenor/Rights of Limited Participation Report

I. Introductory Summary

This proposed bill resolves an inconsistency in two statutes: ORS 419B.116, governing intervention in juvenile dependency proceedings; and ORS 109.119, governing intervention in other matters related to the custody, placement, guardianship or wardship of a child. This proposal also establishes standards and procedures for granting intervention and for recognizing persons with rights of limited participation in juvenile dependency proceedings. Finally, provisions related to rights of limited participation are moved to a more appropriate section of the juvenile dependency code.

II. History of the Project

This proposal was first considered by members of the Continuing HB 2611 Sub-Work Group on June 21, 2002. Members of the Sub-Work Group include: Timothy Travis, Juvenile Court Improvement Project; Lisa Kay, Juvenile Rights Project; Mickey Serice, Department of Human Services; Ted Meece, DOJ Assistant Attorney General, Family Law Section; Michael Livingston, DOJ Assistant Attorney General, Appellate Division; and Linda Guss, DOJ Assistant Attorney General, General Counsel Division. Members of the Sub-Work Group have expressed support for the proposal. The proposal was brought before the full Juvenile Code Revision Work Group[1] on September 20, 2002, and October 18, 2002; members of that Work Group expressed similar support for the proposed bill.

III. Statement of the Problem Areas

Persons asserting that they have a "caregiver relationship" with a child who is the subject of a juvenile dependency proceeding may file a motion for intervention in that proceeding and be granted party status. ORS 419B.116(2). [2] Filing a motion under ORS 419B.116 is the "sole means by which a person may intervene in a juvenile dependency proceeding." ORS 419B.116(3).

Notwithstanding ORS 419B.116, ORS 109.119(1)[3] provides that a person may file a motion for intervention with a court having jurisdiction over the wardship of

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[1] Senator Kate Brown, an Oregon Law Commissioner, chairs the Juvenile Code Revision Work Group.

[2] ORS 419B.116(2) provides: "A person asserting that the person has a caregiver relationship with a child may file a motion for intervention in a juvenile dependency proceeding."

[3] ORS 109.119(1) provides: "Any person, including but not limited to a related or nonrelated foster parent, stepparent, grandparent or relative by blood or marriage, who has established emotional ties creating a child-parent relationship or an ongoing personal relationship with a child may petition or file a motion for intervention with the court having jurisdiction over the custody, placement, guardianship or wardship of

a child. Generally, the only court that establishes wardship of a child is a juvenile court. See ORS 419B.328 and ORS 419C.440. Thus ORS 109.119 conflicts with ORS 419B.116.

ORS 109.119(6)(b)[4] provides a standard for when a motion for intervention filed under ORS 419B.875 may be denied or granted in certain circumstances and also establishes a standard of proof for granting a motion to intervene filed by grandparents. ORS 419B.875 is not the statute governing motions to intervene in juvenile dependency proceedings. The procedures related to motions to intervene under ORS 109.119 are inconsistent with the procedures established by ORS 419B.116. Not only are the procedures inconsistent, but as stated above, ORS 419B.116 states that it establishes the "sole means" for intervening in a juvenile dependency proceeding.

The current juvenile code provisions governing the process by which a person may be granted rights of limited participation require the filing of a motion and affidavit. ORS 419B.875(4)(a)[5]. The affidavit must state certain facts including the reason participation is sought, how the person's involvement is in the best interests of the child or the administration of justice, and why the parties can not adequately present the case. ORS 419B.875(4)(a)(A)-(D). There is no requirement in the present statute; however, that the movant prove any of the facts alleged in the affidavit. There is also no established procedure for parties to oppose a motion for rights of limited participation or for the court to conduct a hearing on the motion.

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that child, or if no such proceedings are pending, may petition the court for the county in which the child resides, for an order providing for relief under subsection (3) of this section."

[4] ORS 109.119(6)(b)(A)-(B) provides:
"(b)(A) A motion for intervention filed under ORS 419B.875 by a person other than a grandparent may be denied or a petition may be dismissed on the motion of any party or on the court's own motion if the petition does not state a prima facie case of emotional ties creating a child-parent relationship or ongoing personal relationship or does not allege facts that the intervention is in the best interest of the child.
(B) A motion for intervention filed under ORS 419B.875 by a grandparent may be granted upon a finding by clear and convincing evidence that the intervention is in the best interests of the child."

[5] ORS 419B.875(4)(a) provides:
"The court may grant rights of limited participation to persons who are not parties under subsection (1) of this section. A person seeking rights of limited participation must file a motion for limited participation and an affidavit. The affidavit must be served on all parties no later than two weeks before a proceeding in the case in which participation is sought. The affidavit must state:
(A) The reason the participation is sought;
(B) How the person's involvement is in the best interest of the child or the administration of justice;
(C) Why the parties cannot adequately present the case; and
(D) What specific relief is being sought."

IV. Objectives of the Proposal

An objective of the proposed bill is to clarify that ORS 419B.116 is the only statute governing the process for intervening in a juvenile dependency proceeding. To that end, the bill would eliminate the reference to "wardship" in ORS 109.119(1). Also deleted are the provisions that allow a court to grant or deny a motion for intervention in a juvenile dependency proceeding under ORS 109.119 and on grounds different than those established in ORS 419B.116.

The second main objective of the proposal is to clarify and further develop the existing juvenile code provisions that govern intervention and rights of limited participation.

To accomplish these objectives, the proposal:

a. Requires the filing of a written objection stating the grounds for objecting to a motion for intervention or rights of limited participation;
b. Authorizes the court to grant a motion for intervention or rights of limited participation without a hearing if no objection is filed;
c. Authorizes the court to dismiss without a hearing either a motion for intervention or rights of limited participation if the motion fails to state a *prima facie* case;
d. Requires the juvenile court to conduct a hearing on a motion to intervene if an objection is filed;
e. Permits but does not require, a hearing on a motion for rights of limited participation;
f. Requires a movant to establish the facts alleged in a motion by a preponderance of evidence if a hearing is conducted;
g. Requires the court to specify in its order the rights of limited participation that are granted; and
h. Moves the provision governing the process for seeking rights of limited participation into the related code section governing intervention.

V. The Proposal: See SB 72 (2003).

VI. Conclusion

This proposed bill should be adopted because it will fulfill the intention of the drafters of ORS 419B.116, to establish one procedure for intervening in juvenile dependency cases. By eliminating confusing references in ORS 109.116, the proposal will also clarify the process for intervening in juvenile dependency proceedings. In addition, the proposal will serve to establish clearer guidelines for persons seeking intervention or rights of limited participation, and will establish clear procedures for those parties who want to object to motions for intervention or rights of limited. Finally, the proposal clarifies court authority to act on motions for intervention and rights of limited participation.

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EMINENT DOMAIN

REPORT

(HB 2273)

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From
The Offices of the Executive Director
David R. Kenagy
and
Assistant Executive Director
Wendy J. Johnson

Report Approved as Amended at
Oregon Law Commission Meeting on
November 22, 2002

Eminent Domain Work Group
Report

I. Introductory Summary

Pre-Condemnation Rights of Entry

Public bodies that have the statutory power of eminent domain often need to enter upon land to conduct preliminary surveys and tests before making a decision to condemn property. These entries are necessary for the condemning body to design projects and determine whether or not the particular property would be suitable for the intended purpose.

In Oregon, statutory pre-condemnation rights of entry vary dramatically among public bodies. Most statutes providing rights of entry are nonspecific, leading to uncertainty as to the scope of permissible inspections and testing. Moreover, some public bodies that have condemnation authority do not have explicit statutory authority for a pre-condemnation right of entry. These uncertainties result in an irregular system where condemners work largely by individual agreements with each landowner.

One purpose of this bill is to replace ORS 281.010 with a more thorough statute governing pre-condemnation rights of entry for inspections and testing. This bill consolidates all of the existing pre-condemnation rights of entry statutes, eliminating the confusion caused by the many different statutes currently in force. Additionally, this bill codifies procedures for a judicial determination of liability and damages.

Chapter 35 Reform

In addition to the clarification of the pre-condemnation rights of entry, this bill makes the deadlines for initial offers that are required prior to filing an action for condemnation consistent throughout the statutes. The bill also extends the existing right to immediate possession that road authorities possess, found in ORS 35.348, to all condemners in the case of certain emergencies. Finally, this bill consolidates ORS Chapters 35 and 281 to provide one location for most of the eminent domain provisions.

II. History of the Project

In 2001, the Oregon Law Commission authorized the creation of an Eminent Domain Work Group to address ambiguities in eminent domain statutory provisions and to look at several law reform areas. Chaired by Commissioner Gregory R. Mowe, the Work Group met nine times between October 2001 and August 2002. Meetings were held at Willamette University College of Law and the Oregon State Bar Offices. The Work Group included several attorneys in private practice (representing condemners and/or condemnees), state attorneys, city attorneys, an appraiser, a federal judge, and a representative from the State Court Administrator's office.[1] In addition, David Heynderickx, Senior Deputy Legislative Counsel, provided the Group with drafting services.

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[1] **Members**

Greg Mowe	Stoel Rives LLP
Al Depenbrock	Trial Division of DOJ
Cynthia Fraser	Oregon Department of Transportation
John Junkin	Bullivant Houser Bailey PC
Edward Leavy	US Circuit Court Judge
Henry Lorenzen	Corey Byler Rew Lorenzen
Robert Maloney	Lane Powell Spears Lubersky LLP
Linda Meng	Portland City Attorney's Office
Spencer Powell	MAI
David Ross	Salem City Attorney's Office
Donald Stark	Bullivant Houser Bailey PC
Joe Willis	Schwabe Williamson & Wyatt PC

Interested Participants

Susan Grabe	Oregon State Bar
Jill Gelineau	Schwabe Williamson & Wyatt PC
Wendy Johnson	Oregon Law Commission
David Kenagy	Oregon Law Commission
Bridget Musgrave	Willamette University
Bradd Swank	Office of State Court Administrator

The Work Group focused its attention both on a technical review and clean-up of the existing eminent domain procedural chapter as well as several substantive reform areas. The Group put together seven Sub-Work Groups to look at seven different eminent domain law reform areas. One Sub-Work Group, consisting of chairman Gregory R. Mowe and members Robert Maloney and David Ross, was charged with the review and standardization of the statutes governing pre-condemnation inspections.

This Sub-Work Group, known as the Pre-condemnation Inspections Sub-Work Group, began by reviewing the existing pre-condemnation rights of entry statutes that had specific provisions on entering land and surveying. The Group also examined the Uniform Eminent Domain Code as well as statutory provisions from Alaska, Connecticut, Illinois, Michigan, Nevada, New York, and South Dakota. Next, David Heynderickx took the ideas from the Group and carefully drafted the bill. Each draft version was thoroughly reviewed and thoughtfully discussed by the entire Work Group before the final version of the bill was accepted.

Another Sub-Work Group, known as the Mechanics of Offer and Acceptance Sub-Work Group, considered changes to the current practice of settlement offers and the ability of condemners to amend their assessment of the property's value to a lower number after the initial offer. The Sub-Work Group consisted of the following members: John Junkin, Don Stark, Al Depenbrock and Joe Willis. After much discussion, the group agreed to make only technical changes to the initial offers statutory provision[2].

III. Statement of the Current Problems in the Law

Pre-Condemnation Rights of Entry

Oregon law currently provides dramatic variation of pre-condemnation rights among the different condemning bodies. Chapter 281 of the Oregon Revised Statutes deals with condemnation generally. While at first glance ORS 281.010[3] seems to provide a uniform pre-condemnation right of entry for all authorized condemners, the statute by itself does not grant entry. Instead, the statute is limited by the language that only allows pre-condemnation entry if another statute expressly grants the entry to the specific condemning body. Therefore, each condemning body must search for its own particular statute providing for a right of entry and then must follow the method prescribed.

In some cases, no specific statutory authority exists for a condemning body to enter upon land to conduct preliminary surveys and testing prior to condemnation. For example, while the State of Oregon may exercise the power of eminent domain to acquire land for public housing or to manage Oregon's waterways, uplands, and minerals, there is no statutory authority for the state to conduct preliminary surveys before condemnation. Often, even if the authority does exist, the statute granting the pre-

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[2] The Eminent Domain Work Group decided to postpone legislation in the remaining five Sub-Work Group areas for this session. Those Sub-Work Groups were as follows: Pleadings Requirements; Appraisal Exchange and Discovery; Pre-trial Deposits/Immediate Possession/Withdrawal of Deposits; Amending Down/Entitlement to Attorney Fees; and Contaminated Property.

[3] ORS 281.010 provides as follows:
"Whenever the law authorizes private real property to be appropriated to public uses, the property may be entered upon, examined, surveyed and selected, in the mode prescribed by the statute giving such authority. Thereafter, the state, county or other municipal or public corporation, seeking and authorized to make such appropriation, may proceed as prescribed in ORS chapter 35 to have such property condemned and the compensation therefor determined and paid, and not otherwise unless otherwise provided by law. The compensation in the case of such condemnation by the state, county, municipal or public corporation shall be paid by the deposit in court of an order duly drawn upon the treasurer thereof for the amount of such compensation."

condemnation right to enter does not clearly outline the scope of the authority, the proper procedure required of the condemner, or the availability of remedies to the landowner.

Chapter 35 Reform

Currently, ORS 35.346 provides two different deadlines for pre-filing settlement offers. This inconsistency confuses both condemners and condemnees, leading to a difference in opinion as to the correct deadline. In addition, the current version of ORS 35.348[4] only applies to road authorities. However, emergency situations may arise for all condemning bodies that require immediate possession to avoid a threat to persons or property. Lastly, practitioners in this field often needed to consult ORS Chapter 35 and 281, as well as many other ORS Chapters that grant condemnation authority. The existence of two Eminent Domain Chapters has been misleading and confusing.

IV. The Objectives of the Proposal

Pre-Condemnation Rights of Entry

In creating this bill, the Work Group sought to establish a uniform statute that provided clear, concrete, and useful guidelines for condemning bodies to enter and inspect property prior to condemnation that were both fair to landowners and met the needs of condemners. The intent was to address and correct the ambiguity in the current eminent domain statutes by providing a single statutory source for this authority. The Work Group's objective was to outline the permitted scope of inspection and the circumstances under which compensation will be required.

The Work Group was specifically concerned with the following issues:

1) Notice

Section 2 of the bill addresses the need for condemning bodies to make reasonable efforts to notify landowners and occupants of their intent to enter upon land for examination, surveying and/or testing. The bill would provide a standard procedure for entry upon, examination, survey, testing, and sampling of real property before commencement of a condemnation action. Specifically, the bill requires a condemner to attempt to provide actual notice to the owner or occupant of the property before entering upon any land to examine or survey. Posted written notice may be used if the condemner is unable to provide actual notice. A condemner must have the consent of the owner or obtain a court order to conduct tests upon or take samples from real property. A court order is also required for examination or survey if the owner objects to entry for examination or survey.

2) Judicial Enforcement of Right to Enter

The bill was drafted so that judicial involvement is not required, but can be used to enforce a condemner's pre-condemnation right to enter upon land. The bill gives the condemner the ability to obtain a court order to allow entry while at the same time providing the landowner with the ability to seek specific terms and conditions for entry.

3) Compensation

The bill requires compensation for actual damage or substantial interference with the property's possession or use. The bill does not make a determination as to whether entry onto property constitutes a taking. The intent of this bill is not to increase or decrease existing rights to

[4] ORS 35.348 provides as follows:
"Notwithstanding the time limits in ORS 35.346(4), in cases where a road authority, as defined in ORS 801.445, determines that an emergency exists that requires immediate maintenance, repair, construction or other road work related to the emergency, the authority may assume rejection by the landowner of a compensation offer made under ORS 35.346."

compensation that landowners have. As written, the bill allows the courts to determine if and when compensation is appropriate.

4) Double Recovery
The Work Group agreed to a provision that ensured that just compensation accorded to the owner resulting from the preliminary entry, survey, and testing activities would not again be recovered by the owner in any subsequent condemnation award.

Chapter 35 Reform

The main objective of amending ORS 35.346 was to make the deadline for the pre-filing initial offer to be 40 days in both Section (1) and Section (4). The proposed change corrects the uncertainty of whether the offer must be made in 20, 40 or 60 days.

The Work Group also sought to extend the "emergency provision" of ORS 35.348 to all condemners. The Work Group agreed that the provision should apply to all condemners, and not only road authorities, in the event of an emergency that threatens persons or property.

The Work Group also concluded that it was good law reform to consolidate ORS Chapters 35 and 281.

V. Review of Legal Solutions Existing or Proposed Elsewhere

The Pre-Condemnation Inspections Sub-Work Group relied heavily on the Uniform Eminent Domain Code for guidance. The Uniform Code arose out of a perceived problem with eminent domain procedures used in many states. The Special Committee on the Uniform Eminent Domain Code, which acted for the National Conference of Commissioners on Uniform State Laws, noted that the differences in procedure and application varied within a single state depending upon the identity of the condemner, the purpose of the taking, and the nature of the property being taken. The resulting code became a Model Act in 1984. In addition, the Sub-Work Group reviewed pre-condemnation inspection statutory provisions from Alaska, Connecticut, Illinois, Michigan, Nevada, New York, and South Dakota.

VI. The Proposal: See HB 2273 (2003) (formerly LC 964).

VII. Conclusion

This bill is the product of thoughtful deliberation and consideration by representatives of both condemners and condemnees. Enactment of this legislation will provide a single statutory source that outlines both the authority for pre-condemnation rights of entry for all condemning bodies and the procedures for landowners to obtain a judicial determination of liabilities and damages. Additionally, this bill eliminates deadline inconsistencies, extends a limited emergency provision to all condemners, and consolidates ORS Chapters 35 and 281. Policy choices have been made in the bill that attempt to strike a balance between the needs of condemnees and condemners.

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JUDGMENTS/ENFORCEMENT OF JUDGMENTS:
Garnishments

REPORT

(HB 2274)

Prepared by
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From
The Offices of the Executive Director
David R. Kenagy
and
Assistant Executive Director
Wendy J. Johnson

Report Approved at
Oregon Law Commission Meeting on
November 22, 2002

Appendix H-1

Judgments/Enforcement of Judgments Work Group
Garnishments Report

1. Introductory Summary

For the 2003 Legislative session, the Oregon Law Commission's Judgments/Enforcement of Judgments Work Group submits a bill to continue clarifying and simplifying the garnishment process. The primary changes are technical corrections and procedural changes to further simplify the garnishment process. Additional changes continue the clarification process by eliminating ambiguities and unsettled areas of garnishment law as well as eliminating inconsistent terminology.

2. History of the Project

In 2001, the Oregon legislature enacted legislation[1] recommended by the Judgment/Garnishment Work Group of the Oregon Law Commission to provide a comprehensive rewrite of the garnishment procedures and forms. ORS Chapter 29 needed a rewrite as the statutes followed no recognizable sequence and many of the individual statutes contained a hodge-podge of unrelated provisions. The bill was intended to simplify and clarify the garnishment process. Specifically, the bill consolidated the four existing writ forms into a single form, two forms for writs of continuing garnishment were eliminated, and the two forms for "snapshot" writs were consolidated into a single form.

Following the legislature's passage of the garnishment rewrite bill, the Law Commission authorized the Work Group to continue during the 2002 Legislative Interim as the Work Group did not complete their goal of addressing all aspects of the effect and enforcement of civil judgments. Rep. Max Williams, an Oregon Law Commissioner, continued to chair the Work Group. The Group is composed of members[2] representing:

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[1] HB 2386 (2001).

[2] **Members**

Rep. Max Williams	Oregon State Legislature
Cleve Abbe	Oregon Title Insurance
Gary Blacklidge	Greene & Markley PC
Thom Brown	Cosgrave Verger & Kester LLP
Thomas Christ	Cosgrave Verger & Kester LLP
Mark Comstock	Garrett Hemann Robertson Jennings Comstock & Trethewy PC
Jeffrey Hasson	Law Office of Jeffrey I. Hasson
Randall Jordan	Department of Justice
Jacqueline Koch	Koch & Dearring
Jim Markee	Oregon Collectors Association
David Nebel	Oregon Law Center
Tom Rask	Kell Alterman & Runstein LLP
Ronelle Shankle	Department of Justice, Division of Child Support Administration
Ken Sherman, Jr.	Sherman Sherman Murch Johnnie & Hazel
Rep. Lane P. Shetterly	Oregon State Legislature
Bradd Swank	Office of State Court Administrator
Irene Taylor	Public Defender's Office
Interested Participants	
Jean Fogarty	Department of Justice
Susan Grabe	Oregon State Bar
Wendy Johnson	Oregon Law Commission
David Kenagy	Oregon Law Commission
Tim Martinez	Oregon Bankers Association
Jack Munro	Oregon Land Title

- Attorneys, who have an obvious interest in the process for enforcing judgments;
- Courts, who are interested in clarity of law governing garnishments and any changes that might lead to increases in judicial efficiency;
- The Department of Justice, who 1) is interested on behalf of state agencies that collect judgments and other debts; 2) represents state agencies in their capacity as garnishees; and 3) is interested with respect to collections on behalf of persons to whom support is owed;
- Financial institutions, who along with employers, make up the bulk of garnishees;
- Collection agencies, who issue a significant proportion of the writs of garnishment generated in the state; and
- Debtors, who have an inherent interest in the garnishment process and in the means, manner, and types of property subject to garnishment.

The Group has worked both on a judgments bill and a garnishments bill this session. As the garnishments bill is largely clean-up work, the Group did not turn its attention to it until July 2002. The Group has had four monthly meetings this interim that focused on the garnishment project. The meetings took place at the Oregon State Bar offices and were open to the public. Several discussions among Work Group members (both verbal and via electronic correspondence), took place before and after each meeting. David Heynderickx, Senior Deputy Legislative Counsel, provided the Work Group with drafting services.

3. The Proposal: See HB 2274 (2003).

4. Bill Section-by-Section Analysis

Section 1: (Personal-Representative Garnishee)

This section addresses an unsettled issue of garnishment law. ORS 18.672 provides that a personal-representative garnishee's duty to deliver property does not arise until the probate court approves a distribution petition. In complicated probate cases, the distribution order may not occur for a period of years. Thus, in many cases, the personal-representative garnishee's duty to deliver property will not arise until over a year after the garnishment was delivered. But the statute of limitations for actions against garnishees requires that an action be commenced within one year from the delivery of the writ of garnishment. On its face, the statute of limitations suggests that although the garnishee has a duty to act, the creditor would have no right to enforce that duty to act.

To resolve this potential conflict, this section amends ORS 12.085 to provide that, with respect to a personal-representative garnishee, the one-year statute of limitations runs from the date of entry of the decree of final distribution of the estate and not from the date of delivery of the writ.

Section 2: (Public Body Definition)

A comprehensive definition of public body was developed by the Oregon Law Commission and adopted by the legislature in 2001 as ORS 174.109. This section amends ORS 18.600(10) to use that definition of public body rather than the one set forth in ORS 192.410.

Section 3: (Joint Debtors; Public Body Definition)

The right to issue one garnishment to reach the assets of more than one joint debtor is currently an unsettled question of garnishment law. This section explicitly amends ORS 18.607 to resolve this question by clarifying that a single garnishment can be directed against the assets of more than one joint debtor.

A single garnishment may be used if the debtors are jointly liable on all or part of the debt. A separate search fee must be delivered to the garnishee for each debtor. Section 9 includes related amendments concerning the garnishee's duties.

This section amends ORS 18.607 to conform to the use of the new comprehensive definition of public body provided by Section 2.

Section 4: (Child Support Payments to Department of Justice)

ORS 18.645 authorizes garnishments to be issued for the collection of past due support under the authority of the administrator as defined in ORS 25.010. To simplify the process and to conform to federal law, this section amends ORS 18.645 to require the garnishee to deliver payments to the Department of Justice, the state dispersement unit. Recognizing that payments will no longer be delivered to the issuer, this section also amends ORS 18.645 to require the Department of Justice, rather than the issuer, to comply with the statute's holding period for garnishment payments.

Section 5: (One Copy of Garnishment Document)

ORS 18.650 currently requires delivery to the garnishee of:

a) the original writ and a certified true copy; or
b) two certified true copies of the writ.

Problems with incomplete or improper certifications were reported to the Work Group, as well as disputes between garnishors and garnishees regarding the validity of certifications or attempted certifications. Upon review, the Work Group concluded that only one garnishment document was needed by the garnishee. To simplify compliance by the garnishor and the review process of the garnishee, and to avoid certification disputes between garnishees and garnishors, this section amends ORS 18.650 to require delivery to the garnishee of either an original writ of garnishment or a copy of a writ of garnishment. For simplicity, the certified-to-be-true-copy requirement is eliminated.

Section 6: (Conforming Amendments)

This section amends ORS 18.652 to conform to the amendments provided in Section 5.

Section 7: (Public Body Definition; Person or Place Designation for Delivery of Writ)

This section amends ORS 18.655 to conform to the use of the new comprehensive definition of public body provided by Section 2. To improve garnishment processing, the section also authorizes a public body to designate a particular person or place for the delivery of writs of garnishment to that public body.

Section 8: (Challenge of Garnishment Form: Address Requirements)

This section amends ORS 18.658 to require the garnishor to add the names and addresses of the garnishor and garnishee to the challenge of garnishment form provided to the debtor. This change provides an easy means for the court to identify the name and address of the garnishee for the purpose of sending notices with respect to a challenge of garnishment received by the court.

Section 9: (Joint Debtors: Garnishee's Duties)

As identified in Section 3, current garnishment law does not address the right of a garnishor to issue one garnishment against the property of joint judgment debtors. Correspondingly, the current law does not address the garnishee's duties when the garnishee holds separate property of each debtor and the combined separate property subject to garnishment exceeds the amount required to satisfy the garnishment. This section amends ORS 18.665 to provide that the garnishee may select which property to hold and deliver to satisfy the garnishment. The decision on which property to use is to be within the sole discretion of the garnishee.

Section 10: (Elimination of Copy Requirement)

To simplify the process for the garnishee and in recognition that the garnishee's response includes a complete case caption, this section amends ORS 18.690 to eliminate the requirement that the garnishee deliver a copy of the writ of garnishment with documents to be delivered to the court.

Section 11: (Modification of Supplemental Garnishee's Response Form)

Under current law, the Supplemental Garnishee Response form is set forth in both ORS 18.692 and ORS 18.838. To simplify the garnishment statutes and to conform to the general format of the garnishment statutes, this section deletes the form inserted in ORS 18.692 and provides a cross-reference to the form included as part of the Instructions to Garnishee as set forth in ORS 18.838.

Section 12: (Challenge to Garnishment Clarifications)

This section amends ORS 18.700 to provide clarification regarding Challenges to Garnishment. As adopted in House Bill 2386 (2001), ORS 18.700 continues the right of the debtor to raise the issues formerly raised through a "Claim of Exemption."[3] Since the Claim of Exemption served other functions than merely to present exemption claims, the new more generic document title "Challenge to Garnishment" was adopted for use in House Bill 2386. The Challenge to Garnishment serves the same function formerly served by the document titled "Claim of Exemption." Unfortunately, the new title has suggested to debtors the right to pursue claims or objections outside of the scope of types of claims properly raised through a Claim of Exemption/ Challenge to Garnishment; for example, some debtors are trying to make collateral attacks on the judgment. This section clarifies that the Challenge to Garnishment allowed by ORS 18.700 cannot be used to raise issues not specifically authorized by that statute or ORS 18.725.

Section 13: (Creditor's Responsibility to Deliver Funds to Court)

This section amends ORS 18.705 to clarify the creditor's responsibility to ensure that garnished funds are delivered to the court in the event that a challenge to garnishment is filed. Garnishment law requires the garnishor to hold garnished funds 10 days after receipt. At the end of the 10-day period, the garnishor is entitled to apply the funds to the debt. When the garnishor is the creditor's attorney, at the end of that 10-day period, the garnishor is authorized to deliver the funds to the creditor, unless a challenge to garnishment has been previously filed. When a challenge to garnishment is filed during the 10-day period, the garnished funds must be paid into the court. It is expected that the person holding the garnished funds – whether the creditor or the garnishor – has the responsibility to deliver the funds to the court. Instead, the current statutory language places that responsibility only on the garnishor. If the money was previously transferred to the creditor, the creditor should have the responsibility and obligation to deliver the funds to the court. The amendments in this section clarify that the creditor and not the garnishee, has that responsibility in this circumstance and thus assures that the garnished funds must be paid with the court.

This section also revises renumbered sub-section 4 of ORS 18.705 to delete confusing wording.

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[3] There are three issues that may be raised by the debtor:
1) ORS 18.700(1) allows a debtor to use a Challenge to Garnishment to "claim such exemptions from garnishment as are permitted by law." See former ORS 29.142, which stated "... the defendant may claim such exemptions from garnishment as are permitted by law." See ORS 23.160.

2) ORS 18.700(1)(a) allows a debtor to use a Challenge to Garnishment to assert that the amount specified in the garnishment as being subject to garnishment is greater than the total amount owed by the debtor to the creditor. See former ORS 29.142(d). This section allows the debtor to correct mathematical errors and failures to provide proper credit for payments. It does not allow the debtor to question the validity of the judgment.

3) ORS 18.700(1)(b) allows a debtor to use a Challenge to Garnishment to assert that certain property is not garnishable property. See former ORS 29.142(e). This section allows the debtor to assert that garnished property is one of the types of property identified in ORS 18.618 as not garnishable property.

The challenge to garnishment process may also be used by a third party to claim an interest in the garnished property. See former ORS 29.245(2) (1999).

Section 14: (Notice of a Challenge to Garnishment)

Under current law, the court is required to give notice of a challenge to garnishment hearing to "the parties." Although this was intended to require notice to the garnishee, the garnishor, and the debtor, the courts did not always have that information. The language was also subject to the interpretation that the "parties" meant the original parties as shown on the court records. Consistent with the Section 8 amendments to the challenge to garnishment form, this section amends ORS 18.710 to require that the court provide notice to the garnishee, the garnishor, and the debtor. To assist the court in the resolution of the challenge to garnishment, the creditor is also required to deliver a copy of the writ of garnishment to the court prior to the hearing.

Section 15: (Payment to State Agency)

To simplify payment processing when a state agency is a creditor, this section amends ORS 18.730 to allow the agency to require checks payable under such writs to be made payable as directed by the garnishor. This would include allowing the check to be made payable to the state agency.

Section 16: (Creditor's Responsibility to Return Excess Funds)

This section amends ORS 18.745 to clarify that the creditor is also responsible for ensuring that payments received under a writ of garnishment that exceed the amount owing on the debt must be returned to the debtor.

Section 17: (Designation of Issuer of Writ of Garnishment)

The writ of garnishment form provides for identification of the issuer of the writ. Space is left to place a check mark to designate whether the writ is issued by the clerk of the court, the attorney for the creditor, or other authorized issuer. To clarify the proper completion of the writ, this section amends ORS 18.830 to add the phrase, "(check one)" as a direction to the person completing the form, that it is necessary to designate the type of issuer. The phrase, "authority to issue writ" is also amended to add the word "statutory" and now reads, "statutory authority to issue writ." The word "statutory" is inserted to clarify that the authority to issue a writ must be based upon statutory authority.

Section 18: (Garnishee Response Form Fixes)

To facilitate and simplify contacts between garnishors and garnishees, this section amends the Garnishee Response form set forth in ORS 18.835 to include space for the garnishee to provide a telephone number and fax number, if available.

Section 19: (Conforming Amendments)

The instructions to garnishee form found in ORS 18.838 is amended by this section.

a) To conform to the amendments provided for in Sections 5 and 6 of the proposed bill, the instructions have been modified to reflect the statutory change requiring service of only the original or a copy of the writ of garnishment.

b) Existing law includes a conflict between the legal duties of the garnishee as set forth in ORS 18.690 and as set forth in the instructions to the garnishee in ORS 18.838. Currently, the garnishee is required to send the original garnishee response to the creditor. The garnishee sends a copy of the response to the court if there is property subject to garnishment. If there is no property subject to garnishment, no copy is sent to the court. In the garnishee instructions; however, the original garnishee's response is sometimes sent to court and sometimes sent to the garnishor. To conform the instructions to the statute and to provide a uniform rule concerning the original garnishee's response, this section amends the instructions to require that the garnishee always send the original garnishee response to the garnishor.

c) Consistent with ORS 18.692, this section modifies the instructions to use the title "Supplemental Garnishee Response" rather than "Notice of Bankruptcy Filing or Receipt of Order to Withhold Income" when that document is required. The instructions have been further clarified to provide that the duty to make a Supplemental Garnishee Response arises only if the garnishee has not delivered all property subject to garnishment under the writ when a Supplemental Garnishee Response would otherwise be required.

Section 20: (Calculation Form Amendments; Multiple Writ Example Addition)

This section amends the wage exemption calculation form set forth in ORS 18.840.

To use terminology consistent with the other garnishment statutes, the phrase "served on" has been replaced with "delivered to" to match ORS 18.650.

To clarify part 8 of the calculation form, this section adds two phrases, "for this pay period" and "or under another writ with priority." The first change makes clear that only amounts withheld during the current pay period are to be subtracted under this subsection. The second change makes clear that the amount subject to garnishment for this writ is also reduced by amounts being withheld during this pay period to satisfy prior writs of garnishment.

The instructions have also been supplemented to clarify the processing of multiple writs. This includes an additional example covering the situation in which two valid Writs of Garnishment are honored for the same pay period. The issue of multiple claims against funds subject to garnishment can arise with a variety of types of documents, including IRS levies, orders to withhold earnings for other than support debts, and notices of garnishment. The nature of the instructions prevents an exhaustive explanation of all possible circumstances presented to garnishees. The additional language and example is not intended to be exhaustive, but rather to provide clarification for that specific instance.

Section 21: (Conforming Amendments)

This section amends ORS 18.845 by revising the document title from "Notice of Exempt Property" to "Notice of Exempt Property and Instructions for Challenge to Garnishment" to clarify that the notice of exemptions form also provides instructions for challenges to garnishment. This section also provides instructions clarifying that a challenge to garnishment can only be used to present the specific issues allowed by ORS 18.700 and 18.725. These changes are made in conjunction with Sections 12 and 22 of the proposed bill.

Section 22: (Conforming Amendments)

This section amends ORS 18.850, the form of the Challenge to Garnishment to conform to the changes made in Sections 8, 12 and 21 of the proposed bill.

Section 23: (Attorney General's Authority to Adopt Garnishment Documents)

This section amends ORS 18.900 to clarify that the Attorney General's authority to adopt a notice of garnishment form includes authority to adopt other garnishment documents, such as the Instructions to Garnishee, Garnishee's Response, and Challenge to Garnishment necessary for the notice of garnishments, to comply with ORS 18.900 to 18.905.

Section 24: (Provisional Process and Concealed Property; Sheriff Authority to Take Possession)

By inadvertence, House Bill 2386 (2001), the garnishment revision bill, included the complete repeal of all sections of Chapter 29. This included the repeal of ORS 29.087. That section related to provisional process and concealed property. The repeal of that section was not discussed by the prior Garnishment Work Group and was not intended.

Former ORS 29.087 provided the sheriff's explicit authority to act to take possession of concealed personal property under provisional process for claim and delivery. At least one court has concluded that the repeal of that section's explicit authority to act evidenced a legislative intent to eliminate any implicit authority the sheriff might have to take those actions. Since the repeal was unintentional, this section restores the sheriff's explicit authority. Since the authority is directly related to claim and delivery provisional process, this section also amends ORCP 85C to restore the sheriff's explicit authority as described.

Section 25: (Prospective Effect)

This section makes the amendments, that the bill proposes, prospective. That is, they apply only to writs of garnishment issued on or after the effective date of the Act.

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CIVIL RIGHTS

Unlawful Discrimination in Public Accommodations: "Age" as a Protected Class

REPORT

(HB 2275)

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Report Approved at
Oregon Law Commission Meeting on
November 22, 2002

Civil Rights Work Group:
Unlawful Discrimination in Public Accommodations:
"Age" as a Protected Class Report

1. Introductory Summary

For the 2003 Legislative Session, the Oregon Law Commission's Civil Rights Work Group proposes a clean-up bill with the following objective:

> To clearly include "age" as a protected class in the public accommodations provisions, complete with the remedies other protected classes hold when an individual is aggrieved with an "unlawful practice" by a place of public accommodation.

2. History of the Project

In 2001, the Oregon legislature enacted legislation recommended by the Oregon Law Commission's Civil Rights Work Group to reorganize ORS Chapter 659 and amend other statutes outside Chapter 659 relating to civil rights and unlawful practices.[1] The intent of the Law Commission's legislation was to make the statutes easier to understand and use, with only minor substantive amendments. The Work Group's focus was to fix the organizational problems of the civil rights statutes.

Following the legislature's passage of the 2001 bill reorganizing Chapter 659, the Law Commission authorized the Civil Rights Work Group to continue and endorsed new law reform projects for the group to address, including projects to fix problems arising from the reorganization bill. Jeff Carter, Oregon Law Commissioner, continued to chair the Work Group. The Work Group[2] met twice to discuss law reform projects proposed

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[1] HB 2352 (2001).

[2] **Members:**

Jeff J. Carter, Chair	Jeff J. Carter PC
Sandra Hansberger	Lewis and Clark College of Law
Bob Joohdeph	Oregon Advocacy Center
Marcia Ohlemiller	Bureau of Labor and Industry
Karen O'Kasey	Hoffman Hart & Wagner LLP
Nathan Schmidt Sykes	Schwabe Williamson & Wyatt PC
Interested Participants:	
Jennifer Bouman	Gordon & Meneghello PC
Jeff Chicoine	Newcomb Sabin Schwartz & Landsverk LLP
David Gerstenfeld	Bureau of Labor and Industries
Corbett Gordon	Corbett Gordon & Associates
Susan Grabe	Oregon State Bar
Wendy Johnson	Oregon Law Commission
David Kenagy	Oregon Law Commission
David Nebel	Oregon Law Center

Doug McKean, Deputy Legislative Counsel, has assisted the Sub-Work Group with drafting services.

by Work Group members. The Group met on August 8, 2001, shortly after the 2001 Legislative Session ended, and then met again on July 17, 2002, to finalize their recommendations for the 2003 Legislative Session. Both meetings took place at the Oregon State Bar offices and were open to the public. Several discussions among work group members, via electronic correspondence, took place before and after each meeting. The Work Group has deferred addressing ambiguities in various statute of limitations and remedy provisions for the 2003 Legislative Session and instead presents two bills(HB 2275 and HB 2276) that focus on necessary clean-up provisions.

3. Statement of the Problem Area

"Age" as a Protected Class

While "age" was listed as a protected class in two public accommodation provisions prior to the 2001 reorganization bill, the reorganization deleted one such reference to "age," leaving only a single limited reference to "age", *i.e.* ORS 659A.409. ORS 659A.409 only prohibits posting of signs, notices, or advertisements that state that discrimination will be made in a place of public accommodation. That provision specifically prohibits the publishing of a notice that limits access to a place of public accommodation based upon age, as well as race, religion, sex, marital status, color, and national origin.

Before the 2001 reorganization, "age" was not listed as a protected class under former ORS 30.670, the general provision providing a right of all persons to equal facilities in places of public accommodation. That omission appears to be an oversight and does not appear intentional; members of the Work Group (including both plaintiff and defense lawyers) believe the legislature intended to include "age" as a protected class. Indeed "age" was listed as a protected class for public accommodation under former ORS 659.045, the provision regarding complaints of discrimination in housing, in places of public accommodation, and in a career school.

With the reorganization, however, former ORS 659.045 was deleted and replaced with ORS 659A.820. Thus, the primary "age" reference was lost. The new ORS 659A.820 created a single complaint procedure for all "unlawful practices" and removed the specific references to protected classes. In short, the Work Group proposes expressly including "age" as a protected class under the public accommodation provisions. The proposed amendment is limited in that, consistent with other provisions of the ORS, it does not prohibit the enforcement of law governing the consumption of alcoholic beverages by minors, the frequenting by minors in places of public accommodation where alcoholic beverages are served, or the offering of special rates or services to persons 55 years of age or older.

4. Objective of the Proposal

The reorganization of Chapter 659 unintentionally omitted "age" as a protected class from one public accommodation provision. That omission created the unintended implication that "age" is not a protected class in public accommodations cases generally.

5. Proposal

See HB 2275 (2003).

6. Conclusion

The proposed bill amends ORS 659A.403, 659A.406, 659A.409, and 659A.805. The bill would prohibit unlawful discrimination based on "age" by places of public accommodation. The bill is a clean-up bill to the 2001 Civil Rights reorganization bill.

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CIVIL RIGHTS

Reinstatement of Compensatory and Punitive Damages for Certain Unlawful Employment Practice Claims

REPORT

(HB 2276)

Prepared by
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From
The Offices of the Executive Director
David R. Kenagy
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Report Approved at
Oregon Law Commission Meeting on
November 22, 2002

Civil Rights Work Group:
Reinstatement of Compensatory and Punitive Damages for Certain Unlawful Employment Practice Claims Report

1. Introductory Summary

For the 2003 Legislative Session, the Oregon Law Commission's Civil Rights Work Group proposes a clean-up bill with the following objective:

> To reinstate the availability of compensatory and punitive damages in a civil rights action for violation of certain injured worker rights.

2. History of the Project

In 2001, the Oregon legislature enacted legislation recommended by the Oregon Law Commission's Civil Rights Work Group to reorganize ORS Chapter 659 and amend other statutes outside Chapter 659 relating to civil rights and unlawful practices.[1] The intent of the Law Commission's legislation was to make the statutes easier to understand and use, with only minor substantive amendments. The Work Group's focus was to fix the organizational problems of the civil rights statutes.

Following the legislature's passage of the 2001 bill reorganizing Chapter 659, the Law Commission authorized the Civil Rights Work Group to continue and endorsed new law reform projects for the group to address, including projects to fix problems arising from the reorganization bill. Jeff Carter, Oregon Law Commissioner, continued to chair the Work Group. The Work Group[2] met twice to discuss law reform projects proposed by Work Group members. The Group met on August 8, 2001, shortly after the 2001

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[1] HB 2352 (2001).

[2] **Members:**

Jeff J. Carter, Chair	Jeff J. Carter PC
Prof. Sandra Hansberger	Lewis and Clark College of Law
Bob Joohdeph	Oregon Advocacy Center
Marcia Ohlemiller	Bureau of Labor and Industry
Karen O'Kasey	Hoffman Hart & Wagner LLP
Nathan Schmidt Sykes	Schwabe Williamson & Wyatt PC
Interested Participants:	
Jennifer Bouman	Gordon & Meneghello PC
Jeff Chicoine	Newcomb Sabin Schwartz & Landsverk LLP
David Gerstenfeld	Bureau of Labor and Industries
Corbett Gordon	Gordon & Meneghello PC
Susan Grabe	Oregon State Bar
Wendy Johnson	Oregon Law Commission
David Kenagy	Oregon Law Commission
David Nebel	Oregon Law Center

Doug McKean, Deputy Legislative Counsel, has assisted the Work Group with drafting services.

Legislative Session ended, and then met again on July 17, 2002, to finalize their recommendations for the 2003 Legislative Session. Both meetings took place at the Oregon State Bar offices and were open to the public. Several discussions among work group members, via electronic correspondence, took place before and after each meeting. The Work Group has deferred addressing ambiguities in various statute of limitations and remedy provisions for the 2003 Legislative Session and instead presents two bills (HB 2275 and HB 2276) that focus on necessary clean-up provisions.

3. Statement of the Problem Area

Compensatory and Punitive Damages for Certain Unlawful Employment Practice Claims (*i.e.* Injured Worker claims)

Violations of ORS 659A.043 (regarding reinstatement of injured workers to their old jobs) and ORS 659A.046 (regarding reinstatement of injured workers to available and suitable work) are "unlawful practices." ORS 659A.885, a part of the 2001 revisions, provides that any person claiming to be aggrieved by listed "unlawful practices" may file a civil action and the court may award various listed remedies. While ORS 659A.885(3) lists many statutes, it does not list violations of ORS 659A.043 or 659A.046. Thus, currently, compensatory damages or $200, whichever is greater, and punitive damages are not available for violations of ORS 659A.043 or ORS 659A.046. Prior to the reorganization, the applicable provision was ORS 659.121 (1999); that provision specifically provided for compensatory and punitive damages for such injured worker claims. The remedies were inadvertently left out with the reorganization and the Work Group proposes reinstating them with this bill.

4. Objective of the Proposal

The reorganization of Chapter 659 unintentionally omitted compensatory and punitive damages for certain injured worker claims. The intent of the 2001 reorganization was not to reduce an individual's cause of action or to limit available remedies. The proposal reinstates the *status quo*.

5. Proposal

See HB 2276 (2003).

6. Conclusion

The proposed bill amends ORS 659A.885. The proposal permits compensatory and punitive damages in civil action for violation of certain injured worker rights. The bill is a clean-up bill to the 2001 civil rights reorganization bill.

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ADMINISTRATIVE & JUDICIAL CHILD SUPPORT ORDERS:
Certificate Requirements

REPORT

(HB 2277)

Prepared by
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Chair, Administrative & Child Support Orders Work Group

From
The Offices of the Executive Director
David R. Kenagy
and
Assistant Executive Director
Wendy J. Johnson

Report Approved at
Oregon Law Commission Meeting on
October 11, 2002

The Oregon Law Commission is f Ui wi ad support for the Commission.

Appendix K-1

Administrative and Judicial Child Support Orders Work Group
Certificate Requirements Report

I. Introductory Summary

Oregon law provides for the resolution of child support in judicial proceedings and in administrative proceedings. The administrative process is through the Oregon Department of Justice's Division of Child Support and contracting District Attorneys, hereafter the "Administrator".[1] Both forums operate under a labyrinth of federal and state statutes and administrative rules.[2] The existence of these two separate processes to establish or modify child support may result in separate, and sometimes inconsistent, child support orders being entered for the same family. The result is confusion regarding which order should be enforced and how much support is owed to the family.

The primary purpose of the accompanying bill (HB 2277) is to prevent multiple orders by requiring litigants to notify the judicial forum or the Administrator of existing orders or pending support proceedings involving the same children. In addition, in some cases, the DOJ will be required to inform the court and parties of existing orders or pending proceedings.

Notification is a first step toward law improvement in this area because it should reduce the occurrences of multiple orders. The Work Group believes that with knowledge of a pre-existing order, the Administrator or court will not purposefully enter a contradictory support order for the same family. The Work Group continues to work toward a resolution of the problem of how to reconcile existing multiple support orders.

II. History of the Project

In 2002, the Oregon Law Commission approved the formation of the Judicial and Administrative Child Support Orders Work Group, having received a law reform project proposal from the State Family Law Advisory Committee. Chaired by Commissioner Sandra Hansberger, the Work Group met 10 times between February 2002 and October 2002. Meetings were held at the Oregon State Bar. The Work Group includes several attorneys in private practice, attorneys with the government entities dealing with support issues such as the Department of Justice's Division of Child Support and the Marion and Clackamas County District Attorney's Office, a hearing officer with the State Hearing Officer Panel, two state court

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[1] For most enforcement services, the term "Administrator" usually refers to the functions given by statute to the District Attorneys and the Department of Justice in child support cases. *See* ORS 25.010(1); ORS 25.080. However, some program or administrative functions are provided solely by the Department of Justice. In this document when the term "DOJ" is used, it is intended to refer to the Department of Justice's child support program functions.

[2] Letter from State Family Law Advisory Committee, The Honorable Dale R. Koch, Chair (Oct. 11, 2001) (on file with Oregon Law Commission).

judges, a representative from the State Court Administrator's Office and a law professor.[3] Doug McKean, Deputy Legislative Counsel, provided drafting assistance.

After studying the scope of the problem presented to the Work Group, the Work Group divided its work into two topics: (1) preventing multiple support and conflicting child support orders; and (2) reconciling multiple and conflicting support orders. The proposed legislation addresses the prevention of multiple support orders.

III. Statement of the Current Problem in the Law

Oregon law currently does not always require litigants in judicial proceedings to notify the court that another support order between the parties exists or that there is a child support proceeding pending in another forum or county. In addition, parties seeking child support orders, or seeking to modify existing orders, are not required to notify the Administrator of existing orders or other pending proceedings. As a result, courts and the Administrator enter conflicting orders dealing with the same children and parties. OJIN may not provide current and relevant information regarding administrative proceedings to courts and may not always be a

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[3] **Members:**

Prof. Sandra Hansberger, Chair	Lewis and Clark College of Law
Kevin Alselm	Hearings Officer Panel, ALJ
Jean Fogarty	Department of Justice, AAG
David Gannett	David G. Gannett LLC
Drake Lightle	Gevurtz Menashe Larson & Howe PC
Carol Anne McFarland	Clackamas Co. District Attorney's Office
Judge Maureen McKnight	Multnomah Co. Circuit Court
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Interested Participants:

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Judge Dale Koch	Multnomah Co. Circuit Court
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Craig Prins	Judiciary Committee
Bradd Swank	Office of State Court Administrator
William Taylor	Judiciary Committee

source of accurate and timely information regarding other pending judicial proceedings. The State CASE Registry, which is required by federal statute to record child support orders, is not available to courts and does not contain information on all support orders entered or registered in Oregon. Furthermore, because of confidentiality concerns, the Registry is presently of limited utility to the courts and to litigants. While technology may help to solve some of the problems with conflicting orders from being entered in the future, other steps must be taken in the interim to prevent conflicting orders.

IV. The Objectives of the Proposal

In drafting this bill, the Work Group sought to establish a requirement that parties provide information about existing or pending child support proceedings in their filings with the court and with the Administrator. The intent is to require parties to certify whether there is another child support order in existence, or whether there is another child support proceeding pending.

Child support may be ordered or modified pursuant to a request by an obligor, an obligee, or a state agency entity providing financial support to the child. Furthermore, as noted below, proceedings under a number of different statutes may give rise to a child support order.

The intent of this legislation is to require the moving party to certify the existence of other support orders or proceedings in every action in which support may be decided. In those limited situations where the court may order support on its own motion, the court must provide notice to the Department of Justice (DOJ), and the DOJ, in turn, must notify the court of any existing orders or pending support proceedings.

The Work Group was specifically concerned with the following issues:

1. Notice
This bill addresses the need to notify the Court, Administrator, and parties of known existing support orders or pending support proceedings. A state agency providing enforcement services is also required to provide notice where applicable.

2. Sanctions
The Work Group had considerable discussion about the type of sanction or consequence that should follow from the failure to accurately certify whether there are other child support orders or pending proceedings. Ultimately, the Work Group decided that sanctions would not be imposed in this bill (HB 2277), in part, because of the large number of *pro se* litigants and the possibility of unintentional errors. However, in future discussions regarding how to reconcile multiple child support orders, the Work Group will consider whether a party's failure to properly notify the court of orders or pending proceedings will be grounds to set aside an order.

3. Providing a form

The Work Group discussed whether the legislation should include a sample form or certificate to fulfill the notice requirement. The group agreed that the form of the certificate should be prescribed in the Uniform Trial Court Rules or by the Administrator, as appropriate.

V. Review of Legal Solutions Existing or Proposed Elsewhere

The Work Group reviewed state and federal statutes relating to child support, and looked to legislation in other jurisdictions. The federal FFCCSOA (Full Faith and Credit for Child Support Orders Act, see 28 U.S.C § 1738B) is aimed at preventing interstate multiple child support orders. While this statue provides guidance for preventing multiple orders, the federal law does not apply to intrastate Oregon orders.

The Work Group also reviewed previous legislative proposals dealing with both the problem of conflicting multiple orders and the lack of notice to the Department of Justice when child support has been assigned to the state. *See e.g.* SB 337 (2001). The Work Group looked to other jurisdictions for handling similar problems with conflicting orders. The Work Group also conducted an informal survey of Oregon judges on their perception of the problems. All of the information gathered lead to the conclusion that a logical first step in addressing the complicated problem of multiple orders was to prevent multiple orders from occurring in the first place.

VI. The Proposal

A. General Provisions

As noted, the purpose of this bill is to require notification of existing child support orders or pending support proceedings in every instance where a court or Administrator may award or modify child support. Specifically, the bill requires notice of:

1. Any type of support proceeding pending in this state or any other jurisdiction; and
2. Any existing support order involving the child in this state or any other jurisdiction, other than the support obligation the entity seeks to modify.

Furthermore, a state agency, when initiating a proceeding, must include a certificate regarding any existing order or pending support proceeding.

B. Statutes Modified

The bill modifies the following statutory sections to add the requirement of notification of existing orders or pending support proceedings:

- Administrative or judicial support proceedings initiated by an entity providing support enforcement services (ORS 25.287; Section 1 & 2);

- Proceedings for marital annulment, dissolution, or separation (ORS 107.085; Section 3);
- Modification of divorce decree when change of circumstances are present (ORS 107.135; Section 4);
- Modification of dissolution upon motion of parent with parenting time (ORS 107.431; Section 5);
- Expedited parenting time enforcement (ORS 107.434; Section 6);
- Child support action by married person (ORS 108.110; Section 7);
- Action by minor child or state agency for support (ORS 109.100; Section 8);
- Support for child born out of wedlock with established paternity (ORS 109.103; Section 9);
- Motion for modification (ORS 109.165; Section 10);
- Child protective proceeding (ORS 125.025; Section 11);
- Notice and finding of financial responsibility issued by Department of Human Service if there is no court order for support (ORS 416.415; Section 12);
- Modification of support order where support enforcement services are provided (ORS 418.425; Section 13);
- Filing and docketing of financial responsibility order (ORS 416.440; Section 14);
- Modification of order after public assistance has ceased (ORS 416.470; Section 15);
- Dependency and delinquency proceedings (ORS 419B.400 and ORS 419C.590; Sections 16 and 17).

C. Notification to the Court and Court's Own Motion to Modify Support

As noted, courts deal with child support pursuant to a number of different statutes. In certain circumstances, the court may, on its own motion, award or modify support. In ORS 125.025 (child protective proceeding), see Section 11 of this bill (HB 2277), and in ORS 419B.400 and ORS 419C.590 (dependency and delinquency hearings), see Sections 16 and 17 respectively, the court may require parents or other persons to pay support. In these cases, the bill requires the court to notify the DOJ that there will be a hearing on support. In addition, the bill requires that prior to the hearing on support, the DOJ inform the court of any existing support orders or any pending support proceeding involving the same child. The Judicial Department and the Department of Justice may enter into an agreement regarding how the courts give the notice required under these sections and how the Department of Justice provides information to the courts.

D. Notification in an Administrative Proceeding

When support enforcement services are being provided under ORS 25.080, if the Administrator issues and serves a notice and finding of financial responsibility, the notice must include, to the extent known, a statement regarding the existence of support orders or pending proceedings regarding the same child. *See* ORS 416.415 and Section 12 of this bill (HB 2277). Similarly, if the Administrator or a private party seeks to initiate or modify an existing support order in an administrative proceeding, the moving party is required to give notice to the

Administrator of the existence of support orders or pending support proceedings. *See* ORS 416.425 and Section 13 of this bill (HB 2277). Section 15 of this proposed bill (HB 2277) requires notice to the Administrator of child support orders and proceedings when an obligor or obligee seeks to modify support after public assistance is no longer provided.

VII. Conclusion

This proposed bill is the first step in addressing the problems created by multiple and conflicting child support orders: that is, the bill if passed, will operate to prevent the existence of multiple orders from arising in the future. The intent is clear: to require notice to the courts and the Administrator of existing orders and pending child support proceedings in order to prevent multiple orders for the same children. The bill becomes complex only by the need to address the numerous proceedings in which child support obligations may be addressed.

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PUBLIC BODY: Special District Provisions

REPORT

(HB 2278)

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From
The Offices of the Executive Director
David R. Kenagy
and
Assistant Executive Director
Wendy J. Johnson

Report Approved at
Oregon Law Commission Meeting on
October 11, 2002

Public Body Work Group
Report

I. Introductory Summary

The proposed bill that accompanies this report is a continuation of the law improvement objectives of House Bill 2425 (2001) which was recommended by the Oregon Law Commission and enacted during the 2001 Legislative Session. House Bill 2425 is now codified at ORS 174.108 to 174.118. This proposed bill is another example of the ongoing nature of the Law Commission's sometimes mundane but nevertheless important work in improving Oregon's laws. The bill would amend the special districts statutory provisions in the Oregon Revised Statutes by using the nomenclature adopted in HB 2425, by updating references to various public bodies found in the statutes, and by making necessary wording changes for consistency and clarity.

The bill can be likened to our beaches. The Oregon Revised Statutes and Oregon beaches are, for the most part, clean, but over the years they both accumulate litter or debris from use. Each needs, on occasion, some clean up work done. This bill, then, is the Special Districts Clean-up Bill.

II. History of the Project

The Oregon Law Commission first addressed the problem of multiple terms for public bodies in preparation for the 2001 Legislative Session. The problem was described in a *Willamette Law Review* article written by William Long.[1] The article highlighted the difficulties caused by the multiple terms used for various public bodies in the Oregon statutes. For example, left over from the 1850's in a few statutes is the term "body politic and corporate." Originally, the term recognized some difference in public bodies that possessed certain corporation-like powers not then inherent in public bodies generally. Today, that difference does not exist, and yet the term remains scattered throughout the statutes.

Based on conversations between Mr. Long and David Heynderickx, Senior Deputy Legislative Counsel, Mr. Heynderickx brought the matter to the attention of the Oregon Law Commission. A Work Group was formed, chaired by Commissioner Professor Bernard Vail.[2] The Work Group first considered amending all of the implicated statutes with uniform, understandable definitions. That approach was rejected due in large part to the vast number of statutes that would need to be amended.

After considerable discussion, the Work Group suggested and the Law Commission agreed that a phased approach was best. First, the Law Commission recommended that definitions be enacted that were prospective in nature. Such definitions would be used in future legislation, when appropriate, and over time, an increasing number of statutes would reference the standard definitions. Second, the Legislature as part of its ongoing amendments to the statutes, could

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[1] William R. Long, *A Modest Proposal on Public Bodies*, 36 Willamette L. Rev. 83 (Winter 2000).

[2] Other members of the Work Group were Steve Blackhurst, Eric Carlson, Prof. Sandra Hansberger, David Heynderickx, Phillip Schradle, Rep. Lane Shetterly, and Bradd Swank.

gradually adopt the definitions in individual subject matter areas with input from persons directly affected by the statutes as to the meaning of the many ambiguous terms that are in use. This approach found favor with the Legislature, and House Bill 2425 was adopted in the 2001 Session without a negative vote.

For the 2003 Legislative Session, the Law Commission's Public Body Work Group[3] turned its attention to the question of which existing laws ought to incorporate the new definition, embarking on step two of the long-term solution. Many references to "public body" can be found in the statutes, including the Public Records Law and the Tort Claims Act. While many areas of the law would benefit from references to the new definitions, the Work Group proposed and the Law Commission authorized the Work Group to take a more narrow focus in the first effort to use the new definitions. The Work Group recommended beginning the process of incorporating the new definitions by addressing special district legislation.

III. Statement of the Problem Area

Passage of House Bill 2425 in the 2001 Legislative Session assured future legislation affecting "public bodies" will have the opportunity to use the new standardized definitions. However, existing laws still need a comprehensive review of the use of the term. The 2001 legislation was only prospective and did not eliminate inconsistent or ambiguous uses of the multiple terms describing public bodies already in the Oregon Revised Statutes.

IV. Objectives of the Proposal

This proposal seeks to improve the law by clarifying terms used for public bodies[4] in the

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[3] This session's members and interested persons included:

Members:

Prof. Bernard Vail, Chair	Northwestern School of Law, Lewis & Clark College
Rep. Lane Shetterly	Shetterly Irick Shetterly & Ozias
Philip Schradle	Department of Justice, Special Counsel
Bradd Swank	Office of State Court Administrator

Interested Participants:

Susan Grabe	Oregon State Bar
Dave Heynderickx	Office of Legislative Counsel
Wendy Johnson	Oregon Law Commission
David Kenagy	Oregon Law Commission
Craig Prins	Judiciary Committee
Hasina Squires	Western Advocates Inc.

[4] HB 2425 (2001) is codified in part in ORS 174.109 which reads: "Subject to ORS 174.108, as used in the statutes of this state 'public body' means state government bodies, local government bodies and special government bodies." Terms used in that statute are defined in subsequent statutes.

special district statutes. It also makes related wording and housekeeping changes by eliminating redundancies and antiquated word usage in the special district statutes.

V. Review of Legal Solutions Existing or Proposed Elsewhere

The Law Commission staff researched efforts by other jurisdictions to address this problem and discovered other states have not addressed the problem.

VI. The Proposal

A. General Principles

After some discussion with representatives of the "districts" now defined under the new ORS 174.116, it was decided that use of the term "district" alone was somewhat confusing. Districts, along with cities, counties, and all subdivisions of cities, counties, and districts are defined as "local government." See ORS 174.116(1)(a). Most of these "districts" also commonly use the term "special district." Adding to the misperception, school districts are not defined as "districts" under ORS 174.116; instead they are defined by the term "special government body" under ORS 174.117. Looking at the essential elements of the various district entities listed in ORS 174.117(2), it was decided that the phrase "local service district" more accurately describes the nature of these public bodies rather than the generic term of "district." All of these districts are indeed "local" in the sense that they have boundaries that are smaller than the entire state and all provide "services" of one sort or another to those within the boundaries.

One of the principal issues addressed by this bill proposed for the 2003 session is the many statutes that authorize the creation of a particular type of local service district and then simply declare the entity to be a "municipal corporation," a "body politic," a "public body, corporate and politic," a combination of such terms, or some other equally unhelpful phrase. Still other statutes authorizing the creation of such districts make no attempt to describe the nature of the entity. In general, these statutes attempt to indicate that the described entity is somehow a governmental body rather than a *private* corporation. Since the statutory powers the entity possesses dictates the status of the body rather than any label, it was decided to avoid reintroducing undefined labels in these statutes (*e.g.* "governmental body"). Following this approach, the statutes have been amended to remove such wording. The listed statutory powers of each body however remain in the proposed bill.

Another principle used throughout the proposed bill is that references to the new definitions of "public body" found in ORS 174.109 and to "local government" found in ORS 174.116 are made throughout the bill. Also, where last session's HB 2425 provided distinctive names for particular districts the bill inserts those names into the authorizing statutes.

Lastly, throughout the bill references to the various entities with whom the districts may contract were deleted and references to ORS Chapter 190 are inserted. Chapter 190 provides statutes of general applicability regarding intergovernmental agreements between local governments and a wide variety of other government bodies (*e.g.* states, the federal government, Indian Tribes, etc.). The existing statutes governing districts contain many old terms for public bodies that are archaic, confusing and redundant. These statutes conflict with ORS Chapter 190 to

the extent they suggest that districts can only contract with certain public bodies. The Work Group believes the substitutions are keeping with the legislature's intent reflected in ORS 190.

B. Section-by-Section Analysis

In addition to the above general types of drafting decisions reflected in the proposed bill, a short section-by-section analysis of the highlights of the bill follows:

Section 1 adds the words "local service" in front of "districts" in ORS 174.116 so that the definition of "local government" would read in part, "all cities, counties and local service districts located in this state." In addition, corrections were made to add "economic improvement districts," "fair districts," and "airport districts." These provisions were inadvertently left out of last session's HB 2425.

Sections 2 through 62 amend provisions in ORS Chapter 223. General principle amendments described above are made throughout these sections.

Section 63, affecting definitions adopted by the Legislative Assembly in ORS 310.140 to implement amendments to Section 11b of Article XI of the Oregon Constitution adopted by initiative petition, has general principle amendments described above.

Section 64, affecting procedures for property tax assessment in ORS 371.655, has general principle amendments described above.

Sections 65 through 79 amend provisions in ORS Chapter 261, affecting People's Utility Districts. The word "city" from ORS 174.109 is substituted for "municipality" throughout and the phrase "people's utility" is inserted prior to the word "district" as needed. Other wording changes are made to assist readability.

Sections 81 through 87 amend provisions in ORS Chapter 264, affecting domestic water supply districts. The chapter heading, "domestic water supply districts," is used throughout and replaces "municipal corporations." Other wording changes are made for consistency.

Sections 88 through 91 amend Chapter 265, affecting cemetery maintenance districts. Wording is improved for clarification.

Sections 92 through 94 amend ORS 267.200, 267.225 and 267.380, affecting mass transit districts. The words "mass transit" are inserted in front of "district" and resulting unnecessary wording is deleted. General principle amendments are made throughout these sections.

Sections 95 and 96 amend ORS 267.550 and 267.560, affecting transportation districts. The word "transportation " is inserted in front of "district" and resulting unnecessary wording is deleted. "Public bodies as defined in ORS 174.109" is substituted for "public corporations, cities or counties." While ORS 174.109 (which includes the State of Oregon) is broader than "public corporation, cities or counties," the Work Group believes this matches the statute's intent. In addition, the Work Group deleted the "public corporation" term as no one is sure what that undefined term includes.

Sections 97 through 99 amend ORS 268.020, 268.300 and 268.393, affecting metropolitan service districts. The words "metropolitan service" are inserted in front of "district" and these sections also have general principle amendments described above.

Section 100 amends ORS 357.261, affecting library districts. The word "library" is inserted in front of "district" and resulting unnecessary wording is deleted.

Sections 101 through 103 amend ORS 371.060, 371.067 and 371.105, affecting county road districts. The word "incorporated" is deleted where it appears in front of "city" and other wording changes are made for consistency.

Sections 104 and 105 amend ORS 371.305 and 371.336, affecting special road districts. Because all cities in Oregon are incorporated (*i.e.* have boundaries), indicating that a city is "incorporated" is redundant. Thus, the word "incorporated" is deleted where it appears in front of "city." Additional cumbersome wording is streamlined.

Sections 106 through 109 amend ORS 371.405, 371.480, 371.485 and 371.520, affecting road assessment districts. The phrase "road assessment" is inserted in front of "district" and resulting unnecessary wording is deleted. In addition, the word "incorporated" is deleted where it appears in front of "city" and other wording changes are made for consistency.

Section 110 amends ORS 372.140, affecting highway lighting districts. The words "highway lighting" are inserted in front of "district" and reference is made to ORS 174.116 where a district's powers are enumerated.

Section 111 amends ORS 401.842, affecting emergency communications districts. The words "9-1-1 communication" are inserted in front of "district" and unnecessary wording is deleted.

Sections 112 through 114 amend ORS 440.320, 440.360 and 440.370, affecting health districts. The word "health" is inserted in front of "district" and related wording changes are made.

Section 115 amends ORS 440.505, affecting port hospitals. "Municipal corporation" references are deleted.

Sections 116 and 117 amend ORS 450.075 and 450.160, affecting sanitary districts. Wording referring to other governments, governmental agencies and municipalities is replaced with "public body as defined in ORS 174.109" or "local governments as defined in ORS 174.116" as appropriate. The Group was unsure if "governmental agency" should include the federal government. Thus, the Group decided to leave in the term rather than use the public body definition from 174.109 to ensure that a change in the law was not inadvertently made.

Sections 118 and 119 amend ORS 450.693 and 450.695, affecting water authorities.

Sections 120 through 122 amend ORS 450.817, 450.835 and 450.875, affecting sanitary authorities.

Sections 123 through 125 amend ORS 451.410, 451.485 and 451.520, affecting county service districts. The words "municipal corporation" are replaced with "district" and wording improvements are made.

Sections 126 and 127 amend ORS 478.300 and 478.990, affecting rural fire protection districts. Wording referring to other governments or governmental agencies is replaced with "public body as defined in ORS 174.109." In addition, section 127 deletes references to grants of jurisdiction to state, municipal and justice courts for violations of rural fire protection district rules and regulations. The deletions in section 127 were made because they are redundant; justice courts are covered in ORS 51.050 and municipal courts are covered in ORS 221.339.

Sections 128 through 131 amend ORS 523.030, 523.050, 523.130 and 523.240, affecting geothermal heating districts. The words "geothermal heating" are inserted in front of the word "district" and "geothermal heating district" is used in place of existing wording where appropriate. General principle amendments are made throughout these sections.

Sections 132 and 133 amend ORS 545.057 and 545.257, affecting irrigation districts. General principle amendments are made throughout these sections. In addition, "an incorporated city" is replaced with "a city."

Section 134 amends ORS 547.045, affecting drainage districts. "State institution" references ORS 179.321 as appropriate and the Department of Human Services is referenced to provide clarification.

Sections 135 through 137 amend ORS 552.113, 552.305 and 552.320, affecting water improvement districts.

Sections 138 through 142 amend provisions in ORS Chapter 553, affecting water control districts. General principle amendments are made throughout these sections.

Section 143 amends ORS 565.275, affecting fair districts. Antiquated and unnecessary wording referring to "a public body, corporate and politic" is deleted.

Sections 144 through 147 amend ORS 568.210, 568.225, 568.410 and 568.805, affecting soil and water conservation districts. Additional cumbersome wording is streamlined. Section 147 limits a port district's ability to issue bonds and make assessments but it is not a substantive change as the limit was already in the definition section at Section 144.

Sections 148 through 152 amend ORS 777.010, 777.112, 777.113 and 778.010, affecting ports. General principle amendments are made throughout these sections.

Sections 153 through 157 amend ORS 285A.603, 285A.654, 285A.657, 285A.666, and Section 19, Chapter 607, Oregon Laws 1987, affecting the Port of Portland and the Port Revolving Fund. References to ports "incorporated" are changed to "formed."

Section 158 amends ORS 838.035, affecting airport districts. Antiquated and unnecessary wording referring to "a public body, corporate and politic" is deleted.

VII. Conclusion

This bill improves consistency in terminology, wording, and grammar in the various special district statutes in furtherance of the goal of providing standard definitions for public bodies. No significant substantive changes were intended by the Work Group in this proposed bill.

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SAVING STATUTE

REPORT

(HB 2284)

Prepared by
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University of Oregon School of Law
Reporter, Saving Statute Work Group

From
The Offices of the Executive Director
David R. Kenagy
and
Assistant Executive Director
Wendy J. Johnson

Report Approved at
Oregon Law Commission Meeting on
November 22, 2002

Saving Statute Work Group[1] Report

I. Introduction: Defects with Current ORS 12.220

Oregon has had a saving statute, in substantially the same form, since statehood. Currently thirty-nine other states have savings statutes which significantly differ in their specifics.[2]

The current ORS 12.220 is in need of substantial amendment in order to overcome at least two important defects. The first of these is its failure to state that its application is limited to situations where the original action is dismissed on a *procedural* as opposed to a *substantive* ground, although it has been so interpreted by the relatively few appellate opinions that have construed it. See, e.g., Tikka v. Martin, 271 Or 287, 532 P2d 18 (1972) and Hatley v. Truck Ins. Exch., 261 Or 606, 494 P2d 1196 (1972). In other words, ORS 12.220 in its present form seems applicable to cases where its application would be futile because the claims and defenses asserted in the original action would be barred by *res judicata*. This anomaly might cause the provision occasionally to be overlooked in cases where its application would be appropriate.

The second defect of the existing statute is that it cannot be applied where the original action is dismissed on the procedural ground most likely to be obviable in connection with a new action and sufficient alias service, namely, dismissal for insufficiency of service of the summons and complaint. See ORCP 21A(5).

II. Purpose of a Saving Statute

The basic premise of a saving statute is that if an action is dismissed without prejudice on some ground not adjudicating its substantive merits and thus not giving rise to claim preclusion, the plaintiff should be entitled to reinstitute the same claim or claims against the same defendant or defendants in a new action whose commencement relates back to the date of filing of the original, dismissed action for purposes of any pertinent limitations period provided the new action is commenced with reasonable promptness following such dismissal. The rationale of saving provisions is that, if a defendant had actual notice of the original, dismissed action, whether by means of sufficient or insufficient service of the summons and complaint or otherwise, that notice fulfills the basic purpose of limitations periods by alerting the defendant

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[1] This Work Group is comprised of: Prof. Dom Vetri, Chair, Mr. Don Corson, Mr. Joel DeVore, Hon. Don Dickey, and Mr. Dave Heynderickx, members. The Reporter is Professor Maury Holland.

[2] The U.S. Judicial Code also contains the following good example of a saving provision: "The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period." 28 U.S.C. § 1367(d).

that a given claim is, or claims are, being asserted against that defendant and that such alert persists for a reasonable time following the dismissal. Provided the plaintiff commences a new action on the same claim or claims against the same defendant or defendants within that time, and further provided the plaintiff is able to overcome whatever procedural defense led to dismissal of the original action, the fundamental policy or purpose of statutes of limitations is in no way offended by allowing the date of commencement of the new action to relate back to the date of filing of the original action.

ORS 12.220 has, of course, no application when adjudication of an action concludes with a judgment determining the merits of claims and defenses asserted therein since a subsequent action asserting the same claims and defenses would be barred by the doctrine of claim preclusion. But, when claims are dismissed on such procedural grounds as lack of personal or subject-matter jurisdiction, or insufficient service of the summons and complaint, the filing of the dismissed action is often followed by the defendant's getting actual notice of it within the 60 days allowed by ORS 12.020(2) by either sufficient or insufficient service or, on rare occasions, by some other means. In that event it seems only fair to give claimants an opportunity to refile the action within a reasonable time after the initial dismissal if the procedural defect which prompted that dismissal can be obviated and a second dismissal on that ground avoided. It should be noted, however, that amended ORS 12.220 does not deprive defendants in a new action of any substantive defense that was available to them in the original action.

III. Comments on Amended ORS 12.220

Amended[3] ORS 12.220 is intended to apply in any case where dismissal without prejudice of the original action is on a procedural ground not adjudicating the merits. An obvious example of such a ground is a dismissal for lack of personal jurisdiction over the defendant. See ORCP 21A(2). While a defendant's lack of amenability to personal jurisdiction in an Oregon court will seldom be obviable in a new action with alias service, sound principles of choice of law dictate that ORS 12.220 be applied by the courts of any other jurisdiction where the defendant might well be thus amenable in a new action on the same claim or claims commenced there. That is because, despite its superficial appearance as a rule of procedure, amended ORS 12.220 is in reality an integral component of Oregon's law of limitations, and thus should be applied according to its terms in any proceeding in state or federal court wherein that law governs as a matter of choice of law. Furthermore, as a matter of choice of law, amended ORS 12.220 should be applied in any case governed by Oregon limitations law even when the original action is dismissed in federal court or a state court other than Oregon's.[4]

An important difference between existing and amended ORS 12.220 is that the former is not, by its terms, applicable to cases where dismissal of the original action is on the procedural ground most likely to be obviable in a new action with alias service, which is dismissal for insufficiency of service. The reason it cannot be applied in that context is because it requires the original action to have been "commenced within the time prescribed therefor." ORS 12.020(2),

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[3] "Amended," here and throughout, of course means "as proposed to be amended."

[4] See Hatley v. Truck Ins. Exch., 261 Or 606, 494 P2d 496 (1972) (existing ORS 12.220 applicable where original action dismissed by federal court for lack of subject-matter jurisdiction).

in turn, provides that, for an action to be "commenced," the complaint must be filed with the court and the complaint and summons must be served on the defendant within 60 days of filing. "Served" in this context clearly refers to service that is sufficient in accordance with ORCP 7D. It is for this reason that amended ORS 12.220 uses the word "filed" in lieu of existing ORS 12.220's "commenced." Of course, when the procedural ground for dismissal of the original action is other than insufficiency of service, the original action will have been "commenced" within the meaning of ORS 12.020, but it will necessarily also have been filed, thus making amended ORS 12.220 applicable to any procedural ground of dismissal without prejudice.

Among other situations amended ORS 12.220 is intended to deal with is the not uncommon one where a complaint is timely filed and the defendant is purportedly served with the summons and complaint within the 60 days permitted by ORS 12.020(2), but the action is subsequently dismissed when the court determines that service had been insufficient even though the defendant actually received the papers within that period, by which time the claim or claims asserted in the action have become time-barred. This occurs most frequently in connection with substituted service, ORCP 7D(2)(b), and office service, ORCP 7D(2)(c).

An apt illustration of this situation is afforded by Baker v. Foy, 310 Or 221, 797 P2d 349 (1990), where the server delivered the summons and complaint to the defendant's mother at what the plaintiff's lawyer reasonably believed, from information furnished by the defendant, was the defendant's residence. Despite the fact that the defendant apparently read the papers at that address within 60 days of the summons and complaint being filed, the action was ultimately dismissed for insufficiency of service, long after limitations had run against the claim, because it was found that the defendant no longer resided at his mother's address on the date of service. Under existing ORS 12.220 filing of a new action would have been futile, a result amended ORS 12.220 is intended to overrule. The latter would not, and constitutionally could not, allow a plaintiff to proceed against a defendant without having effected sufficient service, but would give plaintiffs an opportunity to do so by way of a new action in which sufficient alien service could be attempted. In most, though certainly not all, instances where service is found to have been insufficient, the defendant lives or works in Oregon, so the possibility that sufficient alias service can be accomplished within 180 days of dismissal of the original action, and within 60 days of the filing of a new action, will often be reasonably good.

Cases such as Baker, of which there are a considerable number, though correctly decided under existing law, constitute something of a rebuke to Oregon's civil justice system because they involve situations where litigants, often having meritorious, or at least triable, claims, are deprived of their day in court because of procedural mistakes by lawyers or servers against which they cannot protect themselves, even when those mistakes do not appear to have been prejudicial to the rights of defendants. There is no way totally to eliminate such cases, but the effect of amended ORS 12.220 would be to reduce their number.

Another anticipated benefit to Oregon's justice system from amended ORS 12.220 would almost certainly be to reduce the inordinate number of cases where the single issue on appeal is sufficiency of service, and thereby also reduce the delays occasioned in getting to trial when trial court dismissals for insufficiency of service are reversed and the cases are remanded. It would do so because, rather than appealing trial court rulings setting aside service, plaintiffs' lawyers often could, and presumably would, attempt to effect sufficient alias service when that is feasible because they would know that the new action would not be subject to a limitations defense.

Amended ORS 12.220 provides for a period of 180 days following dismissal of the original action during which a new action relates back to filing of the original action for limitations purposes, as opposed to the one-year period provided by existing ORS 12.220. This change is made because the shorter period is regarded as a sufficient time within which the plaintiff should be able to commence a new action and rectify whatever procedural problem prompted the original dismissal, assuming it can be rectified, and also to be a reasonable time during which defendants must cope with the possibility of renewed litigation of dismissed claims. It also makes amended ORS 12.220 consistent with ORS 72.7250 in this respect.

The language of existing ORS 12.220 concerning heirs and personal representatives of plaintiffs who die following dismissal of the original action is omitted from amended ORS 12.220. This omission does not reflect any intent to deny availability of this procedure to heirs or personal representatives of deceased plaintiffs, but is prompted by belief that their rights are adequately dealt with by ORCP 34 and ORS 115.305.

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JUVENILE CODE REVISION:
Summons

(MAJORITY REPORT)

HB 2272

Prepared by
Michael Livingston
Assistant Attorney General
Appellate Division, Department of Justice

From
The Offices of the Executive Director
David R. Kenagy
and
Assistant Executive Director
Wendy J. Johnson

Amended Draft for Submission to
Oregon Law Commission Meeting on
February 6, 2003

STATEMENT OF THE PROBLEM AREA:

In 2001, the Oregon Legislature enacted Oregon Laws 2001, chapter 622, a procedural code for juvenile court dependency cases. The bill was proposed by the Oregon Law Commission's Juvenile Code Revision Work Group and is now codified at ORS 419B.800 to ORS 419B.929. Because of an error in drafting, Section 31 of the legislation, now codified as ORS 419B.917, requires, in effect, that parent(s) be served with a *separate* summons to appear for each hearing (or stage) in a termination-of-parental-rights proceeding.[1] Although, before 2001, the Multnomah County juvenile court (and, perhaps, one or two other counties) had imposed such requirements through local court rule, most of the juvenile courts in the state did not. The Juvenile Code Revision Work Group did not intend that the new procedural code mandate the local rule requirements. To the contrary, the Work Group intended that the code recognize and incorporate the summons practices of all counties in the state.[2] Furthermore, due process does not require repeated service of summons in termination-of-parental-rights proceedings. *See generally, e.g., State ex rel Juv. Dept. v. Bryant*, 84 Or App 571, 735 P2d 5 (1987). The cost for the requirement of separate summons to the state for each hearing is substantial.

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[1] ORS 419B.917, which also applies to proceedings to establish juvenile court jurisdiction, provides, in pertinent part, as follows:

> (1) If a child is before the court and a person who is required to be summoned has been summoned and has failed to appear for any dates, including but not limited to trial dates for which the person has been summoned, and the petitioner is ready to proceed, the court may proceed with case in the person's absence. * * *.

[2] *Former* ORS 419B.515, which governed summons requirements in termination-of-parental-rights cases before its repeal by Oregon Laws 2001, chapter 622, provided that the juvenile court could terminate parental rights, "only after service of summons," which contained

> "a statement to the effect that the rights of the parent or parents are proposed to be terminated in the proceeding and that *if the parent or parents fail to appear at the time and place specified in the summons, the court may terminate parental rights and take any other action that is authorized by law.*"

(Emphasis added). Until its repeal, *former* ORS 419B.515 was construed and applied by juvenile courts throughout the state to require that summons be served (along with a copy of the termination petition) only once – *i.e.,* when the proceeding was initiated. Although the summons could simply direct the parent to appear for trial on the petition on a date certain, more often than not, it directed the parent to admit or deny the allegations of the petition, either by written answer or at a "preliminary" or "show cause" hearing held for that purpose. If the parent contested the petition, the juvenile court scheduled the trial on the petition, and, in some counties, scheduled pre-trial hearings. If a parent, who had notice of the trial date, failed to appear for trial, and the parent's attorney had no explanation for the parent's absence, the juvenile court – pursuant to *former* ORS 419B.515 – proceeded with the adjudication of the termination petition in the parent's absence. *See, e.g., State ex rel Juv. Dept. v. Bryant,* 84 Or App 571, 735 P2d 5 (1987).

HISTORY OF THE PROJECT:

In 1997, the Oregon State Bar created the Juvenile Law Section and directed the new section to review the procedural statutes governing juvenile court dependency cases. The following year, the Oregon Law Commission, in cooperation with the Bar's Juvenile Law Section, created a Juvenile Code Revision Work Group, chaired by Senator Kate Brown (also an Oregon Law Commissioner). The 2001 Legislature enacted the code of juvenile court dependency procedures proposed by the Juvenile Code Revision Work Group (approved by the Oregon Law Commission and recommended to the legislature), and it also enacted other legislation developed by the Work Group, including procedures for post-adjudication relief in juvenile delinquency cases. When the "summons" problem discussed above became apparent, the Work Group established a Sub-Work Group (known as the Continuing HB 2611 Sub-Work Group) to develop proposed legislation to correct it. The Sub-Work Group[3] spent many months on this project, and the resulting bill (LC 402), which is discussed below, was approved by the full Juvenile Code Revision Work Group on December 9, 2002. On December 18, 2002, LC 402, a minority report authored by Judge Terry Leggert, and a majority report authored by Michael Livingston were presented to the Commission. The Commission approved LC 402 for pre-session filing purposes subject to a session amendment to permit notification by verbal order on the record for each stage (or hearing) subsequent to the initial summons of the case. In short, the Commission agreed with the proposal to permit a verbal order described in the minority report. LC 402 is not HB 2272; it does not presently reflect the necessary "verbal order" amendment but will be amended.

PROPOSED SOLUTION TO THE PROBLEM:

In order to correct the problem created by ORS 419B.917, the Juvenile Code Revision Code Work Group has drafted legislation (to be introduced in the 2003 Legislative Session) to: (1) recognize and authorize, in modified form, the summons practices used in all counties of the state; (2) clarify the summons requirements for proceedings to establish permanent guardianships; and (3) conform and simplify the provisions of ORS 419B.812, 419B.815, 419B.818, and 419B.839. The proposed substantive amendments are described below. The key provisions are in Sections 3, 5, and 10 of the bill.

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[3] **Members**

Ted Meece, Chair	AAG, Oregon Department of Justice
Linda Guss	AAG, Oregon Department of Justice
Amy Holmes Hehn	D.A., Multnomah County
Lisa Kay	Attorney, Juvenile Rights Project
Michael Livingston	AAG, Oregon Department of Justice
Leslie Nelson	Attorney, Metropolitan Public Defenders
Timothy Travis	Attorney, State Court Administrator's Office

SECTION 1 – Amends ORS 419B.812, relating to the issuance of summons. Adds juvenile departments to the list of persons and entities who may issue summons.

SECTIONS 3 and 5 – Establishes the same summons requirements for proceedings to terminate parental rights and to establish permanent guardianship. Also establishes that summonses must require parents to respond in one of three ways: (1) personally appear for hearing on the merits of the petition, at a specified time and place; (2) personally appear at a specified time and place to admit or deny the allegations of the petition; or (3) file a written answer to the petition within 30 days. If the summons requires the parent to attend a hearing to admit or deny the allegations of the petition or to file a written answer, it also must inform the parent that, if the parent contests the petition, the court – by written or verbal order provided to the parent personally or by mail – will require the parent to attend the next hearing in the proceeding.[4] Both the summons and court order must inform the parent that, if the parent fails to appear as directed for any hearing related to the petitions, the court may grant the petition in the parent's absence without further notice.

SECTION 7 – Provides a sample "form" for the summons required in termination and permanent guardianship proceedings.

SECTION 9 – Identifies those who must be served with a summons in a proceeding to establish jurisdiction.

SECTION 10 – Applies the summons requirements of sections 3 and 5 to jurisdictional proceedings.

SECTION 13 – Provides that, notwithstanding sections 3 and 5, "on timely motion of a person showing good cause, a court may permit the person, instead of appearing personally, to participate in any hearing related to a petition * * * in any manner that complies with the requirements of due process." Provides that a person seeking to re-schedule a hearing must appear personally at the time and place "specified in the order or summons to request the change" or, in the motion requesting the change, include an address to which notice of the new date will be sent.

CONCLUSION:

The foregoing amendments: (1) correct the problems created by ORS 419B.917; (2) establish summons requirements for proceedings for permanent guardianship; (3) are consistent with the holding of the court in *State ex rel Juv. Dept. v. Kopp,* 180 Or App 566, 43 P3d 1197 (2002) (construing *former* ORS 419B.515); (4) comply with the requirements of the Due Process Clause; and (5) will save the state money.

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[4] See attached minority report by Judge Terry Leggert that explains why both a written order or a verbal order should be legally sufficient.

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JUVENILE CODE REVISION:
Summons

(MINORITY REPORT)

HB 2272

Prepared by
Judge Terry Leggert
Marion County Circuit Court Judge

From
The Offices of the Executive Director
David R. Kenagy
and
Assistant Executive Director
Wendy J. Johnson

Amended Draft for Submission to
Oregon Law Commission Meeting on
February 6, 2003

1. Introductory Summary

I support the Juvenile Code Revision Work Group's Summons bill generally, but I am concerned with one provision and thus submit this minority report. I propose amending Section 5 from requiring a "written order" to requiring a "written order or verbal order on the record."

2. History of the Project

During the last legislative session, the Juvenile Law Code Revision Work Group of the Oregon Law Commission submitted legislation changing some procedures in juvenile court related to dependency cases. Prior to the 2001 changes, some courts entered default judgments/orders in juvenile dependency and termination of parental rights proceedings, grafting from the Oregon Rules of Civil Procedure (ORCP) process in civil cases. There was some concern that a process should be codified in the juvenile code because the appellate courts too had been struggling with whether the ORCP procedures apply generally in juvenile cases. In addition to addressing the ORCP issue, the 2001 legislation was intended to clarify and to make uniform the process for entering default orders. Inadvertently, the legislation codified a practice only occurring in Multnomah County that does not work in other counties, creating procedures that were not previously required. This bill is an attempt to rectify that problem.

3. Statement of the Problem Area and Proposed Amendment to Bill

My only concern with the proposed bill relates to the form of notice required to take a default after a parent's non-appearance. It codifies a practice regarding notice to parents that is not required by the Oregon or U.S. Constitutions, changing practice in many state courts and costing money to implement.

My concern relates to the form of notice the court must give a parent who appears in court after a summons issued and the case is being set over for a trial. Under such circumstances, the parent has appeared pursuant to a summons that informed the parent how they must respond and the consequence that if the parent fails to appear the court will terminate their parental rights.

My practice has been to orally inform parents at every court appearance, of the need to remain in contact with their attorney, of the date of their next court appearance, and that if they fail to appear the court will enter a default judgment terminating their rights without holding a hearing. Such an oral order would not be legally sufficient notice under the bill draft; rather, the bill requires that courts prepare a written order to be served on the parent in court stating the same information. I propose an amendment to the bill that would give courts the choice of either giving the parent an oral order on the record, or giving the parent a written order.

4. Reasoning for Proposed Amendment to Bill

1. I believe that a judge giving a parent a verbal order in court is more effective than handing the parent an order. The parent may or may not read something which is handed to them. It is not unusual for a parent to receive multiple written documents when they appear in court, and this notice would be one of several pieces of paper they may not review carefully. Further, if the parent does not speak English, an interpreter is in court and would translate what a judge says. Any written order that is prepared and handed to the parent would be in English, as required by statute. The court interpreter may not interpret a written order later because the court interpreter is paid to interpret court proceedings and not events outside of the courtroom. Even if the interpreter does interpret the forms, the emphasis by the interpreter may be different than the one a judge places in court.

2. I do not believe that we should enact a statute which requires more notice than is required by the state or federal constitutions. I have spoken with Assistant Attorney General, Mike Livingston, and several lawyers who specialize in civil procedure and due process, who all agree that a written order is not required to satisfy due process. Furthermore, none of the Work Group members who advocate for the written order requirement have presented any law that would demonstrate that this level of notice is required. In fact, the detail of notice provided before the court hearing is extensive and the parties are represented by counsel. There is no question that there is a high level of process in place throughout this statutory scheme for parents. In fact, there is more process than is required at least by the federal constitution. For example, the United States Supreme Court has ruled that a parent is not even entitled to court appointed counsel in a termination of parental rights case. See Lassiter v. Department of Social Services, 452 U.S. 18 (1981). Yet, in Oregon, we provide attorneys for parents in every termination case and in most dependency proceedings.

3. Requiring the court to prepare, serve, enter, and file an order in every case in which the parent appears and the case is set over, is time consuming and costly. It requires someone to prepare the order, serve the order, enter the order, and file the order. A separate order is required in each child's file, and most parents have more than one child in which these proceedings are pending. If a mandatory written order process were required to comply with constitutional law, I would not argue about doing it, but since it is not, the system cannot afford to do this work. We are already reeling from the effects of state budget problems. Providing for the option of a verbal order allows courts to use written orders when they want to and when courts have the luxury of more staff. In the meantime, courts should be able to advise parents verbally in court on the record.

Judgments/ Enforcement of Judgments:

JUDGMENTS REPORT
(HB 2646)

Prepared by
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Senior Deputy Legislative Counsel

From
The Offices of the Executive Director
David R. Kenagy
and
Assistant Executive Director
Wendy J. Johnson

Report Approved at
Oregon Law Commission Meeting on
February 6, 2003

Judgments/ Enforcement of Judgments Work Group
Judgments Report

I. History of the Problem

On January 1, 1980, the first set of Oregon Rules of Civil Procedure became effective.[1] ORCP 2 contained a bold and dramatic statement about the effect of the rules on the traditional distinctions between the procedures for actions at law and suits in equity. The rule reads as follows:

> **One form of action.** There shall be one form of action known as a civil action. All procedural distinctions between actions at law and suits in equity are hereby abolished, except for those distinctions specifically provided for by these rules, by statute, or by the Constitution of this state.

Although ORCP 2 seems to be a final and authoritative statement on procedural differences based on the age-old distinction between law and equity, the drafters of the ORCP were well aware that there was a substantial disconnect between the absolute proclamation of the rule and the reality of the thousands of statutes that make up the Oregon Revised Statutes. As part of the legislative package that addressed the implementation of the ORCP, the 1979 Legislative Assembly passed ORS 174.590, a statute that grudgingly concedes that the existence of hundreds of statutes that continue to reflect the old common law distinctions. ORS 174.590 reads as follows:

> References in the statute laws of this state, including provisions of law deemed to be rules of court as provided in ORS 1.745, in effect on or after January 1, 1980, to actions, actions at law, proceedings at law, suits, suits in equity, proceedings in equity, judgments or decrees are not intended and shall not be construed to retain procedural distinctions between actions at law and suits in equity abolished by ORCP 2.

ORCP 1 also provided some escape from the hard rule of ORCP 2. ORCP 1 provides in relevant part:

> These rules govern procedure and practice in all circuit courts of this state, except in 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 statute or rule*. (Emphasis added.)

As a legislative drafter, the author of this report is sympathetic to the problem faced by the persons preparing the ORCP in 1979. It would have been a daunting task to amend all of

[1] *See,* ORS 1.725 to 1.760 (governing procedures for adoption of rules of civil procedure by Council on Court Procedures).

those statutes described in ORS 174.590. But the approach reflected in ORCP 1 and ORS 174.590 has led to substantial ambiguity in the statutes that govern the resolution of disputes by the courts of the state. In a few cases, subsequent laws have clarified the application of the ORCP to existing statutory proceedings.[2] In other cases, parties and courts have been left to fend for themselves in determining whether a "different procedure" has been specified by statute or rule.

The law governing judgments is one of the areas in which there are substantial discrepancies between ORCP 2 and other statutes. Many of these statutes date to the earliest days of the state, and reflect the clear distinction between law and equity that existed at that time. "Judgments" were entered in actions at law. "Decrees" were entered in suits in equity. The provisions in ORS chapters 18 and 23 governing "judgments" were understood to apply to the final decisions of courts in actions at law (e.g. tort actions for the recovery of damages), and not to "decrees" entered in suits in equity (e.g. divorce proceedings).

However, the distinctions between judgments and decrees have eroded substantially since the drafting of the Oregon Constitution in 1857. One of the clearest examples of this type of evolution can be found in the history of laws governing the award of support in domestic relations proceedings. At common law, divorce proceedings were an exemplar of suits in equity. The principal relief sought in the proceedings was a declaration of the status of the parties (*i.e.* married or not married). As an adjunct to that relief, courts could award support for dependent children who were placed in the custody of one of the two parents. However, because the relief was granted in equity, the remedies that were available for the enforcement of the support award were equitable in nature. The support award was phrased as an injunction to one of the parties to pay support. If the party failed to comply with the injunction, the spouse entitled to receive the support could seek to have the obligated party held in contempt.[3]

Since 1857 with the drafting of the Oregon Constitution, the importance of prompt and effective enforcement of support obligations has been increasingly recognized. The creation of mechanisms for the enforcement of "judgments" are seen as valuable additions to the remedies available under equity. These remedies include the creation of a lien against the real property of the judgment debtor, and the availability of several writs for enforcing the obligation (e.g. writ of garnishment). The availability of these remedies was eventually achieved by coming to view the support obligation as a "judgment" that existed within the decree, subject to enforcement in the same manner as any other "judgment" entered in an action at law.

Amendments that were made to ORCP 70 in 1989 made very clear the dual nature of divorce decrees that contained support obligations.[4] These amendments declared that awards of money constituted "money judgments."[5] The amendments then required that every "money judgment" contain certain information in a separate section of the judgment clearly labeled as a "money judgment." While there was no question that these requirements applied to child support

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[2] *See, e.g.*, ORS 419B.800 (ORCP does not apply to juvenile dependency proceedings).
[3] Contempt proceedings under ORS 33.015 to 33.155 remain, of course, one of the principal judicial remedies for enforcing support obligations.
[4] Or. Laws 1989, ch. 768, § 1.
[5] ORCP 70 A(2)(a).

awards in divorce decrees, ORCP 70 A was further amended in 1993 to include a requirement that the label of the separate section indicate if an award was for a child support obligation.[6]

It is easy to see the conceptual confusion that arises from the hybrid nature of divorce decrees that now contain "money judgments." Is there a "judgment" within the "decree?" If so, what exactly does the term "judgment" mean? The confusion was great enough that many family law practitioners began to ignore clear language of ORS chapter 107 dictating that marital relationships were ended by the entry of a decree and began to label the final decision of the court in divorce proceedings a "judgment." As a result of legislation passed in 1999, many (but not all) of the statutes in ORS chapter 107 were amended to change "decree" to "judgment."[7] As a result of the changes, some statutes in ORS chapter 107 refer to judgments in one subsection and to decrees in another.[8] The situation with domestic relation cases is emblematic of the problems that have been created by the imperfect implementation of the grand synthesis of law and equity proclaimed by ORCP 2. But it is only one of many problems that have arisen in the laws governing judgments and decrees.

II. Statement of the Problems Addressed by the Proposed Bill

As will be seen from the section-by-section comments to this bill proposal, a myriad of problems has arisen in the laws governing judgments and decrees:

A. Obsolete terminology. Most of the statutes governing judgments were written at a time when the courts of the state kept paper records of court proceedings. There was a large book called the register, and another large book that was called the docket. All filings and decisions in a case were entered in the register. The docket played a special role, since judgments that were entered in the docket created judgment liens. The circuit courts of this state now maintain all records by computers. But many laws in ORS chapter 18 and 23 continue to reflect the assumption that hard copy ledgers exist with entries made in hand by the court administrator.[9]

Also, as noted in Part I of this report, the use of the term "decree" is obsolete.

B. Lack of statutory organization. Some of the laws governing judgments appear in ORS chapter 18. Some appear in ORS chapter 23. Chapter 18 is confusing, because it also contains many laws that fall under the general rubric of "tort reform." Some of the provisions on writs of execution appear at the very beginning of ORS chapter 23; others at the end of the chapter.

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[6] Or. Laws, 1993, ch. 763, § 3.

[7] Or. Laws, 1999, ch. 659.

[8] *See, e.g. ORS* 107.115. Subsection (1) of this statute details the effect of a decree of dissolution of marriage, but subsection (2) indicates that the marriage relationship is terminated when the judge signs a judgment of dissolution of marriage.

[9] *See, e.g. ORS* 18.400 (1), which states that the "officer having custody of the docket" must indicate that satisfaction of a judgment must be noted in the docket "over the signature" of that officer. The court computer system does not accommodate an electronic "signature" at this time.

C. Lack of clarity on what is an "appealable" judgment. An embarrassingly large number of appellate cases have been generated over the years by confusion relating to the appealability of decisions rendered by a court. To some degree, these cases arise because of lack of clear statutory guidelines for the form of judgments. More significantly, the existing laws fail to make an unequivocal statement as to what a "judgment" is.

D. Judgments labeled as judgments that are not really judgments. The existing law allows documents to be filed with the court that are denominated "judgments," but do not operate as judgments. Confusion can easily arise as to the effect of these documents. The Work Group suspected that many such documents are docketed by the court administrator and create liens, even though the document does not become enforceable until entry of the general judgment in the case.

E. Inaccurate statutory language on "expiration" of judgments. ORS 18.360 currently indicates that most judgments "expire" at the end of ten years if not renewed. If a judgment is renewed, the judgment "expires" 10 years after the renewal is entered. This language is not accurate. For example, a judgment that convicts a person of a crime does not "expire" at the end of 10 years. The language of ORS 18.360 should only address the ability to enforce the money award portion of a judgment, either by judgment lien or other remedy.

F. Obsolete writ of execution procedure. Many of the statutes that govern the procedure for writs of execution do not reflect what actually occurs. Many of these laws were written when a sheriff knew all of the people in the county. These statutes contemplate that a judgment creditor can simply give a writ of execution to the sheriff, who will then go and look for property to apply against the judgment debt. Under these laws, the sheriff is directed to seize all of this property and to make decisions about which property to first apply to the debt.

This statutory structure no longer reflects reality. Sheriffs will not look for property of the judgment debtor. Instead, the sheriff will require that the judgment creditor provide specific instructions on the nature of the property to be seized and a specific location where the sheriff is to look for the property. The sheriff does not make decisions about which property will first be applied to retire the judgment debt.

The existing law also contains an antiquated and unused series of statutes that call for the creation of a "sheriff's jury" to decide third-party claims to property seized on execution. Nobody in the Work Group had ever heard of a sheriff's jury being formed.

G. Confusion in statutes between "execution" and "writs of execution." "Execution" has generally been considered a comprehensive term for the various types of judgment remedies available to a person to enforce a money award.[10] A "writ of execution" is one of those remedies. However, there is confusion in the statutes between the two terms, and some circuit courts have held that a writ of garnishment is not a form of "execution" for the purpose of some statutes.

[10] For instance, all of the statutes relating to property that is exempt from judgment remedies use the phrase "exempt from execution."

III. Problems Deferred with this Proposed Bill

The Work Group decided to delay work on the majority of the statutes that govern sheriff sales under writs of execution.[11] These statutes contain some of the most archaic language in the Oregon Revised Statutes, and are in serious need of rewriting. However, the revision of these statutes is complicated by the fact that they perform multiple functions. Sale of property after foreclosure of mortgages, trust deeds and other property liens are governed by these statutes.[12] The Work Group decided to defer work on these laws until a broader representation of real property practitioners was available.

As noted in Part I of this report, the elimination of decrees by the proposed bill is part of an ongoing effort to merge the procedural rules for actions at law and suits in equity. The Oregon Revised Statutes still has hundreds of laws that refer to "suits in equity," usually reflecting a drafter's attempt to be comprehensive in referring to judicial proceedings (e.g. "in all actions at law and suits in equity ..."). The Work Group also deferred this project to another day.

IV. Work Group

Many members of the Work Group for the 2003 Session had participated in the Oregon Law Commission Work Group that produced the law revising the statutes governing writs of garnishment for the 2001 Legislative Session.[13] Additional members were added to ensure that the many different areas of practice that would be affected by the proposed bill would have input in the drafting of the proposal. The Work Group met 14 times, usually for three hours each meeting, at the Oregon State Bar offices or at the Oregon State Capitol.

The Work Group was chaired by Commissioner Representative Max Williams, who also chaired the Work Group for the garnishment revision project. Other members, interested parties, and staff of the Work Group included:

MEMBERS:	
Cleve Abbe	Oregon Title Insurance
Gary Blacklidge	Greene & Markley PC
Thom Brown	Cosgrave Vergeer & Kester PC
Justice Wallace P. Carson, Jr.	Oregon Supreme Court
Thomas Christ	Cosgrave Vergeer & Kester PC
Mark Comstock	Garrett Hemann Robertson Jennings Comstock & Trethewy PC
Jeffrey Hasson	Law Offices of Jeffrey Hasson
Randall Jordan	Department of Justice
Jaqui Koch	Koch & Deering
Jim Markee	Oregon Collector's Association
Janet McGalliard	U.S. Bank Nation Association

[11] ORS 23.450 *et seq.*
[12] *See, e.g.*, ORS 88.080 (sale and redemption after foreclosure of mortgage governed by ORS 23.410 to 23.600).
[13] Or. Laws, 2001, ch. 249.

Greg Mowe	Stoel Rives LLP
David Nebel	Oregon Law Center
Ronelle Shankle	Department of Justice
Ken Sherman	Sherman Sherman Murch & Johnnie LLP
Rep. Lane Shetterly	Shetterly Irick Shetterly & Ozias
Bradd Swank	State Court Administrator's Office
Irene Taylor	Public Defender's Office (Salem)

INTERESTED PARTIES:

Jean Fogarty	Department of Justice
Susan Grabe	Oregon State Bar
Prof. Maury Holland	University of Oregon
Tim Martinez	Oregon Bankers Association
Jack Munro	Oregon Land Title
Jim Nass	Appellate Legal Counsel, Oregon Supreme Court

STAFF:

David Heynderickx	Legislative Counsel
Wendy Johnson	Oregon Law Commission
David Kenagy	Oregon Law Commission
Craig Prins	Judiciary Committee Counsel
William Taylor	Judiciary Committee Counsel

Throughout the Work Group process that produced the proposed bill, as well as the lengthy meetings that produced the garnishment revision bill last session, the leadership of Representative Williams has been truly outstanding. The Chair and the Work Group have devoted a tremendous amount of time and effort to these projects. By their very nature, law improvement efforts of this type are of little interest to non-attorneys, but have immense significance for practitioners. The huge number of hours contributed by the Work Group members should not be forgotten; many hours of work came from public and private practitioners whose only interest was the betterment of the law. The Work Group had one of the largest memberships of any of the Oregon Law Commission Work Groups. The wide range of experiences and viewpoints was essential to arriving at the final product.

V. Section by Section Comments of the Proposed Bill

Section 1. Definitions. The Work Group spent more time on section 1 than any other section of the proposed bill. In large part, this was attributable to issues relating to defining "judgment" and the consequences of that definition on determining which types of judicial decisions are appealable. Looking at the various terms:

1. "Action," "civil action," and "criminal action." The definition provided by the proposed bill contemplates that only proceedings in which a judgment may be rendered are considered actions for the purposes of the bill. There are many statutory proceedings that currently do not result in the entry of a judgment. Good examples are proceedings under the

Family Abuse Prevention Act.[14] These proceedings usually end with entry of an order (i.e. a family abuse restraining order). The Work Group discussed whether the proposed bill should mandate that the final decision of a court in a proceeding should always be denominated a "judgment." There was concern however about the large number of changes in existing laws and accepted procedures that this would entail. The Work Group concluded that this would involve too many changes in existing laws and procedures.

The definition for "criminal action" is borrowed from ORS 131.005. The term refers to any action in which a person is accused of committing a felony, misdemeanor or violation.

"Civil action" is defined by what it is not (*i.e.* a criminal action). Because "action" is defined to only include those proceedings in which a judgment can be rendered, the full definition of "civil action" can be phrased as "a proceeding in which a judgment can be rendered that is not a criminal action."

2. "Money award," "support award" and "child support award." "Money award" replaces the term "money judgment." As noted in Part I of this report, "money judgment" creates many conceptual difficulties. Frequently, the "money judgment" is only one part of a larger judgment that contains provisions that do not relate to awards of money. The newly defined "money award" makes it clear that the award of money may only constitute part of the judgment. In most other respects, the same rules that govern "money judgments" under the existing law will also apply to "money awards" under the proposed bill.

"Support award" includes child support and spousal support. A "child support award" is a specific type of support award, and consequently a specific type of money award. The statutory references include all of the many types of proceedings that can result in a judicial or administrative award of support for a child.

3. "Claim." The provisions of the proposed bill apply to judgments in both criminal and civil actions. The definition of "claim" eliminates the need to refer to "claim or charge" throughout the proposed bill because it encompasses both.

4. "Execution." The definition of "execution" includes only the enforcement of money awards, and the enforcement of judgments for delivery of specific real or personal property, by writs and other remedies. The term is important for a number of purposes, but is crucial to the definition of "judgment remedies." For instance, section 18 of the bill addresses expiration of "judgment remedies," and consequently addresses expiration of the ability of a judgment creditor to enforce a judgment by execution. The Work Group decided not to include within this definition methods of enforcing portions of a judgment that are not money awards. For instance, if a judgment sentences a person to life imprisonment and a $10,000 fine, the incarceration portion of the sentence can continue to be enforced until the death of the defendant, but the ability to enforce the money award is governed by the sections of the bill addressing judgment remedies.

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[14] ORS 107.700 *et seq.*

5. "Judgment", "judgment document, "general judgment, "limited judgment" and "supplemental judgment." One of the biggest problems addressed by the Work Group were the questions that frequently arise on appeal relating to whether a judgment is "final." Oregon cases have long held that only a "final" judgment may be appealed.[15] In general, this rule reflects an aversion for piecemeal, or interlocutory appeals.[16] The finality requirement has been construed by the Oregon Supreme Court to require that all claims in the case be resolved before an appeal can be taken from a decision of the court.[17]

The principal exception to the requirement of a final judgment is provided by ORCP 67 B. This rule allows a court to decide that for the purposes of a single claim or defendant that there is "no just reason for delay" and to allow an immediate appeal even though other claims remain unresolved. This determination must be expressly set out in the judgment document.

The problem with this arrangement is that many documents labeled as "judgments" purport to adjudicate less than all of the claims in the case but do not contain the required ORCP 67 B language. These documents, signed by the judge, are presumably entered by the clerk and docketed if they contain a money judgment. This situation arises most commonly after motions for summary judgment under ORCP 47. The name of this motion understandably leads practitioners to believe that the product of a successful motion is a "judgment." In reality, a successful motion should produce an order granting summary judgment. The party may then submit a judgment document, but the court's decision constitutes a "judgment" only if the judgment document contains the magic language from ORCP 67 B.

The combination of ORCP 67 B and the judicial rule requiring a decision on all claims in the proceedings before an appeal can be taken has produced strange results. One of the strangest is what has become known as the "seriatim judgment" rule announced in *Zidel vs. Jones*.[18] In *Zidel*, a party submitted a document labeled as a judgment that did not include the magic ORCP 67 B language. Consistent with the language of ORCP 67 B, the *Zidel* court held that the document was not a judgment. At the end of the case, a judgment document was submitted that resolved all issues except the issue decided by the earlier "judgment." The question on appeal was whether there was a final judgment (i.e. whether the final document constituted an appealable judgment). The *Zidel* court held that while the earlier document, standing on its own did not constitute an appealable judgment, the court would look at all documents labeled as "judgments" to determine whether a final judgment had been entered. Thus, even documents that were not judgments when entered could become part of the judgment when combined with other documents resolving the remaining issues in the case.

The new definitions proposed by this bill are designed to bring a clear statement about the effect of any document that is being filed with the court. A "judgment" is defined to have two distinct requirements. First, a judgment has to be a "concluding decision of a court on one or more claims in one or more actions." Second, a "judgment" must be "reflected in a judgment document."

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[15] *See, e.g., Propp vs. Long*, 313 Or 218 (1992).
[16] *See, e.g., David M. Scott Construction vs. Farrell*, 284 Or 563 (1979).
[17] *Industrial Leasing Corp. vs. Van Dyke*, 285 Or 375 (1979).
[18] 301 Or 79 (1986).

There is much confusion in existing law between the "judgment" of a court and the document that reflects that judgment. The bill attempts to correct this problem by carefully delineating between the "judgment" (that is, the decision of the court in the abstract), and the "judgment document" (that is, the writing that reflects that decision). As the definition of "judgment" clearly indicates, whatever the decision of the court may have been in the abstract, it is the judgment document that controls. A "judgment document" is defined to be a writing in the form provided by section 4 of the bill that incorporates a court's judgment.

"General judgment" replaces what has commonly been referred to as a "final judgment."[19] Many members of the Work Group were concerned about the continued use of the term "final" because of the different meanings ascribed to the word, both in the statutes and in common parlance. In many statutes, "final" means that a judgment is appealable. In other statutes, "final" means that all appellate rights have been exhausted. Some Work Group members argued that under the common meaning of the word, the decision of the trial court is not "final," it is simply ready for appeal. "General judgment" was felt to be more descriptive, encompassing the truly important aspect to this particular set of decisions as reflected in the judgment document, to-wit: Resolution of all issues that had not been previously decided by earlier judgments in the case.

"Limited judgment" is defined to be any judgment entered before a general judgment that resolves less than all issues in a case. The term specifically includes judgments entered under ORCP 67 B.[20] However, to avoid the problems that have arisen because of the "magic language" requirement of ORCP 67 B, that rule is amended by the bill to eliminate the requirement that the judgment document expressly state that there is no just reason for delay. (See discussion of section 5 of the bill, infra.). By reason of the amendments to ORS 19.250 in the bill, a limited judgment is appealable upon entry in the same manner as a general judgment.

"Supplemental judgment" is defined to be any judgment that by law may be entered after entry of a general judgment. Examples of this type of judgment are the existing supplemental judgment for attorney fees provided for in ORCP 68 C(5)(b) and changes to dissolution judgments that are currently entered as modifications.

6. "Judgment remedies," "judgment lien" and "support arrearage lien." "Judgment remedies" are defined to include execution and judgment liens. The definition is particularly important in the context of expiration and extension of judgment remedies under sections 18 and 19 of the bill.

"Judgment liens" are defined as the effect of a judgment on real property in the county in which the judgment is entered and in any county in which the judgment is recorded (see sections 14 and 15 of the bill). The use of the term "effect" is important. The lien effect of support awards has long constituted a conundrum. Judgments that do not include support awards have an easily understandable lien effect (immediate attachment to real property owned by the judgment debtor at the time the judgment is entered; subsequent attachment when property is thereafter

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[19] *See, e.g.*, ORCP 67 G.

[20] But see discussion of amendments to ORCP.

acquired). The lien effect is easy to understand because the amount of the judgment is fixed when the judgment is entered.

Support awards, by contrast, have a more amorphous lien effect. Until the judgment debtor misses a payment, there is no judgment amount for which a lien may attach. So long as there are no missed payments, the judgment debtor may freely convey or encumber real property. If a judgment debtor misses a payment, and has real property in the county where the judgment was entered or recorded at the time the payment is missed, the lien attaches at that time, and the property can only be transferred or encumbered subject to the lien for the missed payment.

By defining "judgment lien" to mean the effect of a judgment on real property as described in sections 14 and 15 of the bill, the bill clarifies that the judgment lien for a judgment without a support award and a judgment with a support award have markedly different natures. The lien for a support award creates a "cloud" on any property owned by the judgment debtor, and thereby puts title companies and other interested persons on notice that a support arrearage lien might have attached to the property. This lien does not however prevent conveyance or encumbrance of the property free of the judgment lien. If individual support arrearage liens have attached to property, any conveyance or encumbrance will be subject to those liens, but not to any support arrearage lien that may arise after the property is conveyed or encumbered. The judgment lien for judgments without support awards is radically different. Once the judgment lien arises, the full amount of the judgment must be paid before the property of the judgment debtor that is subject to the lien can be conveyed free of the lien.

The 1993 Legislative Assembly addressed this problem in part with the passage of ORS 25.700, which followed then-existing case law in stating that each installment payment that came due and was not paid constituted a separate judgment. The Work Group opted to abandon this concept for two reasons. First, the separate judgment concept was irreconcilable with the definition of a judgment reflected in the bill. For example, one of the key aspects of a judgment is that it is appealable when entered. No one would argue that a judgment debtor could appeal each "separate judgment" that arose by reason of a missed installment. Second, the Work Group felt that the problems addressed by ORS 25.700 could be resolved in the bill by addressing the lien effect and enforceability of support awards instead of resorting to the legal fiction of calling each missed payment a separate judgment.[21] The draft uses the term "support arrearage liens" for those individual liens that arise from the failure of a judgment debtor to timely make an installment payment under a support award.

Section 2. Application. Consistent with the approach now found in ORS chapter 18 and 23, sections 1 to 44 of the bill apply to circuit courts, justice courts, municipal courts and county courts exercising judicial functions, unless otherwise specifically provided in the bill.

Section 3. Preparation of judgment document. Subsection (1) of this section is new. The language provides options for preparing a judgment document in civil actions, starting from the assumption that the court will generally indicate that one of the parties prepare the judgment. For criminal actions, subsection (2) incorporates language from ORS 137.071 (1).

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[21] *See* section 18 (5) of the bill.

Section 4. Form of judgment document generally. Most of this section comes from ORCP 70 A (1). The section is generally applicable to both civil and criminal judgments.

Subsection (1) would seem to be self-evident, and the requirement that a judgment be labeled as a judgment has been in the law for many years. Nevertheless, the requirement continues to be a problem. Judges on occasion still sign documents designated "judgment orders" or other variations on a simple judgment. The requirement that a judgment be designated a judgment is as significant under the bill as under existing law.

Subsection (2) contains what is probably the single most significant change in judgment procedure made by the bill. This subsection requires that every judgment document indicate whether the judgment is a limited judgment, a general judgment or a supplemental judgment. Every judgment must comply with this requirement. As will be seen in the comments on sections 8 and 13 of the bill, the Work Group was very concerned about the consequences of this provision, but felt that this additional requirement was necessary to ensure that the parties, the trial court and the appellate courts had clear direction with respect to whether a given judgment document was intended to be what is now commonly referred to as a "final" judgment. If the judgment document is intended to end the case at the trial court level, the title must tell the court and all of the parties that a general judgment is intended. If the judgment document will resolve less than all of the issues in the case, and the intent is that others will later be addressed in a subsequent judgment document, the title must indicate that the judgment is a limited judgment. Any judgment entered after the entry of a general judgment (other than a "corrected judgment" under section 12 of the bill) must be designated as a supplemental judgment.

The danger posed by this requirement is that parties might inadvertently submit a general judgment when only a limited judgment was intended. The Work Group was aware that there will be occasions when the person preparing the judgment document would be quite happy if a general judgment was entered, ending the case, instead of a limited judgment. Or, a practitioner preparing a judgment document after a motion for summary judgment might think that the judgment is a "general" judgment from the client's point of view. The Work Group was also concerned about the period of time immediately following the effective date of the bill, when practitioners will still be learning the difference between a limited and a general judgment. Because of these concerns, a special section on correcting mislabeled judgments was included in section 13 of the bill.

Section 5. Civil judgments with money awards. Section 5 is closely based on ORCP 70 A(2). Consistent with that rule, the existence of a separate money award in the judgment document will determine whether the judgment creates a judgment lien. *See*, ORS 18.320 (court administrator will only docket a judgment if the judgment has the separate section required by ORCP 70 A).

The second sentence of subsection (1) is also important. If a judgment document does not contain the separate money award section the judgment can still be enforced by judgment remedies, however the judgment does not create a judgment lien. Again, this is implicit in ORS 18.320 (failure to include money judgment section does not prevent entry of the judgment in the register, it only prevents docketing).

Section 6. Criminal judgments with money awards. The language of this section comes from ORS 137.071, 137.073 and 137.180. The requirements parallel the requirements of civil judgments. Consistent with ORS 137.073, the principal exceptions to the requirements are judgments entered on uniform citation forms.

Section 7. Duties of judge with respect to form of judgment. Note that consistent terminology has been used throughout the bill for the various acts that are performed in achieving a completed judgment. A judge renders a judgment. That is, the court decides one or more issues. The judge signs a judgment document, and files the document with the court administrator. As seen in section 9, the court administrator notes in the register that the document has been filed, at which point the judgment is deemed entered. There is much confusion in the existing law in the terminology used for these different acts, and it is hoped that these terms will become standardized for these various functions.

The most significant provision in this section is the last sentence of subsection (1). As can been seen, this sentence eliminates the requirement of ORCP 67 B that "magic words" appear in the judgment document to acquire an appealable judgment. Instead, the judge is charged with making the required determination (no just reason for delay) and by the very act of signing a "limited judgment" attests to having made that determination.

This provision highlights one of the advantages of requiring that a judgment be labeled as a limited or general judgment. Judges are busy individuals, and they are required to sign numerous documents every day. Under ORCP 67 B, it is questionable whether all judges now look carefully at the language of every judgment document to see whether the judgment authorizes immediate appeal. With the strict division between limited and general judgments, and the requirement that each judgment be labeled as one of the three types of judgments, every judge should be able to quickly determine what type of judgment is being requested.

The removal of the "magic words" requirement is not intended to change the existing case law relating to the duties of the trial court in deciding whether to make disposition of the claim immediately enforceable and appealable.[22]

Section 8. Duty of clerk with respect to form of judgment. Subsection (2) of this section is the most significant provision of this proposed bill. The Work Group debated at length the manner of enforcing the requirement that a judgment be designated as either a limited, general or supplemental judgment. Subsection (2) prohibits the clerk from entering the judgment unless the judgment document reflects one of the three designations. The clerk is directed to return such judgment documents to the judge for insertion of the appropriate designation.

The language also requires that the clerk return to the judge any document labeled as a "decree." It is anticipated that it may take some period of time before all practitioners realize that decrees no longer exist, and the documents reflecting final court decisions in all cases must be designated as judgments.

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[22] *See, e.g., May vs. Josephine Memorial Hospital*, 297 Or. 525 (1984);

While this procedure may result in delay in the entry of some judgments, the approach reflected in subsection (2) seemed to provide the most effective enforcement mechanism with the least possibility of giving rise to malpractice claims.

Section 9. Entry of judgments. As already noted, subsection (1) of this section establishes a uniform meaning for "entry" of a judgment. "Entry" means that the court administrator has noted in the register that a judgment document has been filed with the court administrator.

Subsection (2) reflects the shift from "docketing" of a judgment to a simple notation in the register that the judgment creates a judgment lien.

While the bill repeals ORS 7.040 (requiring that circuit courts maintain dockets), the courts will still need to maintain a separate record that allows title companies and other interested persons to find the details of judgments that create judgment liens. Subsections (3) and (4) require this separate record and list some of the information that must be reflected in the separate record.

Sources for the language in this section are ORCP 70 B and ORS 7.040 and 18.320.

Section 10. Notice to attorneys. The provisions of this section are based on ORCP 70 B. Consistent with the requirement that a judgment must be designated as either a limited, general or supplemental judgment, the notice will inform the attorney (or unrepresented party) of what the register will reflect as to the nature of the judgment. Instead of indicating whether the judgment was docketed, the notice will indicate whether a judgment lien was created.

Section 11. Effect of entry of judgment. This section reflects substantial changes in existing law relating to the effect of entry of a judgment.

Subsection (1) makes general statements about the effect of entry of a judgment. The most important of these statements is that upon entry, a judgment can be appealed and enforced. This provision is consistent with one of the Work Group's fundamental decisions: There should never be "judgments" that are entered in the register but that are not appealable and enforceable. This does not mean that an appellate court must entertain an appeal from anything that has been labeled as a judgment and entered in the register.[23] For instance, if a malicious party labeled a grocery list as a general judgment, an oblivious judge signed the document, and the clerk entered it in the register, the appellate court is not somehow compelled to entertain an appeal from a non-decision by the court.[24]

Subsection (2) addresses the problem of incorporation in the general judgment of earlier written decisions of the court that did not constitute judgments. Examples of these types of

[23] See amendments to ORS 19.205 in the proposed bill.

[24] Note that this is true in many less dramatic situations. If an appellate court cannot determine from the judgment document what the trial court decided, nothing in the bill would compel the appellate court to somehow engage in a meaningless review.

decisions are orders granting ORCP 21 motions and motions for summary judgment for which a limited judgment is not entered. Under subsection (2), these earlier decisions are incorporated in the general judgment and become appealable at the time the general judgment is entered.

The language in subsection (2)(c) that requires that the writing "reflects an express determination by the court that the decision be final" is not intended to impose some new requirement of magic language in orders of the court. Most orders as they are currently written will meet this test. For instance, a simple order that indicates that the court is granting a defendant's ORCP 21 motion to strike the sole claim that exists in a complaint against the defendant should be adequate to establish that the order reflects an express determination that the decision be final as to that defendant.

Subsection (3) is related to subsection (2), and constitutes a change in the law on the effect of the entry of a general judgment. This subsection reverses the longstanding judicial rule that any claim not resolved by a decision of the trial court is presumed not to have been decided. Consistent with the definition provided by section 1 of the bill, a judgment document that is designated a general judgment resolves all remaining claims. Any claim not mentioned in the judgment document is dismissed with prejudice unless: (a) The claim was resolved by the entry of a limited judgment; (b) A decision on the claim is incorporated in the general judgment under the provisions of subsection (2); or (c) The claim can be decided by a supplemental judgment.

Although subsection (3) changes the law relating to the effect of entry of a judgment, it was noted in the Work Group proceedings that most practitioners probably believe that the language of subsection (3) reflects the existing law. Many practitioners have been surprised to have a case remanded by an appellate court to the trial court when the appellate court *sua sponte* discovers that the record is lacking any decision by the trial court on one of the claims that dropped out of the case early in the proceedings. Subsection (3), in combination with the definition of "general judgment," provides a clear rule: If you make a claim in the action, and you think you prevailed on the claim, you must be sure that it is somehow incorporated in the general judgment or it will be dismissed with prejudice.

Section 12. Corrections to judgments. The language of section 12 does not have an existing statutory counterpart. To some degree section 12 reflects existing case law. In one respect it changes existing case law.

The provisions of subsection (2) relating to the time for appeal of a corrected judgment reflect existing case law insofar as the language conditions a new appeal period on whether the correction affects a substantial right of a party.[25] Subsection (3) creates a new rule however with respect to corrections that occur after the appeal period on the original judgment expires. If the correction occurs before the original appeal period expires, the parties receive another full appeal period from the date of entry of the corrected judgment for any provision in the judgment. If the correction occurs after the original appeal period expires, the parties receive another full appeal period only for the corrected provisions of the judgment and other portions of the judgment affected by the correction.

[25] *Mullinax and Mullinax*, 292 Or 416 (1982).

Section 13. Corrections of designation of judgment as general judgment. As noted in the commentary on section 1 of the bill, the Work Group was concerned about practitioners inadvertently designating a limited judgment as a general judgment. Section 13 provides for a special motion for relief from an error of this type. The heart of the section is subsection (1)(b), which indicates that the moving party must show that the designation was made "under circumstances that indicate that the moving party did not reasonably understand that the claims that were not expressly decided by the judgment would be dismissed."

The Work Group was concerned about the possible misuse of this provision. However, the Work Group also recognized that during the implementation period for the proposal there will be cases in which there are misunderstandings about the significance of designating a judgment as a general judgment. Finally, there was concern because ORCP 71 (relating to correction and vacation of judgments) does not apply to criminal actions, and the Work Group wanted to provide a clear avenue for any prosecutor that mistakenly prepares a general judgment that inadvertently dismissed unadjudicated counts against a defendant.

Section 14. Judgment liens. The lien effect of judgments is one of the most complicated issues in the law. The Work Group spent a very large amount of time addressing the language that now appears in sections 14 and 15 of the bill.

Subsection (1) establishes the general rule that if a judgment includes a money award and complies with the separate section requirements of either section 5 (civil judgments) or section 6 (criminal judgments), the court administrator will note in the register that the judgment creates a judgment lien. The subsection then lists the three existing exceptions to this rule and a "catch-all" exception for other laws that provide for an exemption.[26]

Subsection (2) states the general rule about the lien effect of judgments. The provisions of subsections (2)(a) and (b) are intended to maintain the existing law on the lien effect of regular judgments, as reflected in ORS 18.350. For instance, the language in these paragraphs indicates that the lien attaches to "all real property" of the debtor. The equivalent language in ORS 18.350 has been generally interpreted to exclude equitable interests in property from the lien effect of a judgment. The bill is not intended to change this interpretation.

Subsections (2)(c) and 3(c) as written are intended to change the existing law as interpreted by the courts. The Work Group is still reviewing these sections and the Group expects they will be amended further during session.

Subsection (3) establishes the lien effect of the support award portion of a judgment. It is important to note that these rules only apply to the support award portion of the judgment. To the extent a judgment also contains money awards that are not support awards including lump sum awards for arrearages, those money awards are governed by subsection (2). As discussed in the commentary on section 1, subsection (3) is designed to describe the nature of a support award judgment's lien effect (lien for support award creates a "cloud" on property owned by the

[26] The Work Group was not aware of any other exceptions, but felt it was prudent to allow for future statutory exceptions to the general rule.

judgment debtor, and thereby puts title companies and other interested persons on notice that support arrearage lien might have attached to the property).

Subsection (4) makes a clear statement about the ability of judgment debtor under the support award portion of a judgment to convey or encumber real property free of the judgment lien (i.e. the cloud), but not free of individual support arrearage liens that have attached to the property.

Except for the provisions of sections 14 (2)(c) and (3)(c), and sections 15 (2)(c) and (3)(c), nothing in sections 14 and 15 is intended to change in any way the current law relating to priority of a judgment lien as opposed to other liens and encumbrances.

Section 15. Establishing judgment lien in other counties. This section largely mirrors section 14, and addresses the lien effect of judgments that are recorded in the County Clerk Lien Record for counties other than the county in which the original judgment was entered. All comments on equivalent provisions of section 14 are applicable to section 15. Subsection (4) establishes rules for extending judgment liens created under section 15.

Section 16. Elimination of judgment lien by appeals. ORS 18.350 (2) currently provides that a judgment lien automatically expires if a supersedeas bond is filed as part of an appeal of the judgment. This has resulted in cases in which a bond was filed and the lien eliminated, with a subsequent failure of the bond because of failure of the appellant to pay premiums.

Section 16 eliminates the automatic expiration of the lien, and instead authorizes the appellant to make a motion for elimination of the lien upon filing of a supersedeas bond and upon providing such additional security as may be required by the court.

Section 17. Judgment lien based on judgment for support entered in another state. This section is taken largely verbatim from ORS 18.320.

Section 18. Expiration of judgment remedies. ORS 18.360 currently provides that judgments expire after a specific period of time. As discussed in Part II of this report, judgments do not actually expire. Only the ability to enforce those judgments expires (generally in 10 years after entry of the judgment). Section 18 reflects this general concept, and segregates out specific types of judgment remedies in circumstances in which the general 10-year rule does not apply.

The general rule appears in subsection (3). All judgment remedies as defined in section 1 of the bill expire 10 years after entry of the judgment unless a certificate of extension is filed under section 19. Subsection (4) continues the existing rule that judgment remedies for a criminal judgment expire 20 years after the entry of the judgment, and cannot be extended. (See section 19.)

Subsection (5) reflects the rule enunciated in ORS 25.700 that judgment remedies for child support awards expire 25 years after entry of the judgment that first establishes the support obligation. This language contemplates that a general judgment of dissolution of marriage might not contain a child support award (e.g. because joint custody is awarded). However, a

supplemental judgment might include such an award, and the 25-year period commences with the entry of the supplemental judgment. However, the language also contemplates that the period is tied to the obligation for a particular child, not to the particular debtor. Thus, the 25-year period is not affected by a change of custody in a supplemental judgment that switches the support obligation to the other parent.

Subsection (6) is new law that attempts to bring spousal support into conformity to the greatest extent possible with the 25-year period currently provided for child support. The 25-year period for child support is premised on the fact that child support can never be awarded for a period of longer than 21 years. Spousal support is not limited in this manner. Because spousal support is not subject to ORS 25.700, it is probable that spousal support remains subject to the old judicially created rule that each unpaid installment constitutes a judgment. As such, those judgments and the liens arising out of them can be renewed for up to 10 years.

However, spousal support awards are also subject to ORS 107.126 (1). This provision indicates that no award of spousal support continues to have lien effect after 10 years from the docketing of the judgment unless the judgment is renewed under ORS 18.360. As a result of this rule, it is quite probable under the existing law that the lien effect of most spousal support judgments expire 10 years after the docketing of the original judgment. In other words, all liens attributable to unpaid installments during the first 10 years expire and an unpaid installment that occurs after the expiration of the 10-year period does not create a lien.

Subsection (6) and the provisions of section 21 provide a compromise on spousal support. First, all payments that come due during the first 25 years after the obligation is established are enforceable by execution for 25 years after entry of the judgment, or for 10 years after the installment payment is not made, whichever is longer. The judgment lien of the spousal support portion of the judgment, and any support arrearage liens arising under that lien, expires 25 years after the judgment is entered, unless the lien is extended under section 21.

The net result of this arrangement is that payments that come due under spousal support awards after the first 15 years are only enforceable by execution for 10 years. They cannot be extended. (See section 19 (5)). This is shorter than the time available under the existing law, since those remedies can be renewed under ORS 18.360.

However, the bill gives the support obligee something the obligee currently doesn't have: Lien effect for 25 years without the need to renew. And as will be seen in section 21, the bill provides the ability to continue the lien effect after the expiration of the 25-year period.

Subsection (7) is taken from ORS 18.360 (3).

Section 19. Extension of judgment remedies. Current law requires that a motion for the renewal of a judgment be made to extend judgment remedies. An order of renewal must be entered within the initial 10-year period or the ability to enforce the judgment expires. The requirement of an order has created problems because judges sometimes are slow to sign the order and deliver it to the court administrator.

Subsection (1) eliminates the requirement of an order and instead requires that a certificate of extension be filed before the expiration of judgment remedies. This change will make it easier for practitioners to be sure that the extension meets the deadlines of section 18. However, it also raises the possibility of a gap in the title record when an extension is filed within the 10-year period but is not entered until after the 10-year period has expired.

Subsection (1)(a) to (c) provide that a practitioner makes certain certifications by filing a certificate of extension (e.g. that judgment remedies for the judgment have not expired under section 18).

Subsection (3) states the general rule that judgment remedies may be extended only once. The only exception is found in section 20 for spousal support awards.

Subsections (5) and (6) state the general rule that judgment remedies for support awards and money awards in criminal actions cannot be extended.

Section 20. Extension of judgment lien for spousal support. As noted in the commentary to section 18, the judgment lien of the spousal support portion of the judgment, and any support arrearage liens arising under that lien, expires 25 years after the judgment is entered, unless the lien is extended under this section. At any time more than 15 years after entry of the judgment that establishes the support obligation,[27] a judgment creditor may file a certificate of extension, the effect of which is extend the judgment lien of the judgment for 10 years from the date the certificate is filed. As a result of this extension: (a) Any installment arrearage lien that arose before the certificate is filed is given a full 10-year lifespan and does not expire 25 years after the entry of the judgment that establishes the support obligation; and (b) Installment arrearage liens can arise after the expiration of the 25-year period, but will only survive to the 10-year anniversary of the filing of the certificate unless another certificate is filed within the 10-year period as authorized by subsection (2) of this section.

The filing of the certificate of extension under this section has no significance for judgment remedies other than the judgment lien. All installments that come due more than 15 years after entry of the judgment that establishes the support obligation can be enforced by other judgment remedies for 10 years after the installment is not paid, without regard to whether a certificate of extension is filed under this section.

The Work Group rejected allowing extension of individual installment arrearage liens beyond the 10-year period provided by subsection (1) because of the complexity and confusion that would be generated by that approach.

Subsection (2) allows certificates of extension to continue to be filed for spousal support awards for so long as the judgment lien has not expired and any installments remain to be paid under the judgment.

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[27] Any filing before the 15th anniversary would have no effect in any event. Note that the comments under section 18 relating to the effect of the language relating to what is the "judgment that first establishes" a child support obligation, applies with equal force to the equivalent language for spousal support obligations.

Section 21. Spousal support judgments entered before January 1, 2004. There was substantial disagreement within the Work Group with respect to the lien effect of spousal support awards under the existing law. The one clear rule is found in ORS 107.126 (1), and is carried forward in subsection (1) of this section: The judgment lien for a spousal support award, and any support arrearage lien arising under that judgment lien, expires 10 years after entry of the judgment that first establishes the obligation unless a renewal (or certificate of extension under the new law) is filed within that 10-year period.

Subsection (2) is a savings clause for pre-2004 judgments. The language was designed to preserve the *status quo* with respect to the expiration and extension of judgment remedies for those judgments.

Section 22. Child support judgments entered before January 1, 1994. Section 22 performs the same function for child support awards that section 21 performs for spousal support awards. The only difference is that the date is tied to the effective date of ORS 25.700 (January 1, 1994).

Section 23. Release of lien. Although it is fairly common practice for practitioners to give lien releases under the current law, there is no specific statutory authorization for the practice. Section 23 provides that authorization, prescribes certain requirements for release of lien documents, and describes the effect of a release of lien.

Section 24. Assignment of judgment. This section incorporates provisions from ORS 18.400 relating to assignments. The Work Group agreed that assignments should be acknowledged by a notary (compare release of liens and satisfactions which need only to be witnessed by a notary).

Section 25. Satisfaction of money awards. This section establishes requirements for satisfaction documents and the effect of those documents. Subsection (3) incorporates the provision currently found in ORS 18.350 (3) that imposes a duty on a judgment creditor to provide a satisfaction document for all amounts credited against the money award.

Section 26. Satisfaction of support awards payable to Department of Justice. This section is based on the provisions of ORS 18.400 (4), (5)(a) and (6).

Section 27. Alternate method for satisfaction of support awards payable to Department of Justice. This section is based on the provisions of ORS 18.400 (5)(b).

Section 28. Motion to satisfy money award. This section is based on ORS 18.405 and 18.410. The Work Group made extensive changes in subsection (4) on the manner in which a motion under this section must be served. The changes were made to indicate that service on the judgment creditor and the judgment debtor may be made as provided in ORCP 9 if the motion is filed within one year after entry of the judgment. If the motion is filed more than one year after entry of the judgment, the motion may either be served as provided in ORCP 7, or by certified mail, returned receipt request. The court may waive service if it is shown that the person cannot be found after diligent effort.

Section 29. Execution. As noted in Part II of this report, considerable confusion exists in the statutes relating to the difference between execution in the broad sense and writs of execution. The definition of "execution" provided by section 1 of the bill should eliminate most of this confusion. Section 29 sets forth the general rule for execution (*i.e.* judgments may be enforced by execution upon entry of the judgment).

Section 30. Enforcement of judgment by circuit court for county where judgment debtor resides. The provisions of this section are based on ORS 23.030 (3) to (8).

Section 31. Debtor examination. This section is based on ORS 23.710 and 23.730. The major change from existing law relates to the requirements imposed on judgment debtors as a condition of requiring a debtor to appear for examination. ORS 23.710 (1) requires that there be an "unsatisfied execution"[28] or service of a demand for payment. Section 31 (1) sets out three different optional preconditions for a debtor examination.

Section 32. Conduct of debtor examination. This section is based on ORS 23.720 (1).

Section 33. Written interrogatories. This section is based on ORS 23.720 (2).

Section 34. Writs of execution generally. A writ of execution may only be issued for a judgment that includes a money award or a judgment that requires the delivery of specific real or personal property (e.g. on claim and delivery). Subsection (1)(b) points out the differences between the use of a writ of execution and a writ of garnishment for seizure of personal property (a writ of execution is used for property in the possession of the debtor; a writ of garnishment is used for property of the debtor that is in the possession of third parties[29]).

Section 35. Issuance of writs of execution. This section substantially changes the existing law on the directions given to a sheriff in a writ of execution.[30] As mentioned in Part II of this report, the existing law contemplates that a sheriff will make an active search for property of the debtor in the county, and then apply that property against the debt pursuant to a specific priority. Section 35 recognizes that sheriffs no longer actively search for property of the debtor. If the writ of execution is not directed to the seizure or sale of specific property identified in the judgment, the writ will merely direct to the sheriff to sell such property as may be identified by the judgment creditor in instructions provided to the sheriff. If property is seized or sold, the sheriff makes no determination on the manner in which the property or proceeds will be applied.

The Work Group intended subsection (5) to retain the requirement of ORS 23.030 (1)(b) that, in case of executions against real property, a judgment creditor must file a certified copy of the writ or a lien record abstract for the writ in the County Clerk Lien Record for each county in which the real property is located. But the bill as written requires recording for all writs. The Work Group anticipates an amendment to conform to existing law.

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[28] This is one of the statutes in which there is dispute as to which type of "execution" is meant. Some courts will accept a response to a writ of garnishment; others construe this reference to mean an unsatisfied writ of execution.
[29] *See*, ORS 18.602.
[30] *See*, ORS 23.050.

Subsection (5) also addresses cases in which the judgment does not create a judgment lien against the subject real property. In those cases, this subsection establishes that the recording has the effect of a notice of pendency with respect to the effect of the execution sale.

Section 36. Issuance of writs by district attorney or Division of Child Support. This section is based on ORS 23.050 (2).

Section 37. Sheriff's duties. Existing law contains many confusing provisions references to the sheriff "levying" on property. For the purpose of personal property, this almost certainly means seizure. Less clear is the meaning of "levy" in the context of real property. And very unhelpful is the statutory directive that property be levied on "in like manner and with like effect as similar property is attached."[31]

The proposed bill eliminates references to a "levy" on property. For the purpose of the timelines that commenced based on when a "levy" occurred, the bill substitutes seizure of personal property or notice of an execution sale under ORS 23.450 for real property.[32]

Subsection (3) reflects the existing law on distribution of property and proceeds by the sheriff.[33]

Section 38. Return on writ of execution. This section is based on ORS 23.060. The last sentence of this section is new law. The provision allows a judgment creditor to give the sheriff additional time to make a return on the writ when the normal 60 day period is inadequate to finish a sale.

Section 39. Notice to judgment debtor. This section is based on ORS 23.425. Existing law makes use of the challenge to garnishment form provided by ORS 18.850 for debtors that wish to claim an exemption. This is an awkward fit, since much of the language of the garnishment form is inapplicable to writs of execution. The bill addresses this problem by creating a challenge to execution form in section 42.

Section 40. Challenge to writ of execution. Under this section a debtor may make a challenge to writ of execution only to present claims of exemption.

The existing law has an antiquated and unused series of statutes that call for the creation of a "sheriff's jury" to decide third-party claims to property seized on execution.[34] These statutes are repealed by the bill, and consistent with the use of the challenge to garnishment form in ORS 18.850, section 40 indicates that a third-party claiming an interest in property that is seized on execution may use the challenge to execution form to assert that interest.

The timing for the filing of a challenge to execution is driven to a large degree by the existing laws on when a sale will occur. ORS 23.160 (the general statute on exempt property)

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[31] ORS 23.410 (4).
[32] *See* section 39 of the bill (timing for sheriff's notice to debtor).
[33] *See* ORS 23.410 (5) and (6).
[34] *See* ORS 23.320 to 23.350.

indicates that a judgment debtor must "select and reserve" the exemptions before the sale of the property. Subsection (4) reflects this requirement.

Section 41. Notice of challenge to execution. This section is based on the analogous provision for challenges to garnishment.[35]

Section 42. Form of challenge to execution. The form is based on the statutory forms for challenges to garnishment and notices of exemption,[36] with provisions that are inapplicable to executions removed.

Section 43. Hearing on challenge to execution. This section is based on the analogous statute for challenges to garnishment.[37]

Section 44. Sanctions. This section is based on the analogous statute for challenges to garnishment.[38]

Sections 45 to 76. These sections allow the existing statutes on garnishment to become part of the new ORS chapter 18. Almost all of the amendments are simply to change references from "clerk of the court" to "court administrator," consistent with the defined term in section 1 of the bill.

Sections 77 to 79. These sections allow the existing statutes on execution sales to become part of the new ORS chapter 18.

Sections 80 to 82. These sections allow the existing statutes on exemptions and other miscellaneous provisions to become part of the new ORS chapter 18.

Sections 83 to 88. Conforms provisions of law governing appeals in ORS chapter 19 and the ORCP to sections 1 to 44 of the bill.

Sections 89 and 90. Conforms provisions of law governing the lien effect of small claims judgments to sections 1 to 44 of the bill.

Sections 91 to 95. Conforms laws on justice and municipal courts to sections 1 to 44 of the bill.

Sections 96 to 155. Conforms laws on domestic relations (ORS chapters 107, 108 and 109) to sections 1 to 44 of the bill. Of particular significance in these sections is the elimination of "modification" of judgments. A modification of a support award must be done by a supplemental judgment under the bill.

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[35] *See* ORS 18.702.
[36] *See* ORS 18.845 and 18.850.
[37] *See* ORS 18.710.
[38] ORS 18.715 (1).

Note also that the amendments to ORS 107.095 make it clear that preliminary support awards are limited judgments and may be enforced by judgment remedies under sections 29 to 44 of the bill. The Work Group discussed whether these preliminary orders should be appealable. The Work Group decided that these judgments would be the one exception to the rule that any document designated as a judgment is appealable.

If a limited judgment is entered for support pending entry of a general judgment, the general judgment may include a lump sum award for unpaid support. A lump sum award of this type is not a support award as defined by section 1 of the bill, which indicates that support awards are for amounts paid in installments. This means that for purpose of the lien effect of these awards, sections 14 (2) and 15 (2) govern, not sections 14 (3) and 15 (3). However, as specifically provided by section 18 (5), the 25-year enforcement period applies to these lump sum payments.

Sections 156 to 158. Conforms laws on criminal judgments to sections 1 to 44 of the Act.

Sections 159 to 166. Adjusts laws to reflect repeal of ORCP 70 and elimination of "money judgments."

Sections 167 to 217. Adjusts laws to reflect elimination of the circuit court docket.

Sections 218 to 562. Changes statutory references of "decrees" to "judgments."

Section 563. Provides a savings clause to make it clear that the change from "decrees" to "judgments" does not affect legal rights attendant to suits in equity under existing law (e.g. scope of review).

Sections 564 to 569. Provides for miscellaneous conforming amendments.

Section 570. Repeals replaced statutory provisions.

ADMINISTRATIVE & JUDICIAL CHILD SUPPORT ORDERS:
Certificate Requirements

REPORT

(HB 2277)

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From
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Report Approved at
Oregon Law Commission Meeting on
October 11, 2002

Administrative and Judicial Child Support Orders Work Group
Certificate Requirements Report

I. Introductory Summary

Oregon law provides for the resolution of child support in judicial proceedings and in administrative proceedings. The administrative process is through the Oregon Department of Justice's Division of Child Support and contracting District Attorneys, hereafter the "Administrator".[1] Both forums operate under a labyrinth of federal and state statutes and administrative rules.[2] The existence of these two separate processes to establish or modify child support may result in separate, and sometimes inconsistent, child support orders being entered for the same family. The result is confusion regarding which order should be enforced and how much support is owed to the family.

The primary purpose of the accompanying bill (HB 2277) is to prevent multiple orders by requiring litigants to notify the judicial forum or the Administrator of existing orders or pending support proceedings involving the same children. In addition, in some cases, the DOJ will be required to inform the court and parties of existing orders or pending proceedings.

Notification is a first step toward law improvement in this area because it should reduce the occurrences of multiple orders. The Work Group believes that with knowledge of a pre-existing order, the Administrator or court will not purposefully enter a contradictory support order for the same family. The Work Group continues to work toward a resolution of the problem of how to reconcile existing multiple support orders.

II. History of the Project

In 2002, the Oregon Law Commission approved the formation of the Judicial and Administrative Child Support Orders Work Group, having received a law reform project proposal from the State Family Law Advisory Committee. Chaired by Commissioner Sandra Hansberger, the Work Group met 10 times between February 2002 and October 2002. Meetings were held at the Oregon State Bar. The Work Group includes several attorneys in private practice, attorneys with the government entities dealing with support issues such as the Department of Justice's Division of Child Support and the Marion and Clackamas County

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[1] For most enforcement services, the term "Administrator" usually refers to the functions given by statute to the District Attorneys and the Department of Justice in child support cases. *See* ORS 25.010(1); ORS 25.080. However, some program or administrative functions are provided solely by the Department of Justice. In this document when the term "DOJ" is used, it is intended to refer to the Department of Justice's child support program functions.

[2] Letter from State Family Law Advisory Committee, The Honorable Dale R. Koch, Chair (Oct. 11, 2001) (on file with Oregon Law Commission).

District Attorney's Office, a hearing officer with the State Hearing Officer Panel, two state court judges, a representative from the State Court Administrator's Office and a law professor.[3] Doug McKean, Deputy Legislative Counsel, provided drafting assistance.

After studying the scope of the problem presented to the Work Group, the Work Group divided its work into two topics: (1) preventing multiple support and conflicting child support orders; and (2) reconciling multiple and conflicting support orders. The proposed legislation addresses the prevention of multiple support orders.

III. Statement of the Current Problem in the Law

Oregon law currently does not always require litigants in judicial proceedings to notify the court that another support order between the parties exists or that there is a child support proceeding pending in another forum or county. In addition, parties seeking child support orders, or seeking to modify existing orders, are not required to notify the Administrator of existing orders or other pending proceedings. As a result, courts and the Administrator enter

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[3] **Members:**

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Jean Fogarty	Department of Justice, AAG
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Carol Anne McFarland	Clackamas Co. District Attorney's Office
Judge Maureen McKnight	Multnomah Co. Circuit Court
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Judge Keith Raines	Washington Co. Circuit Court
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Craig Prins	Judiciary Committee
Bradd Swank	Office of State Court Administrator
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conflicting orders dealing with the same children and parties. OJIN may not provide current and relevant information regarding administrative proceedings to courts and may not always be a source of accurate and timely information regarding other pending judicial proceedings. The State CASE Registry, which is required by federal statute to record child support orders, is not available to courts and does not contain information on all support orders entered or registered in Oregon. Furthermore, because of confidentiality concerns, the Registry is presently of limited utility to the courts and to litigants. While technology may help to solve some of the problems with conflicting orders from being entered in the future, other steps must be taken in the interim to prevent conflicting orders.

IV. The Objectives of the Proposal

In drafting this bill, the Work Group sought to establish a requirement that parties provide information about existing or pending child support proceedings in their filings with the court and with the Administrator. The intent is to require parties to certify whether there is another child support order in existence, or whether there is another child support proceeding pending.

Child support may be ordered or modified pursuant to a request by an obligor, an obligee, or a state agency entity providing financial support to the child. Furthermore, as noted below, proceedings under a number of different statutes may give rise to a child support order.

The intent of this legislation is to require the moving party to certify the existence of other support orders or proceedings in every action in which support may be decided. In those limited situations where the court may order support on its own motion, the court must provide notice to the Department of Justice (DOJ), and the DOJ, in turn, must notify the court of any existing orders or pending support proceedings.

The Work Group was specifically concerned with the following issues:

1. Notice
This bill addresses the need to notify the Court, Administrator, and parties of known existing support orders or pending support proceedings. A state agency providing enforcement services is also required to provide notice where applicable.

2. Sanctions
The Work Group had considerable discussion about the type of sanction or consequence that should follow from the failure to accurately certify whether there are other child support orders or pending proceedings. Ultimately, the Work Group decided that sanctions would not be imposed in this bill (HB 2277), in part, because of the large number of *pro se* litigants and the possibility of unintentional errors. However, in future discussions regarding how to reconcile multiple child support orders, the Work Group will consider whether a party's failure to properly notify the court of orders or pending proceedings will be grounds to set aside an

order.

3. Providing a form
The Work Group discussed whether the legislation should include a sample form or certificate to fulfill the notice requirement. The group agreed that the form of the certificate should be prescribed in the Uniform Trial Court Rules or by the Administrator, as appropriate.

V. Review of Legal Solutions Existing or Proposed Elsewhere

The Work Group reviewed state and federal statutes relating to child support, and looked to legislation in other jurisdictions. The federal FFCCSOA (Full Faith and Credit for Child Support Orders Act, see 28 U.S.C § 1738B) is aimed at preventing interstate multiple child support orders. While this statue provides guidance for preventing multiple orders, the federal law does not apply to intrastate Oregon orders.

The Work Group also reviewed previous legislative proposals dealing with both the problem of conflicting multiple orders and the lack of notice to the Department of Justice when child support has been assigned to the state. *See e.g.* SB 337 (2001). The Work Group looked to other jurisdictions for handling similar problems with conflicting orders. The Work Group also conducted an informal survey of Oregon judges on their perception of the problems. All of the information gathered lead to the conclusion that a logical first step in addressing the complicated problem of multiple orders was to prevent multiple orders from occurring in the first place.

VI. The Proposal

A. General Provisions

As noted, the purpose of this bill is to require notification of existing child support orders or pending support proceedings in every instance where a court or Administrator may award or modify child support. Specifically, the bill requires notice of:

1. Any type of support proceeding pending in this state or any other jurisdiction; and
2. Any existing support order involving the child in this state or any other jurisdiction, other than the support obligation the entity seeks to modify.

Furthermore, a state agency, when initiating a proceeding, must include a certificate regarding any existing order or pending support proceeding.

B. Statutes Modified

The bill modifies the following statutory sections to add the requirement of notification of existing orders or pending support proceedings:

- Administrative or judicial support proceedings initiated by an entity providing support enforcement services (ORS 25.287; Section 1 & 2);
- Proceedings for marital annulment, dissolution, or separation (ORS 107.085; Section 3);
- Modification of divorce decree when change of circumstances are present (ORS 107.135; Section 4);
- Modification of dissolution upon motion of parent with parenting time (ORS 107.431; Section 5);
- Expedited parenting time enforcement (ORS 107.434; Section 6);
- Child support action by married person (ORS 108.110; Section 7);
- Action by minor child or state agency for support (ORS 109.100; Section 8);
- Support for child born out of wedlock with established paternity (ORS 109.103; Section 9);
- Motion for modification (ORS 109.165; Section 10);
- Child protective proceeding (ORS 125.025; Section 11);
- Notice and finding of financial responsibility issued by Department of Human Service if there is no court order for support (ORS 416.415; Section 12);
- Modification of support order where support enforcement services are provided (ORS 418.425; Section 13);
- Filing and docketing of financial responsibility order (ORS 416.440; Section 14);
- Modification of order after public assistance has ceased (ORS 416.470; Section 15);
- Dependency and delinquency proceedings (ORS 419B.400 and ORS 419C.590; Sections 16 and 17).

C. Notification to the Court and Court's Own Motion to Modify Support

As noted, courts deal with child support pursuant to a number of different statutes. In certain circumstances, the court may, on its own motion, award or modify support. In ORS 125.025 (child protective proceeding), see Section 11 of this bill (HB 2277), and in ORS 419B.400 and ORS 419C.590 (dependency and delinquency hearings), see Sections 16 and 17 respectively, the court may require parents or other persons to pay support. In these cases, the bill requires the court to notify the DOJ that there will be a hearing on support. In addition, the bill requires that prior to the hearing on support, the DOJ inform the court of any existing support orders or any pending support proceeding involving the same child. The Judicial Department and the Department of Justice may enter into an agreement regarding how the courts give the notice required under these sections and how the Department of Justice provides information to the courts.

D. Notification in an Administrative Proceeding

When support enforcement services are being provided under ORS 25.080, if the Administrator issues and serves a notice and finding of financial responsibility, the notice must include, to the extent known, a statement regarding the existence of support orders or pending proceedings regarding the same child. *See* ORS 416.415 and Section 12 of this bill (HB 2277). Similarly, if the Administrator or a private party seeks to initiate or modify an existing support order in an administrative proceeding, the moving party is required to give notice to the Administrator of the existence of support orders or pending support proceedings. *See* ORS 416.425 and Section 13 of this bill (HB 2277). Section 15 of this proposed bill (HB 2277) requires notice to the Administrator of child support orders and proceedings when an obligor or obligee seeks to modify support after public assistance is no longer provided.

VII. Conclusion

This proposed bill is the first step in addressing the problems created by multiple and conflicting child support orders: that is, the bill if passed, will operate to prevent the existence of multiple orders from arising in the future. The intent is clear: to require notice to the courts and the Administrator of existing orders and pending child support proceedings in order to prevent multiple orders for the same children. The bill becomes complex only by the need to address the numerous proceedings in which child support obligations may be addressed.