OREGON LAW COMMISSION

245 WINTER STREET SE
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PHONE 503-370-6973
FAX 503-370-6998

BIENNIAL REPORT OF THE OREGON LAW COMMISSION

2003-2005

From
David R. Kenagy
Executive Director

and

Wendy J. Johnson
Deputy 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.

OREGON LAW COMMISSION

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This Biennial Report reflects the Commission's work from 2003-2005. The Oregon Law Commission, with the help of over two hundred dedicated and capable volunteers, completed work on twenty-three pieces of recommended legislation for the 2005 Legislative Assembly. In addition, the Commission is already looking ahead to 2007 and has commenced study or will begin study of several other significant law reform projects as described in this Report.

We would like to thank the distinguished and very capable members of the Commission, its Work Groups, and the Executive Director's office at Willamette University for their extensive efforts on behalf of the Commission. The Commission looks forward to the next two years as it continues the important work of law reform in support of the Oregon Legislative Assembly.

Lane P. Shetterly
Chair of Oregon Law Commission

Senator Kate Brown
Vice-Chair of Oregon Law Commission

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WILLAMETTE
THE FIRST UNIVERSITY IN THE WEST

COLLEGE OF LAW
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DEAN SYMEON C. SYMEONIDES
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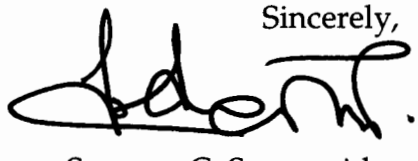
On behalf of Willamette University, it is my pleasure to congratulate the Oregon Law Commission and its staff for another highly productive biennium, the results of which are described in this Report.

Law reform is hard, painstaking, and important work. It is also thankless work, even—or especially—when it is done well, and even when it is done for a fraction of the real cost. The Oregon Law Commission has been carrying out this task remarkably well and for a minuscule fraction of the real cost. The reason for the former is the expertise and impartiality of the people who work under the Commission's auspices. The reason for the latter is the fact that most of them are volunteers who have generously contributed countless hours of uncompensated legal work.

The Willamette University College of Law is a proud supporter of and contributor to this all-important undertaking. Based on a 50/50 public/private partnership agreement with the State of Oregon entered into in 2000, the College of Law has matched dollar-for dollar all of the State's appropriations to the Oregon Law Commission and has provided a home for the Commission. As the person who, for the last five years, has had signing authority over this expenditure, I continue to wholeheartedly support it despite multiple competing needs.

I am pleased that we have been able to contribute in this fashion to the improvement of the laws of our State.

Sincerely,



Symeon C. Symeonides
Dean and Professor of Law

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Appendices
(Contains Explanatory Report for Each 2005 Recommended Bill)

Introduction to Oregon Law Commission

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. Lane Shetterly and Senator Kate Brown were re-elected to serve as the Commission's Chair and Vice-Chair, respectively, on September 1, 2003.

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 the form of 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. 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 Legislative Assembly 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 generally 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 expertise.

With the help of the many dedicated volunteers serving on the Commission's Work Groups, the Commission prepared and approved 23 bills for recommendation and introduction in the 2005 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 Biennial Report contain the available explanatory reports for the 2005 bills. The Commission presents its recommended bills to the 2005 Legislative Assembly anticipating careful consideration and enactment of the bills.

This Biennial Report documents the Commission's work from January 1, 2003, through June 1, 2005. It is our hope that the report gives you 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 2005 legislative package a success.

David R. Kenagy
Executive Director

Wendy J. Johnson
Deputy Director

Commissioners of the Oregon Law Commission

Lane P. Shetterly, Chair — **Appointed by Speaker of the House**
Director of Department of Land Development and Conservation; Salem, Oregon

Senator Kate Brown, Vice-Chair — **Appointed by Senate President**
Senate Democratic Leader, Senate District 21; Portland, Oregon

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

Craig A. Prins — **Appointed by Speaker of the House**
Executive Director of Criminal Justice Commission; 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

Senator Vicki Walker — **Appointed by Senate President**
State Senator, Senate District 7; Eugene, Oregon

Martha L. Walters — **Designee of Board of Governors of Oregon State Bar**
Attorney at Law, Walters Chanti & Zennache PC; Eugene, Oregon

Staff of the Oregon Law Commission

Willamette University College of Law Staff

David R. Kenagy
Executive Director

Wendy J. Johnson
Deputy Director

Gerald G. Watson
Staff Attorney

Julie K. Gehring
Administrative Assistant

State of Oregon Staff

David W. Heynderickx
Acting Legislative 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 assist the Commission in a variety of ways, including researching new law reform projects, writing legal memoranda, attending Law Commission meetings, and writing final reports. The following law students, all from Willamette University College of Law, served the Oregon Law Commission this biennium. The Commission is hopeful that the University of Oregon and Lewis & Clark law schools will participate in the future.

Robert Andresen—Research Asst.
Summer 2004

Kimberly Boswell—Research Asst.
Fall 2004

Jessica Carlson—Research Asst.
Fall 2004

Cameron Hall—Research Asst.
Fall 2004

Carter Hick—Research Asst.
Fall 2003 to Spring 2005

Jason Janzen—Research Asst.
Summer 2004 to Present

Cheryl Taylor—Research Asst.
Summer 2004

Heather Vogelsong—Research Asst.
Spring 2003 to Summer 2005

Oregon Law Commission Meetings

The Commission held twelve meetings from January 1, 2003 through June 1, 2005. Committees and Work Groups established by the Commission held numerous additional meetings. The Commission meetings were held on the following dates:

February 24, 2003	State Capitol
June 13, 2003	State Capitol
September 18, 2003	Seaside, Oregon
December 12, 2003	State Capitol
February 27, 2004	State Capitol
May 21, 2004	State Capitol
August 20, 2004	State Capitol
October 22, 2004	State Capitol
November 19, 2004	State Capitol
January 18, 2005	State Capitol
February 17, 2005	State Capitol
May 25, 2005	Attorney General's Conference Room

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 meetings (ORS 173.328). Meetings for the rest of 2005 have not been scheduled. Please check the Commission's Master Calendar web page at the following URL to confirm dates and times, or contact the Commission at (503) 370-6973: www.willamette.edu/wucl/oregonlawcommission/home/calendar.html

Program Committee
2003-2005

The purpose of the Program Committee is to review law reform projects that have been submitted to the Oregon Law Commission, and then make recommendations to the Commission regarding which laws should be studied and developed by the Commission. (See page 8 for guidance on how to draft a law reform project proposal for submission to the Commission.)

Commissioners serving on the Program Committee:

Attorney General Hardy Myers, Chair
Chief Justice Wallace P. Carson, Jr.
Professor Hans Linde
Greg Mowe
Lane Shetterly
Martha Walters

The Program Committee held nine meetings from January 1, 2003 through June 1, 2005 on the following dates:

May 28, 2003	Department of Justice
July 15, 2003	Department of Justice
September 2, 2003	Attorney General's Conference Room
November 18, 2003	Attorney General's Conference Room
February 17, 2004	Attorney General's Conference Room
May 4, 2004	Department of Justice
September 10, 2004	Department of Justice
November 19, 2004	State Capitol
May 25, 2005	Attorney General's Conference Room

The Program Committee meets as necessary to review proposed law reform projects for the Oregon Law Commission. Meetings for the rest of 2005 have not been scheduled. Please check the Commission's Master Calendar web page at the following URL to confirm dates and to see future meetings, or contact the Commission at (503) 370-6973:
www.willamette.edu/wucl/oregonlawcommission/home/calendar.html.

Program Committee Selection Criteria

In addition 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 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:
Project Proposal Outline

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

A written law reform proposal seeking involvement of the Oregon Law Commission 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.

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OREGON LAW COMMISSION

173.315 Oregon Law Commission established; 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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2005 SESSION SUMMARY:

Bills Recommended by the Oregon Law Commission

1. House Bill 2268 requires parties in condemnation actions to exchange certain information along with an appraisal. If the appraisal relies on a written report, opinion or estimate, the material must be attached. If the appraisal relies on an unwritten report, opinion or estimate, the party providing the appraisal must also provide the name and address of the person who provided the information.

2. House Bill 2269 establishes an optional procedure for public condemners to follow when taking immediate possession. That process is to give notice, provide an opportunity for objection and a hearing, and acquire a court order confirming immediate possession of the property.

3. House Bill 2275 adds a provision in the ORS that will permit the termination of the monetary support terms of an administrative child support judgment and the reinstatement of the monetary support terms of a later issued child support judgment of a court if certain requirements are met. Additionally, the bill cleans up certain terms.

4. House Bill 2276 codifies the Oregon Supplemental Income Program (OSIP), which provides supplemental cash payments to recipients of Supplemental Security Income and special need allowances for one-time or ongoing needs to eligible persons. The bill also repeals obsolete provisions pertaining to state programs that provided aid to the disabled, aid to the blind and old-age assistance found in ORS Chapters 412 and 413.

5. House Bill 2359 resolves a number of clean-up issues that became apparent after the passage of a major revision of Oregon judgment laws in 2003. Among other things, the bill clarifies jurisdictional requirements for appellate review of a judgment and clarifies those provisions of a judgment that are necessary to create a judgment lien.

6. Senate Bill 229 requires that in a dependency proceeding in juvenile court, the court give preference in placement of the child or ward to a person with a caregiver relationship with the child or ward. This bill also clarifies the definition of "caregiver relationship."

7. Senate Bill 230 establishes a procedure for appointing a guardian *ad litem* for a parent in juvenile dependency proceedings.

8. Senate Bill 231 improves the juvenile records statute, ORS 419A.255. The bill provides express authority for DA's, AAG's, juvenile departments, OYA, and DHS to access juvenile court materials. These parties may also share materials. The bill also clarifies the process for making materials part of the record. Lastly, the bill provides that transcripts of juvenile court proceedings are confidential.

9. Senate Bill 232 codifies the affirmative defense of a mental disease or defect in juvenile delinquency proceedings and establishes a disposition for juveniles who successfully assert the defense when they have a serious mental condition or present a substantial danger to others. The bill also provides for a juvenile panel of the Psychiatric Security Review Board to have jurisdiction over such juveniles.

10. Senate Bill 233 updates the Oregon Youth Authority's (OYA) case planning statutes to reflect the shift in delinquency policy to a public safety focus. The bill also improves provisions

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regarding OYA's reports to the court regarding youth offenders and the review hearings process for youth offenders.

11. Senate Bill 234 modifies the notice provisions relating to putative fathers in juvenile court proceedings. The bill also provides the juvenile court with authority to resolve paternity disputes.

12. Senate Bill 235 requires places of public accommodation to provide reasonable accommodations, akin to federal law requirements, when necessary to provide disabled persons access to goods, services and facilities offered by places of public accommodation.

13. Senate Bill 236 codifies a one-year statute of limitations for filing civil actions in court for unlawful discrimination by places of public accommodations.

14. Senate Bill 237 codifies a one-year statute of limitations for filing civil actions in court for discrimination based on the exercise of one's rights under workplace safety statutes.

15. Senate Bill 238 codifies remedies for unlawful discrimination against firefighters, tobacco users and members of the Legislative Assembly.

16. Senate Bill 239 modifies the lists of protected classes in various civil rights statutes and standardizes the order of the protected classes listed.

17. Senate Bill 920 substantially revises, updates and clarifies Oregon law dealing with judicial sales under writs of execution. It clarifies how property of a debtor is to be "executed" upon following the entry of a judgment and how judicial sales of real and personal property are to be conducted.

18. Senate Bill 921 requires petitioners for adoption to serve summons with a motion and an order to show cause on certain parents who do not consent to an adoption (eliminating the citation procedure). The bill codifies the right to appointed counsel for a non-consenting parents in certain circumstances. The bill permits the court to take action authorized by law, if the parent fails to answer or appear at the hearing.

19. Senate Bill 922 requires self-insureds to provide payments, meeting the Financial Responsibility Law requirements, for permissive users. (The permissive user's insurance will pay if the user does have insurance.) Second, if struck by a self-insured vehicle, and all of one's damages are not paid, one's own underinsured motorist coverage will apply.

20. Senate Bill 923 assures that when multiple claimants divide the wrongdoer's "per accident" liability insurance limit into small amounts (25/50K minimum limits policy), that an injured claimant may rely on the claimant's own underinsured motorist coverage for the balance of their "per person" limit.

21. Senate Bill 924 provides that when one's car is stolen, it can be treated as an uninsured car so that the owner has a remedy in their own uninsured motorist policy. The bill also requires the reporting of a stolen vehicle to police and cooperation with police to prevent insurance fraud.

22. Senate Bill 925 is a cleanup of ORS 742.504 and simply states clearly that when an insured is in one's own car, one's own policy coverage is primary, but when driving someone else's car, the policy coverage is excess and the other car's policy is primary.

23. Senate Bill 926 addresses the problem of insurers that become insolent two or more years after an accident. The bill takes out the two year limit on bankrupt insurers for the purposes of the definition of "uninsured vehicle."

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 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 of 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.

MEMORANDUM

To: Commissioners of the Oregon Law Commission
From: David Kenagy
Date: September 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.

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.

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 Deputy 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

Commission's Law Reform Agenda for 2007 Legislative Session

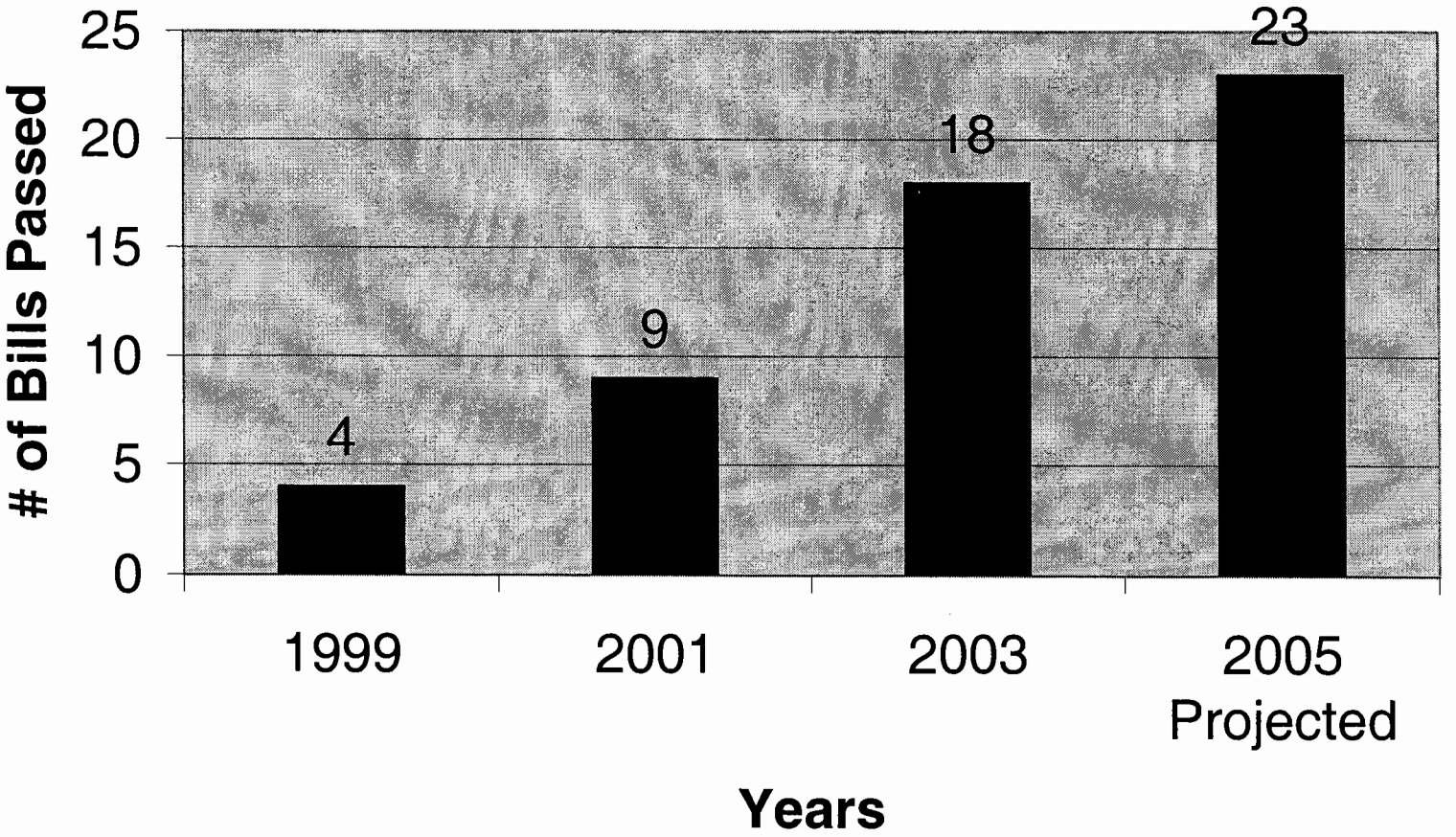
The following projects are on the Commission's agenda:

- Criminal Background Checks—project should improve clarity and public safety
- Government Bonding (ORS chapters 286, 287, 288)—project should provide cost savings and clarity for state and local government
- Government Ethics—project should provide clear standards for good government and include enforcement recommendations for the standards
- Uniform Parentage Act (UPA)—project should help families and update the law

The following projects are under consideration:

- Elective Share Reform
- Juvenile Court Fitness to Proceed Standards
- Juvenile Court Probation Violation Sanctions
- Mandatory Child Abuse Reporting Standards/Training Issues
- Continued Work on Earlier Law Commission Projects, e.g. Automobile Insurance, Civil Rights, Judicial Sales, Judgments, and Juvenile Law

Oregon Law Commission Bills by Session



2005 Oregon Law Commission Legislative Package at a Glance

Bill Number	Work Group	Work Group Chair	Drafter of Report(s) for Bill(s)
HB 2275	**1. Administrative and Judicial Child Support**	Prof. Sandra Hansberger	Shani Fuller
	2. Automobile Insurance:	Martha Walters	
SB 922	Self-Insured Vehicles Under Liability and UM/UIM Insurance Statutes		Joel Devore
SB 923	Matching Minimum Limits and Multiple Claimants Under UM/UIM Insurance Statutes		Joel Devore
SB 924	UM Coverage to Insureds Injured by Stolen Cars		Steve Murrell
SB 925	Overlapping Insurance in UM/UIM Statute		Joel Devore
SB 926	Bankrupt Insurance Companies		Tom Mortland
	3. Civil Rights:	Sen. Vicki Walker	Wendy Johnson
SB 235	Discrimination Against Disabled Persons By Places of Public Accommodation		
SB 236	Statute of Limitations for Public Accommodation Discrimination Claims		
SB 237	Statute of Limitations for Occupational Safety and Health Discrimination Claims		
SB 238	Miscellaneous Remedy Ambiguities		
SB 239	Standardized List of Protected Classes in Civil Rights Laws		
	4. Eminent Domain:	Greg Mowe	Wendy Johnson
HB 2268	Appraisal Exchanges		
HB 2269	Immediate Possession		
	5. Judgments/Enforcement of Judgments	Prof. Sandra Hansberger	
HB 2359	Judgments		David Heynderickx & Randall Jordan
SB 920	Judicial Sales		Gerald Watson
	6. Juvenile Code Revision	Sen. Kate Brown	
SB 229	Intervenor Clean-up		Wendy Johnson
SB 230	Guardian *ad Litem*	Julie McFarlane	Jason Janzen
SB 231	Confidentiality of Juvenile Court Records	Michael Livingston	Michael Livingston
SB 232	Juvenile Panel of the Psychiatric Security Review Board (PSRB)	Mary Claire Buckley	Katherine Berger & Mary Claire Buckley
SB 233	Juvenile Code Split	Timothy Travis	Timothy Travis
SB 234	The Rights of Putative Fathers in Juvenile Court	KayT Garrett	Professor Leslie Harris
SB 921	Rights and Procedures for Parents in Certain Private Adoption Proceedings		Wendy Johnson
HB 2276	**7. Welfare Code**	Prof. Sandra Hansberger	Heather Vogelsong

Appendices

Appendices Note

The explanatory reports provided in this section were approved by both the respective work group and by the Oregon Law Commission for recommendation to the Legislative Assembly, unless otherwise noted in the report. The reports were also submitted as written testimony to the Legislative Committees that heard the respective bills. Thus, these reports can be found in the State Archives as they constitute legislative history.

Some bills were amended after the Commission approved recommendation of the bill and accompanying explanatory report. The reports are generally printed as presented to the Commission; however, some reports had minor edits made after the Commission's approval. Several of the bills were amended during the Legislative Session. Rather than try to change the text of the reports affected, the Executive Director's office staff has inserted an "Amendment Note" at the conclusion of reports when a bill was amended to assist the reader by providing context and history.

Juvenile Code Revision Work Group:

INTERVENOR CLEANUP

SB 229

Prepared by Wendy J. Johnson
Oregon Law Commission
Deputy Director

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

Report Approved at
Oregon Law Commission Meeting on
January 18, 2005

I. Introductory Summary

This proposed bill cleans up 3 small items missed in SB 72 (2003) that was submitted by the Juvenile Code Revision Work Group's Intervention Sub-Work Group last session.

II. History of the Project

SB 72 (2003) resolved inconsistencies in ORS 419B.116 and ORS 109.119. One of the objectives of the 2003 bill was to clarify that ORS 419B.116 is the only statute governing the process for intervening in a juvenile dependency proceeding to become a party. Persons asserting that they have a "caregiver relationship" with a child who is the subject of the juvenile dependency proceeding may file a motion for intervention in the proceeding under that statute. ORS 419B.116(1) defines "caregiver relationship."[1] The

[1]ORS 419B.116 provides in relevant part:

(1)(a) As used in this section, "caregiver relationship" means a relationship between a person and a child or ward:
(A) That has existed:
(i) During the year preceding the initiation of the dependency proceeding;
(ii) For at least six months during the dependency proceeding; or
(iii) For half of the child or ward's life if the child or ward is less than six months of age;
(B) In which the person had physical custody of the child or ward or resided in the same household as the child or ward;
(C) In which the person provided the child or ward on a daily basis with the love, nurturing and other necessities required to meet the child or ward's psychological and physical needs; and
(D) On which the child depended to meet the child or ward's needs.

bill deleted provisions in ORS 109.119 that also allowed a court to grant or deny a motion for intervention as that provision conflicted with ORS 419B.116.

III. Statement of the Problem Area and Solution

A cross-reference in ORS 419B.192 to ORS 119.119 was missed in SB 72 (2003); thus, presently ORS 419B.192 references the repealed provision. The correct reference is to ORS 419B.116 and the correct term is "caregiver relationship." See Section 1 of LC 190.

In addition, ORS 419B.116(1), the provision defining "caregiver relationship" requires clarification in (A)(i). See Section 2 of LC 190. The intent of the definition of "caregiver relationship" was to capture those persons who have a meaningful relationship with a child that should be given party status in a dependency case. Persons who have had a relationship for a very short amount of time were never intended to be included. Substituting "For the 12 months immediately" for "During the year" makes it clear that a relationship for a full 12 months is necessary, and not a shorter period, to fall under subsection (1)(A)(i).

IV. Conclusion

This bill is a technical clean-up bill. The amendments to the Juvenile Code made by this bill come with the support of the Commission's Juvenile Code Revision Work Group, chaired by Sen. Kate Brown.

V. Amendment Note

This bill was amended in the Senate to add Section 4 of the bill. The amendment provides that the court may not substitute appointed counsel in termination of parental rights proceedings except pursuant to Public Defense Services Commission (PDSC) guidelines. This was an amendment requested by PDSC that was also a clean-up item that fit within the relating clause of the bill.

(b) "Caregiver relationship" does not include a relationship between a child or ward and a person who is the nonrelated foster parent of the child or ward unless the relationship continued for a period exceeding 12 months.

(2) A person asserting that the person has a caregiver relationship with a child or ward may file a motion for intervention in a juvenile dependency proceeding.

Juvenile Code Revision Work Group:

GUARDIAN AD-LITEM SUB-WORK GROUP

SB 230

Prepared by Jason Janzen
Oregon Law Commission
Law Student Research Assistant
at
Willamette University College of Law

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

Report Approved at
Oregon Law Commission Meeting on
January 18, 2005

I. Introductory Summary

This juvenile law project arose from attorney uncertainty regarding their ethical responsibilities for requesting appointment of guardians ad litem. In recent years, parties have raised issues regarding appointment of guardians ad litem (GAL) and the role of guardians ad litem for mentally ill, mentally retarded and physically incapacitated parents in dependency and termination of parental rights cases more frequently. The Juvenile Code does not delineate the role of GALs in these proceedings, nor how the attorney for the parent should work with the GAL. Increased litigation, along with confusion and a lack of consistency has resulted.

II. History of the Project

The Oregon Law Commission approved the formation of a Guardian ad Litem for Parents Work Group at its February 27, 2004 meeting. The Juvenile GAL for Parents Group is a sub-group of the Juvenile Code Revision Work Group chaired by Senator Kate Brown. Julie McFarlane, an attorney with the Juvenile Rights Project, chaired the project. Participants in the project included: Emily Cohen (private practitioner), Michelle DesBrisay (District Attorney), Kathryn Garrett (Department of Justice), Linda Guss (Department of Justice), Connie Haas (Department of Justice), Bob Joondeph (Oregon Advocacy Center), Jill Mallery (Oregon State Bar), and Ingrid Swenson (Public Defense Services). Virginia Vanderbilt, Senior Deputy Legislative Counsel, provided drafting services for the sub-group. The sub-group was also fortunate to have the participation of two persons who routinely serve as GALs: Peter Miller, an attorney working in the Portland area, and Billie Bell, a licensed social worker.

III. Statement of the Problem Area

The Juvenile Code lacks a provision that adequately addresses the issues of the appointment and the role of a GAL for a parent in a dependency or termination of parental rights proceeding. The result has been increased litigation accompanied by confusion and inconsistency.

In 1991, the Court of Appeals held that it is a violation of due process to fail to appoint a GAL for a mentally incompetent parent in a termination of parental rights proceeding. *State ex rel Juv. Dept. v. Evjen*, 107 Or App 659, 813 P2d 1092 (1991). More recently, the Court of Appeals found that the juvenile court erred in terminating parental rights based upon presentation of a *prima facie* case, where the parent had failed to appear to request trial dates, but the parent's GAL had appeared and requested that the court set trial dates. *State ex rel Juvenile Department v. Cooper*, 188 Or App 588 (2003). *Cooper* illustrates the fundamental lack of statutory guidance in the Juvenile Code sufficient to produce consistent decisions by the juvenile courts throughout Oregon.

Legal ethics issues also arise in this area. The Oregon State Bar Ethics Committee issued a formal opinion regarding "Zealous Representation: Requesting a Guardian *ad Litem* in a Juvenile Dependency Case." OSB Formal Op. No. 2000-159 (2000). The opinion states the following three conclusions with qualifications: a lawyer may not ethically request a GAL for a client; when a lawyer acts as GAL, the lawyer does not have the same ethical duties, obligations, and powers as in a regular attorney-client relationship; and after the appointment of the GAL for the mentally ill parent, the parent's lawyer is obligated to take direction from the GAL and from the parent client.

IV. Objectives

The clear objective for this sub-work group was to devise a bill that would properly answer the following questions if deemed relevant to the bill:

1. When should a GAL be appointed?
2. Who can/should request a GAL and under what circumstances?
3. What procedure should apply in determining whether to appoint a GAL?
4. Should a parent be required to submit to a competency evaluation?
5. What, if any, other parties should be able to obtain their own competency evaluation of the parent?
6. What should be the qualifications of a GAL and should the GAL be paid and by whom?
7. How should a GAL determine the position they should take on issues in the case?
8. Under what circumstances and with what procedure should the appointment of a GAL be reviewed or terminated?
9. What are the duties and authority of a GAL? Specifically, can a GAL take actions that are contrary to the stated wishes of the parent, including admitting petitions for jurisdiction and termination of parental rights, or signing voluntary relinquishments?
10. Can a GAL continue to pursue the case if the parent has disappeared? For how long?
11. What should be the GAL's relationship to the parent?
12. Should a GAL have their own counsel?

V. Existence of Legal Solutions Proposed in Other Jurisdictions

While some states have statutes dealing with the issue at hand, the group felt that no existing state statutes were adequate to properly take on the potential problems arising in Oregon. One state requires appointment of a GAL if the parent's parental rights are sought to be terminated due to mental illness or mental deficiency. Neb. Rev. St. § 43-292.01. Other states require appointment of a GAL for a parent if they are found to be mentally ill or mentally deficient, but provide no other statutory guidance for the court. California largely relies upon case law for procedures relating to appointment of a GAL for parents. See e.g., *In re Sara D.*, 104 Cal Rptr 2d 909 (2001). The group believes that none of these options were proper for formulating a GAL for parents statute.

VI. The Proposal

Section 1.

This section provides that the bill will become a part of ORS Chapter 419B. 419B is the Juvenile dependency chapter of the Juvenile Code.

Section 2.

(1) This subsection answers the question as to who may request a GAL: the court or any party. Once a party raises the issue, the court has discretion to conduct a hearing to determine the parent's competency.

(2) Subsection two provides the first method of obtaining a hearing to determine whether appointment of a GAL is appropriate. To get a hearing under this method, a party must set forth facts that establish that it is more probable than not that the parent, due to mental or physical disability, lacks substantial capacity to either understand the nature and consequences of the proceedings or give direction and assistance to the parent's attorney on decisions the parent must make.

(3) Subsection three provides an alternative method of obtaining a hearing for this issue. Under this method, the court upon its own motion may conduct a hearing if the court has reasonable belief that the parent, due to mental or physical disability, lacks substantial capacity to either understand the nature and consequences of the proceedings or give direction and assistance to the parent's attorney on decisions the parent must make.

(4) Often, a GAL appointment can prejudice a parent. Therefore, there must be a hearing before a GAL may be appointed. At the hearing, "relevant evidence" may be received by the court. The group believes that this subsection, in conjunction with subsections 2 and 3, will adequately assure that the due process rights of a parent are protected.

(5) To appoint a GAL, the court must find by a preponderance of the evidence that the parent lacks substantial capacity to either understand the nature and consequences of the proceedings or give direction and assistance to the parent's attorney on decisions the parent must make.

(6) An appointment of a GAL under this section may not be used as evidence of mental or emotional illness in any juvenile court proceeding, civil commitment proceeding, or any other civil proceeding.

Section 3.

(1) The sub-group believes that this subsection provides clarity as to the qualifications for serving as a GAL. The persons who may serve as a GAL are licensed mental health professionals, or attorneys, who are familiar with legal standards relating to competence. These persons must have skills and experience in representing persons with mental or physical disabilities. The person serving as a parent's GAL may not be a member of that parent's family. The GAL may not have an interest or stake in the representation.

(2) The GAL is not a party in the proceeding but is a representative of the parent.

(3) This provision describes the duties of the GAL. This provision delineates the decisions that a GAL may make. Additionally, the GAL must consult with the parent, if the parent is able, and with the parent's attorney, and make any other inquiries as are appropriate. The GAL may make decisions concerning the case and litigation. This would include among other things, the ability to stipulate to terminate parental rights or a dependency petition. The GAL may also make decisions concerning the adoption of a child of the parent including release or surrender, certificates of irrevocability and consent to adoption under ORS 109.312 or 418.270, and agreements under ORS 109.305.

(4) This provision provides a guiding principle for GALs when making decisions for the parent. A GAL must make decisions consistent with what the GAL believes the parent would decide if the parent did not lack substantial capacity to either understand the nature and consequences of the proceedings or give direction or assistance to the parent's attorney on decisions the parent must make.

(5) This provision guides the attorney's interaction with the GAL, requiring the attorney to follow directions provided by the GAL on decisions that are ordinarily made by the parent.

(6) This subsection permits the GAL to have evidentiary privilege in the GAL's communications with the parent and the parent's attorney. The parent also may assert this privilege. The bill protects communications between the GAL and the parent's attorney (or representative of the attorney) and between the GAL and the parent. The sub –work group believes that such a privilege is necessary to ensure trust and free communication between the GAL and the parent.

Section 4.

(1) Subsection 1 sets out the duration of the GAL's appointment. This subsection provides that the appointment of a GAL continues until the court terminates the appointment, the juvenile court proceeding is dismissed, or the parent's parental rights are terminated, unless the court continues appointment.

(2) Subsection 2 provides a procedure for removing the GAL.

(3) The Public Defense Services Commission will compensate GALs. The group believes the cost of the procedures created in this bill will be similar to the current cost of GAL appointment procedures.

Section 5.

Section 5 amends ORS 419B.819 to require that a copy of summons for an order establishing permanent guardianship is provided to a GAL appointed under section 2 of the bill.

Section 6.

Section 6 amends ORS 419B.839 to require that a copy of summons for an order establishing jurisdiction under ORS 419B.100 be served to a GAL appointed for a parent under section 2 of this bill.

Section 7.

Section 7 amends ORS 419B.010 to include a GAL appointed under section 2 of this bill as a person who is not required to report information of child abuse communicated to that person if the communication is privileged.

Section 8.

Section 8 repeals the current GAL appointment procedure.

Section 9.

Section 9 amends ORS 419B.881 to require that information disclosed to parties under this statute is disclosed to a GAL appointed under section 2 of this bill.

VII. Conclusion

This bill addresses the lack of clarity in the law and confusion that exists in the role of the guardian ad litem (GAL) in juvenile dependency proceedings. Furthermore, the bill will reduce or limit instances where GALs are appointed erroneously.

VIII. Amendments

This bill was amended in the Senate and the House. The amendments had the input of the Oregon Law Commission Guardian *ad Litem* Sub-Work Group members during the session and were consensus amendments that improved the clarity and specificity of the bill, while also addressing concerns raised by legislators.

Section 2 was amended to clarify the procedure for appointing a guardian *ad litem*. The amendments shortened subsection 1 without changing its purpose.

The amendments also combined former subsections 2 and 3 into current subsection 2. The amended subsection 2 provides for when there shall be a hearing based on a motion made by a party or the court. Subsection 2, as amended, added a court finding requirement that the "appointment of a guardian ad litem is necessary to protect the parent's rights in the proceeding during the period of the parent's disability or impairment."

The amendments reorder the subsection requiring a hearing before appointment of a guardian *ad litem* and defining the evidence that may be received at that hearing. As amended, the evidence that may be received must be relevant to the findings required under this section and of a type commonly relied upon by reasonably prudent persons in the conduct of their serious affairs.

The amendments also moved the subsection that provides the standard of proof—a preponderance of the evidence—to subsection 4.

Former subsection 6 was not changed, but it is now subsection 5.

Section 3 was amended for form and style. Subsection 1(c) was amended to modify who may be appointed as a guardian *ad litem*. This subsection now requires the person to have skills and experience in representing persons with mental and physical disabilities or impairments. Subsection 3 was amended to require the guardian *ad litem* to make any other inquiries as are appropriate to assist the guardian *ad litem* in making decisions in the proceeding. Subsection 3, paragraph (b) was amended to provide a nonexclusive list of legal decisions the guardian *ad litem* shall make. These decisions include admitting or denying the allegations of any petition; agreeing to or contesting jurisdiction, wardship, temporary commitment, guardianship or permanent commitment; accepting or declining a conditional postponement; and agreeing to or contesting specific services placement. Former paragraphs (b), (c), and (d) were renumbered (c), (d), and (e). Amendments for form and style were made to subsection 4. Amendments to section 4 were also form and style amendments.

Juvenile Code Revision:

Confidentiality of Juvenile Court Records

SB 231

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

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

Report Approved at
Oregon Law Commission Meeting on
January 18, 2005

STATEMENT OF THE PROBLEM

ORS 419A.255 governs the confidentiality of information in the juvenile court's *legal file* ("the petition and all other papers in the nature of pleadings, motions and orders * * * and other papers filed with court") and in the court's *social history file* ("[r]eports and other material relating to the child, ward, youth or youth offender's history and prognosis"). The text of ORS 419A.255 is set out in the Appendix to this report.

The core provisions of ORS 419A.255 – subsections (1) and (2) -- apply to both dependency and delinquency proceedings and have remained substantially unchanged since they were enacted as part of the 1959 juvenile code.[1] *See* Or Laws 1959, ch 432, § 46. At that time,

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[1] Subsections (1) and (2) of the 1959 juvenile code are set out below:

(1) The clerk of the court shall keep a record of each case, including therein the summons and other process, the petition and all other papers in the nature of pleadings, motions, orders of the court and other papers filed with the court, but excluding reports and other materials relating to the child's history and prognosis. The record of the case shall be withheld from public inspection but shall be open to inspection by the child, his parent or guardian or other persons having a proper interest in the case, and their attorneys, or by any person authorized by the court to inspect the record.

(2) Reports and other material relating to the child's history and prognosis are privileged and, except with the consent of the court, shall not be disclosed directly or

distinctions between "delinquent" and "dependent" children were thought to serve no useful purpose and the juvenile department was part of the juvenile court. *See Report of the Legislative Interim Committee on Judicial Administration*, Part II – Juvenile Law, January 1, 1959, at 11-12. Since then, the statute has been amended piecemeal in an effort to reflect changes elsewhere in the code, but the problems discussed below remain. *See, e.g.,* Or Laws 1993, ch 33, § 49; Or Laws 1993, ch 234, § 3; Or Laws 1995, ch 422, § 68. A comprehensive amendment of ORS 419A.255 is long overdue. For example:

- Some "parties" to juvenile court proceedings who have a right, under ORS 419B.875 and 419C.285, to obtain *copies* of confidential juvenile court records are not expressly authorized by ORS 419A.255 to inspect or have access to these same materials. Those parties include the district attorney, DHS (the Department of Human Services), and OYA (the Oregon Youth Authority). The statute also is silent on the question of whether the district attorney, the juvenile department, OYA, and DHS may disclose to each other information obtained from the juvenile court's legal file and social history files, notwithstanding that such disclosures are a practical necessity – and occur daily throughout the state – in both delinquency and dependency cases.

- When subsection (2) of what is now ORS 419A.255 was enacted in 1959, the juvenile department was, in effect, part of the juvenile court and was responsible for maintaining the social history file. *See Report of the Legislative Interim Committee on Judicial Administration*, Part II – Juvenile Law, January 1, 1959, at 26. However, notwithstanding that the juvenile department no longer is part of the juvenile court and the juvenile court is part of the Judicial Department, subsection (2) has *not* been amended to specify whether the juvenile court or the juvenile department is responsible for maintaining the social history file.[2] The social history file includes, among other things, reports submitted to the court by DHS and OYA, as required by other provisions of the juvenile code, and the court relies (at least in part) on these reports in certain disposition proceedings. There is continuing uncertainty about the responsibility for maintaining these materials and what is or is not deemed to be included in the "record on appeal" from juvenile court orders in such proceedings. *See generally, e.g., State ex rel DHS v. Nancy Marie Lewis,* 193 Or App 264, 89 P 3d 1219 (2004) (record on appeal from order issued following permanency hearing).

- ORS 419A.255(1) does not identify adequately what is included in the "record of the case." For example, subsection (1) does not state whether transcripts of juvenile court proceedings are part of the record of the case, and, in March 2003, a newspaper reporter

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indirectly to anyone other than the judge of the juvenile court and those acting under his direction.

See 1959 Or Laws, ch 432, § 46.

[2] Last year, an informal survey of the state's juvenile courts revealed that, currently, there is no uniform procedure for keeping these records and that, in some counties, the records are not kept on file at all.

who requested a transcript found it necessary to seek a Public Records Order from the Attorney General to resolve that question. The Attorney General concluded that transcripts *are* part of the "record of the case," under ORS 419A.255(1), and, for that reason, are confidential. *See* Public Records Order, March 5, 2003. A copy of that order is attached as part of the Appendix to this report.

- ORS 419A.255 does not make clear whether materials maintained by DHS and OYA, which are copies of or are the bases for the "reports and other material" in the juvenile court's social history file, as described in ORS 419A.255(2), also are confidential.

- The confidentiality of court records in delinquency proceedings (ORS ch 419C) and dependency proceedings (ORS ch 419B) should be governed by separate statutes.

HISTORY OF THE PROJECT

In May 2004, the Oregon Law Commission's Juvenile Code Revision Work Group proposed and the Oregon Law Commission approved the drafting of amendments to ORS 419A.255 to correct the problems and deficiencies outlined above. During the summer and fall of 2004, the Juvenile Code Revision Work Group's Confidentiality Sub-Work Group, which had developed the proposal, began the task of drafting the proposed legislation.[3] During the course of their work, the sub-group members discovered that, given the current structure of ORS 419A.255, it was not feasible to accomplish the goals of the proposal by using that statute as a framework for the required changes in the law. Rather, it would be necessary to draft a series of new statutes to replace ORS 419A.255, a task that could not be completed in time for the bill to be considered by the 2005 Legislature. At the same time, the sub-group members agreed that three of the problems the proposal was intended to resolve can and should be addressed immediately in the form of a "stand-alone" bill. Those problems are:

> (1) The lack of express authority for district attorneys, assistant attorneys general, juvenile departments, OYA and DHS to have access to confidential juvenile court materials described in ORS 419A.255 (1) and (2) and to share with each other the information contained therein in connection with their official duties in a juvenile court proceeding;
>
> (2) The lack of any requirement or procedure to insure that social history materials upon which the juvenile court relies in certain disposition hearings are identified and will be available as part of the record, if a party to the proceeding decides to appeal; and

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[3] **Confidentiality Sub-Group Members:** Honorable Terry Leggert, Marion County Circuit Court Judge; Amy Holmes Hehn -- DDA, Multnomah County District Attorney's Office; Karen Andall -- Oregon Youth Authority; Tim Loewen -- Yamhill County Juvenile Department; Michael Livingston (Chair) -- AAG, Oregon Department of Justice; Linda Guss – AAG, Oregon Department of Justice; Kathie Berger, Attorney, Angela Sherbo, Attorney, Juvenile Rights Project; Harry Gilmore, DHS; Timothy Travis, Judicial Department; Nancy Miller, Judicial Department; and Bradd Swank, Judicial Department.

(3) The need to clarify whether transcripts of juvenile court proceedings are confidential.

PROPOSED SOLUTION

In order to correct the three problems identified above, the Juvenile Code Revision Work Group has drafted legislation to be recommended in the 2005 Legislative Session. SECTION 2 of the proposed legislation establishes requirements for identifying and preserving for appeal the social history file materials upon which the juvenile court relies in making its disposition orders; SECTION 3 provides that the transcripts of juvenile court proceedings are confidential; and SECTION 4 authorizes district attorneys, assistant attorneys general, juvenile departments, OYA and DHS to have access to confidential juvenile court materials described in ORS 419A.255 (1) and (2) and to share with each other the information contained therein in connection with their official duties in a juvenile court proceeding. Sections 1, 2, and 3 were presession filed and compose the text of SB 231. Section 4 was completed later and is found in the SB 231-1 amendments to the bill.

CONCLUSION

Although the proposed legislation (SB 231 with SB 231-1 amendments) does not solve all of the current problems with ORS 419A.255, it does address three of the more troublesome ones and, at the same time, provides an important first step toward re-writing and re-codifying the provisions that govern the confidentiality of juvenile court records.

AMENDMENT NOTE

This bill was amended in the Senate and the House. Section 4 was added to the bill in the Senate as –1 amendments. This amendment was anticipated and was covered in the report above. Section 4 makes it clear that the DA, AAG, DHS, and OYA have access to juvenile records. It also provides for the sharing of juvenile records between these persons or agencies.

Amendments made in the House were to Section 2, and Section 5 was also added. The Section 2 amendments were to clarify how materials are made part of the evidentiary record in juvenile proceedings. That is, to become a part of the record, the judge must receive the offered material as an exhibit, take judicial notice of the material, or the material must be testified to. See State exrel Department of Human Services v. Lewis, 193 Or App 264 (2004). The court shall cause a list to be made that reasonably identifies information judicially noticed. Section 5 of the bill adds an emergency clause to the bill, and thus the Act takes effect on its passage.

Juvenile Code Revision:

JUVENILE PANEL OF THE PSYCHIATRIC SECURITY REVIEW BOARD (PSRB)

SB 232

Prepared by
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From the Offices of the Executive Director
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Report Approved at
Oregon Law Commission Meeting on
January 18, 2005

1. Introductory Summary

Juveniles alleged to have committed a delinquent act have the ability to raise a defense of mental disease or defect, *see State ex rel Juvenile Department of Multnomah County v. L.J.*, 26 Or App 461, 552 P 2d 1322 (1976), but the juvenile code is silent as to the disposition available to the juvenile court if a youth is successful in asserting the defense. The Oregon Law Commission Juvenile Code Revision Work Group recognizes that the lack of dispositional alternatives may result in the denial of constitutional rights of some mentally ill youth.

2. History of the Project

This project was initiated by a Sub-Work Group of the Juvenile Code Revision Work Group[1] whose task it was to develop a model of the successful adult Psychiatric Security Review Board (PSRB) for incorporation into the juvenile code. The Sub-Work Group was formed to during the interim before the 2003 session and included the following persons: Mary Claire Buckley, PSRB; Kathie Berger, Juvenile Rights Project; Helen Smith and Amy Holmes Hehn, Multnomah County District Attorney's Office; Karen Brazeau and Phil Cox, Oregon Youth

[1] Sen. Kate Brown, Vice-Chair of the Oregon Law Commission, chairs the large Juvenile Code Revision Work Group.

Authority; the Honorable Deanne Darling, Circuit Court Judge; Muriel Goldman, citizen member; Bob Joondeph, Oregon Advocacy Center; Nancy Miller, Oregon Judicial Department; Mickey Serice and Bill Bouska, Department of Human Services; and Ingrid Swenson, Oregon Criminal Defense Lawyers' Association. The sub-work Group completed SB 887 (2003) and the bill was recommended by the Oregon Law Commission to the 2003 Legislative Assembly. Due to the large fiscal statement on the bill, the bill did not get out of the Ways and Means Committee during the 2003 session. This 2005 session's bill is substantially similar to that submitted in 2003. During the interim before the 2005 session, the Sub-Work Group continued to work on the fiscal statement details of the bill and made minor changes to the bill.

3. Statement of the Problem Area

Alleged delinquent youth have the right to assert an insanity defense. In criminal court, successful assertion of this defense results in a finding that the person was guilty but insane and the sentencing court can either discharge the case or can commit the person to the supervision of the Psychiatric Security Review Board. The person can be placed in a hospital or facility designated by the Department of Human Services or can be placed and monitored in the community. If a person under the supervision of the PSRB is placed in the community, the person may be moved to a more structured setting, if their mental health needs and protection of the community warrant this type of placement.

The Oregon Juvenile Code is silent as to the dispositional options for youth who are successful in asserting the defense. Since they have not been adjudicated on the offense, they cannot be placed in the custody of the Oregon Youth Authority. Historically, these youth have been placed into the custody of the child welfare agency, which cannot provide the level of community protection needed in many cases. Due to the confusion regarding possible dispositional alternatives, many defense attorneys do not raise the defense and when raised, judges may not find that the defense was successful due to a concern for community safety.

4. Objective of the Proposal/Section Analysis

The proposal seeks to establish a juvenile panel of the Psychiatric Security Review Board.

Section 1

This section provides for the newly created term "young person" to distinguish persons put under the PSRB through juvenile court from other person terms, including "child," "youth," or "youth offender."

Section 2

This section incorporates the defense of insanity into the Oregon Juvenile Code.

Section 3

This section provides for newly defined terms in the juvenile code. The term "mental disease or defect" is derived from the definition in the Oregon Criminal Code, but it is modified to also exclude "solely a conduct disorder" from the diagnoses that are included in a mental disease or defect. Personality disorder diagnoses cannot be given to persons under 18 years of age, and the diagnosis of conduct disorder does not mean the person will later develop a personality disorder. Conduct disorder does manifest itself, when it is a sole diagnosis, in repeated antisocial conduct. A conduct disorder diagnosis is not limited to persons under 18 years of age, but is most commonly given to persons under 18 years of age.

The term "serious mental condition" provides a limitation on the broader "mental disease or defect" term and is added to restrict the number of youth put under the jurisdiction of the PSRB.

Section 4

This section provides that insanity is an affirmative defense.

Section 5

This section outlines the requirements of the youth to give notice of intent to rely on the insanity defense. There is no express timeline for the filing of the notice of intent to rely on the insanity defense for youth that are held in detention, due to the short timelines for adjudicating the petition filed against youth held in detention pretrial.

Subsection 2 sets out the timeline for the filing of the notice of intent to rely on the insanity defense for youth who are not in detention. The timeline is tied to the filing of the petition because it is the one event that is consistent throughout all counties.

Subsection 3 expressly states that, if a youth is not held in detention pretrial and is not represented by an attorney during the time period for filing the notice, the youth shall be given additional time to file the notice of intent to rely upon the insanity defense. In many counties, the appointment of counsel may not occur until 60 days after the filing of the petition.

Subsection 4 clarifies that the filing of a notice of intent to rely upon the insanity defense is express consent for continued detention under ORS 419C.150. However, this does not preclude a judge from releasing a youth pretrial after the notice of intent to rely upon the insanity defense if a less restrictive alternative placement can be found. The express consent for continued detention also does not relieve the court from holding 10-day detention hearings pursuant to ORS 419C.153.

Section 6

This section gives the State the ability to have the youth evaluated by an expert of the State's choosing. The term "board eligible" means that the psychiatrist has all of the eligibility

requirements to sit for the certification examination, but has not yet taken the examination. By allowing these psychiatrists to evaluate the youth, we are expanding the number of qualified psychiatrists because the number of psychiatrists who are board certified in child psychiatry is quite low in Oregon.

Just as in the insanity defense in the Criminal Code, the youth has the ability to object to the expert chosen by the State and, if good cause can be shown, the court can direct the State to select another expert.

The requirement that the report generated from the examination shall be provided to the State is added because the confidentiality restriction of reports pursuant to ORS 419A.255(2) does not allow the State to receive copies. Rather than amending ORS 419A.255(2), we included a right for the State to receive a report from this evaluation in this section.

Section 7

Subsection (4)(e) allows for the termination of juvenile court jurisdiction when the court places a person under the jurisdiction of the PSRB as provided in section 13. However, if the court already has jurisdiction over the person, the court can elect to continue that jurisdiction. This is so the court does not need to reestablish jurisdiction over a person after the person is discharged from the jurisdiction of the PSRB because the person is still a juvenile and still requires the services of the juvenile court.

Section 8

This section provides the right to notice of any proceeding before the PSRB to all parties listed.

Section 9

This section provides that the youth has the burden of proving the affirmative defense of insanity by a preponderance of the evidence. This is the same burden of proof as in criminal court.

Section 10

This section sets out what the youth must prove to be found responsible except for insanity. The defense is the same as the defense in criminal court.

This section also sets out the dispositional options if the youth is found responsible except for insanity (REI). If the youth is found REI, the court then must find, by a preponderance of the evidence, whether, at the time of disposition, the youth either has a serious mental condition (as defined in Section 1) or presents a substantial danger to others. If the court finds either condition by a preponderance of the evidence, the court must order a disposition under section 13.

If the court finds neither condition by a preponderance of the evidence, the court may not put the youth in the custody of the Oregon Youth Authority or place the youth on probation. The

court may find the youth within the jurisdiction of the court on dependency grounds and order any disposition authorized by ORS 419B, initiate civil commitment proceedings, or enter an order of discharge.

Section 11

This section sets out that the dispositional duration for young persons under the jurisdiction of the PSRB shall be the same as the available dispositional duration for a delinquency matter. The only exception is for young persons found to be within the jurisdiction of the court for committing an act, which if committed by an adult, would constitute the crime of murder or any aggravated form of murder; the dispositional duration is for life for these acts.

Only juveniles under the age of 15 at the time of the alleged act can be prosecuted in juvenile court for acts that would constitute murder or an aggravated form of murder, if committed by an adult. While the juvenile court can waive jurisdiction and allow the juveniles to be prosecuted as adults in criminal court, the Work Group believed that mentally ill juveniles should not be subjected to the possibility of life in prison sentences in criminal court in order to receive lifetime supervision under the jurisdiction of the PSRB.

Section 12

This section simply provides that the new statutory provisions of the bill will be added to Chapter 419C. Chapter 419C is the delinquency chapter of the Juvenile Code.

Section 13

If the court finds a youth REI and has either a serious mental condition or presents a danger to others, and the court feels that the youth requires either a conditional release or a commitment to a hospital or facility, the court shall order the young person under the jurisdiction of the PSRB. Throughout the dispositional portions of this bill, the reference is to "hospital or facility" to allow for the most flexibility for DHS in placing these youth.

Subsection (2) sets out the findings that the court must make to determine whether the young person should be conditionally released or committed to a hospital or facility. This subsection makes it clear that the protection of society must be the primary concern for the court when determining whether a young person should be released on conditional release or committed to a hospital or facility.

Subsection (3) allows the court, when considering whether a young person should be conditionally released, to order examinations or evaluations deemed necessary to assist the court.

Subsection (4) requires the court to notify the Juvenile PSRB of its conditional release order, the supervisor designated and all conditions of release.

Subsection (5) (a) requires the court to make a determination of whether the young person's parent or guardian is willing and able to assist the young person in obtaining necessary

mental health or developmental disabilities services and is willing to acquiesce in the decisions of the board. If the court finds that the parent or guardian is able and willing to do so, the court shall order the parent to sign an irrevocable consent in which the parent or guardian agrees to any placement decision made by the board. If not, the court shall order that the young person is put into the custody of DHS for the purpose of obtaining necessary mental health or developmental disability services. This section is necessary to ensure that the board has the authority to make placement decisions regarding the young person, with the usual appellate review to the Court of Appeals, but without having to run to juvenile court every time a placement change occurs, or is requested and turned down by the board.

Subsection (5)(b) requires that the court make specific findings about whether there is a victim and if there is a victim whether the victim wishes to be notified of any board decisions. While this does not preclude a victim from changing his/her mind regarding notification in the future, the requirement of specific findings regarding the victim's wish for notification of future hearings is meant to ensure that notification occurs.

Sections 14 – 19 are similar to ORS 161.336 – 161.351, but have been reorganized in an attempt to make logical sense. There were no substantive changes intended by the reorganization.

Section 14

This section gives the PSRB authority to conduct hearings filed under or required by sections 17, 18, or 19 and sets out the findings that must be made by the Board at every hearing.

Subsection (8) allows the PSRB to appoint an appropriate psychiatrist or psychologist to examine the young person and submit a report to the PSRB regarding the young person's mental disease or defect, the danger the young person presents to others if the mental disease or defect is not a serious mental condition, and whether the young person can be adequately controlled with treatment services.

Subsection (10) outlines what evidence the Board may consider when making placement decisions.

Subsection (12) establishes that the Board is responsible for providing written notice of any hearing within a reasonable time period, and sets out what information the notice must include.

Subsection (16) sets out that the Board must provide written notice of the Board's decision within 15 days after the conclusion of the hearing.

Subsection (17) clarifies that the Board is responsible for maintaining the records of young persons under the Board's jurisdiction and for ensuring the confidentiality of those records.

Section 15

This section sets out the ability of a young person to qualify for a court-appointed attorney and establishes procedures for the appointment of counsel. The section also establishes the ability of the board to order the young person, the young person's parent or guardian or the guardian of the estate, to repay the costs of the young person's court-appointed attorney, if any of those parties is financially able to repay the cost. This section also establishes that the Attorney General represents the state unless the district attorney from the county in which the young person was adjudicated elects to represent the state.

Section 16

This section outlines the requirements of a conditional release ordered by the PSRB, including how the young person can be returned to the hospital or facility designated by the Department of Human Services and the timelines for hearings.

Section 17

Subsections (1) – (3) deal with hospital or facility requested hearings for an order of discharge or conditional release. The director of the hospital or facility submits the application for a hearing, which includes a verified conditional release plan, if conditional release is being requested.

Subsections (4) – (7) deal with a hearing that is requested by the young person or the young person's parent or guardian. The applicant has the burden of proving the young person's fitness for discharge or conditional release unless more than two years have passed since the state had the burden of proving the young person's lack of fitness for discharge or conditional release; then, the state has the burden of proving the young person's lack of fitness for discharge or conditional release.

Section 18

This section establishes the timelines for required hearings for the young person, which include an initial hearing no later than 90 days after commitment; an annual hearing if no other hearing has been requested; and a hearing no later than 30 days after a young person has been on conditional release for three consecutive years.

Section 19

This section establishes when a case is transferred from the juvenile panel of the PSRB to the adult panel of the PSRB. This transfer will occur when the young person attains the age of 18, if the young person was adjudicated on an act which would constitute murder or any aggravated form thereof. If the young person was adjudicated for an act which was not murder or any aggravated form thereof, the juvenile panel may hold a hearing at any time after the young person attains the age of 18 to determine whether it is in the young person's best interest to

transfer his/her case to the adult panel of the PSRB. The juvenile panel shall transfer the case unless good cause is shown.

The Work Group felt that the case should be transferred to the adult panel when the young person attained the age of 18 to mirror the federal Medicaid requirements. Additionally, many diagnoses which cannot be given prior to a juvenile's 18th birthday, are available after the person turns 18. Thus the young person's case would no longer need to be monitored by a panel with expertise in juveniles. Finally, it was determined that although cases should be transferred to the adult panel after the young person turned 18 years of age, there would be situations (i.e., the young person's jurisdiction will lapse soon after his/her 18th birthday) where it would make the most sense for the juvenile panel to continue monitoring the case.

Section 20

This section sets out the qualifications of the persons to be appointed to the juvenile panel of the PSRB, as well as makes clear that there would be two separate panels, both administered by the PSRB.

Section 21

This section clarifies that youths found to be responsible except for insanity (REI) cannot be ordered to pay the unitary assessment pursuant to ORS 137.290.

Section 22

This section clarifies that for the purpose of ORS 137.712, an adjudication of a juvenile to be REI is not included in the definition of the word "conviction," as used in this statute.

Section 23

This section adds the contested hearings for a young person before the PSRB as hearings to which counsel may be appointed.

Section 24

This section adds young persons under the jurisdiction of the PSRB to ORS 161.375, the escape statute.

Section 25

This section amends the Oregon Evidence Code to include proceedings in accordance with ORS 419C.400 (4).

Section 26

These sections modify the dispositional order subsection of 419C.626 to conform to amendments made by this Act.

Section 27

This section modifies ORS 419C.656, tracking the numbering change made to ORS 419C.400 in Section 9.

Section 28

This section makes Section 29, regarding notification to schools, a part of ORS Chapter 419A, the Juvenile Code's general provisions and definitions chapter.

Section 29

This section requires that DHS notify school districts when young persons are conditionally released just as OYA must provide such notification for youth offenders.

Section 30

This section amends ORS 181.607 to allow young persons to request relief from sex offender registration after the termination of PSRB jurisdiction just as persons whose juvenile court jurisdiction has terminated may. The section also sets forth the time frames for such a petition as well as the burden of proof.

Section 31

This section amends ORS 419B.100 to add, as a basis for jurisdiction, an order entered by the court pursuant to Section 10(7)(a) of this Act. Section 10(7)(a) allows for the court to "[e]nter an order finding the youth to be within the court's jurisdiction under 419B.100 and make any disposition authorized by ORS chapter 419B."

Sections 32 and 33

These sections deal with the appeals of Board decisions to the Court of Appeals.

Section 34

This section requires sex offender registration for young persons found responsible except for insanity of an act that would constitute a sex crime if committed by an adult.

Section 35

This section defines the terms of the members of the juvenile panel of the PSRB as well as the initial terms for the first juvenile panel of the PSRB.

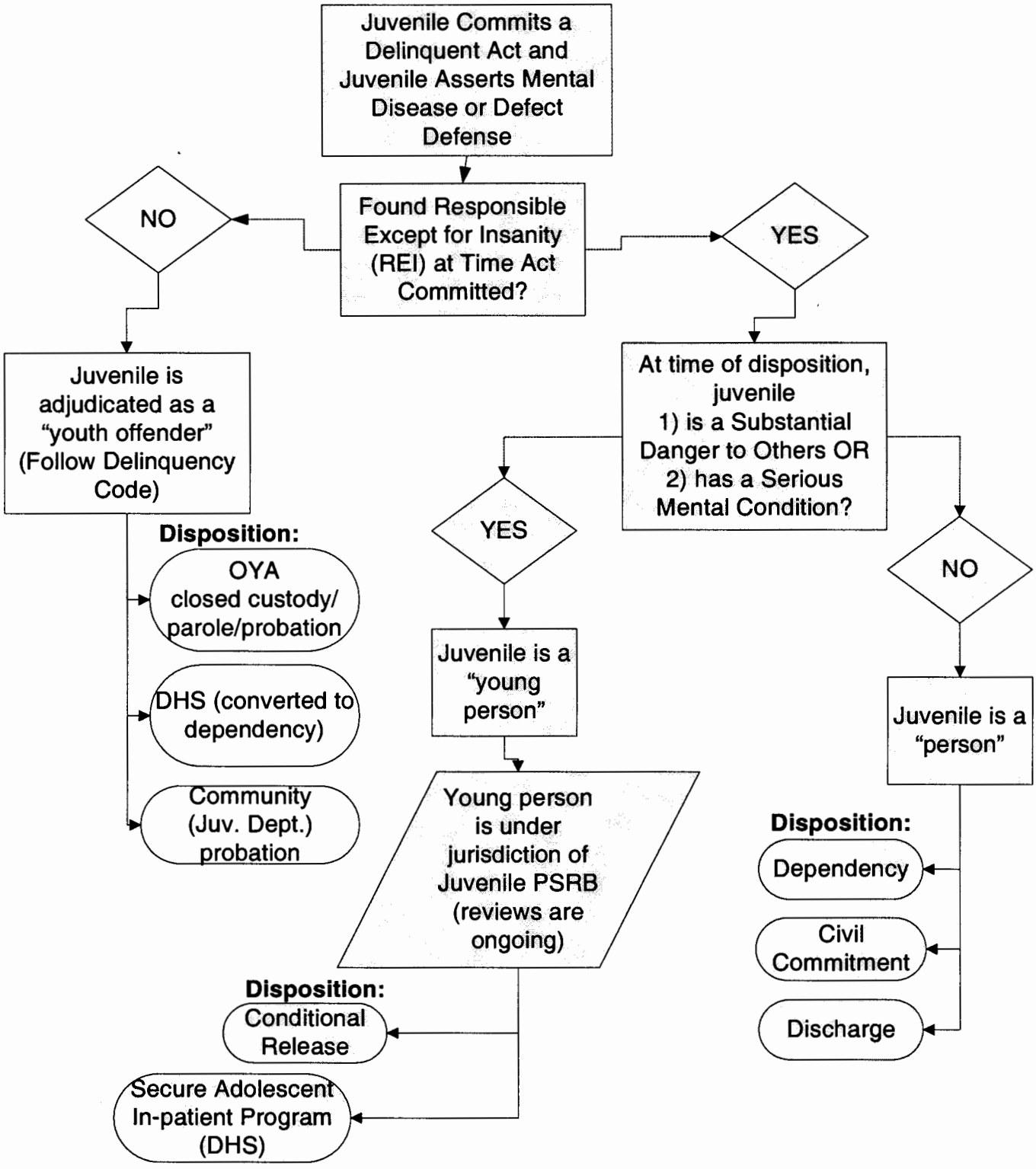
Section 36

This section authorizes the appropriation of funds to carry out the duties, function and powers of the Board.

Sections 37, 38 and 39

These sections establish the effective dates of this bill. The operative date of most of the bill is January 1, 2006—the traditional date for bills passed during the 2005 session. See Section 38. The bill does however have an emergency clause provision in Section 39. Thus, those provisions of the bill not listed in Section 38, namely those setting up the board membership and appropriating money, would occur on July 1, 2005, assuming the bill has passed by then. In this way, the machinery will be in place and preparations can be made before the rest of the bill takes effect on January 1, 2006.

Flow chart for SB 232



Juvenile Code Revision Work Group:

JUVENILE CODE SPLIT

SB 233

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From the Offices of the Executive Director
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Report Approved at
Oregon Law Commission Meeting on
February 17, 2005

Introduction: Sub-Work Group Composition and Mission

The Sub-Work Group had the benefit of participation of an inclusive cross-section of the juvenile court community, including representatives from the Department of Human Services, the Attorney General's Office, the courts, juvenile departments, Court Appointed Special Advocates, and attorneys representing children and parents.

The Juvenile Code Split Sub-Work Group has been in operation for the past two sessions and has concerned itself with "cleaning up" the statues. The group has not previously seen itself engaged in substantive change of any statute.

Background: Two Dynamic Bodies of Law Diverging From One Another

Although this Sub-Work Group has previously dealt with highly technical changes to the three chapters of the Oregon Revised Statutes commonly known as "The Juvenile Code," it found this time that there are conflicts between some individual statutory provisions and the policies that underlie the statutory scheme(s) as a whole. It is common to find that statutory provisions within a particular body of law "conflict" with one another. In the case of juvenile law in Oregon, however, conflicts resulted from an uneven implementation of conscious efforts at wholesale reform in the past. The result is that the business of addressing juvenile delinquency could, currently, be compromised because some of the statutes that govern such cases retain language that should have been changed in the course of the divergence, over the past fifteen years, of delinquency and dependency law.

This body of law, commonly known as "The Juvenile Code," was contained in a single chapter in the Oregon Revised Statutes until 1993. This single chapter, ORS 419, contained statutes governing both delinquency and dependency (child abuse and neglect) cases. That was because it had come into being when a single policy governed both kinds of cases, which were seen as different manifestations of a single social problem or set of social problems. Delinquency and dependency cases were approached with a common set of assumptions and values, and were thus governed by a common body of law. The guiding principle, the underlying policy, of this body of law was "the best interest of the child."

In fifteen intervening years, however, dependency and delinquency law have diverged markedly. Society no longer sees these as two manifestations of a single problem or set of problems, and federal and state mandates have thus changed the underlying policy in each area.

This process of divergence began in 1993 when ORS Chapter 419 was divided into three separate chapters, ORS 419A (containing statutes pertaining to both dependency and delinquency cases), ORS 419B (containing statutes pertaining to dependency cases) and ORS 419C (statutes pertaining to delinquency cases).

This division, which was done by a group consisting of a cross section of the juvenile court community, presented problems. Many discussions centered on whether this statute or that pertained to delinquency cases or dependency cases or both. Since the work proceeded on a consensus basis, many statutes ended up in both the dependency and delinquency chapters because members of the group could not agree or because it was not immediately apparent what use either system might make of a provision. (An example where the expunction statutes. Clearly expunction was related to delinquency law but the possibility still remained that a young child committing a delinquent act might well be brought under the jurisdiction of the court under ORS Chapter 419B "as a dependent"and therefore might, at a later age, want to apply the expunction statutes to that case).

This group understood that as time went on changes would be made and that provisions assigned to one or the other chapter might well be eliminated or modified.

In general, the approach adopted by this group and applied to dividing Chapter 419 in 1993 was consistent with the development of American law and social policy since: Dependency cases have remained centered around "the best interest of the child," and have retained a family centered focus while delinquency law has left that standard behind as a guiding principle and has adopted an approach based on public safety, offender accountability and reformation. In 1995 Senate Bill One, a wholesale revamping of the juvenile delinquency system in Oregon, created a "philosophy statement" for the delinquency statutes. This statement , found in ORS 419C.001(1), provides as follows:

> "The Legislative Assembly declares that in delinquency cases, the purposes of the Oregon juvenile justice system from apprehension forward are to protect the public and reduce juvenile delinquency and to provide fair and impartial procedures for the initiation, adjudication and disposition of allegations of delinquent conduct. The system

is founded on the principles of personal responsibility, accountability and reformation within the context of public safety and restitution to the victims and to the community."

Although the shift in policy is clearly stated here, and was manifest in many other changes that were made in ORS Chapter 419C by Senate Bill One, there were some statutes that were left unchanged and, therefore, left "behind" in the sense that what they required had been appropriate when the best interest of the child was the guiding principle but was less so when public safety, accountability and reformation were being pursued.

It is therefore possible, and necessary, to make substantive changes to some delinquency statutes that will conform them to current policy and prevent them, in their present form, from frustrating pursuit of that policy.

Since this substantive change is being done under the aegis of "cleaning up" the statutes this Sub-Work Group has proceeded on a principle of unanimity, ensuring that the proposed amendments work toward the well established and well defined policy goals of the body of law, as a whole, and remove impediments to the carrying out of that policy.

1. The problems Addressed by LC 1142 (SB 233)

Section One: Language remains in ORS Chapter 419C.486, regarding case planning in delinquency cases, that was written when both delinquency and dependency law were based upon the best interest of the child standard. The policy of the delinquency system has shifted from the best interest of the child to public safety, offender accountability and reformation. The requirements of this statute (which is identical to the case planning statute in ORS Chapter 419B.343(1) which governs case planning in dependency cases) are now at odds with the underlying policy of ORS Chapter 419C as a whole.

Sections Two and Three: Editorial changes are proposed to clarify the meaning of the two statutes there addressed.

2. Analysis of proposed amendments

Section One of the bill is intended to ensure that the Oregon Youth Authority is not hampered in its case planning by being required to use a model of case planning that is not appropriate for youth offenders.

The language of ORS Chapter 419C.486 provides that a case plan for a youth offender should be rationally related to the findings that brought the youth offender within the court's jurisdiction. It should also be based on an assessment of the family's needs. The statute finally provides that whenever possible the family should be involved in designing the treatment plan.

This language has a history, the relating of which may help to show why its application to delinquency cases is not appropriate. It was placed in the statutes to resolve a specific controversy that had arisen in the practice of child abuse and neglect law.

Prior to 1993, some practitioners and judges believed that once a court took jurisdiction over a child, the child protection agency was free to design a case plan to address any problem that it perceived in the family. The scope of that intervention was limited only by the oversight of the court.

Other practitioners and judges believed that the intervention of the executive branch of government, in the form of the child protection agency, should be limited to fixing the problem that the parents either admitted interfered with the safe parenting of their child or that were proved to interfere with that parenting, at trial.

The dispute was resolved by the legislature in 1993. The language "rational relationship to the jurisdictional finding" was used to express agreement with the latter interpretation. Parents whose children were in need of protection because, for example, of a parental substance abuse problem could only be required to comply with a case plan designed to deal with substance abuse or something rationally related to substance abuse. There could be no other prerequisite for return of the children. If the child protection agency or the court believed that the parent had other problems these had to be alleged and proved or admitted by the parent before they could form the basis for continued removal of a child.

At the same time that this change was working its way through the process some members of the legislature believed that the child protection agency, at that time, was not as "family friendly" as it should be. They added language to the case planning bill mandating involvement of the family in case plan design and assessment of the family's needs as key components of case planning.

Meanwhile, ORS Chapter 419 was being split into its three separate chapters during this same legislative session. The new provision regarding case planning was placed in both the dependency and delinquency chapters.

In 1995, however, Senate Bill One changed the face of delinquency law in Oregon. While the "rational relationship" and the family friendly case planning remain important in dependency law, the ground has shifted in delinquency law, where treatment plans now center more on the youth offender than on the youth offender's family, and a more global approach is necessary to deal with the situations created by the youth offender's delinquency.

While it makes sense to limit case planning in a dependency case to prevent overreaching on the part of the executive branch (for example, prohibiting requirements that family members undergo sex offender treatment when the jurisdictional allegations center on drug use or mental illness) it does not make similar sense in a delinquency case. For example, a youth offender may come into the jurisdiction of the court as the result of assaultive behavior. Chronic alcohol abuse may well be a contributing factor to this assaultive behavior, but the assault for which he is taken into custody may not result in an alcohol charge.

The plain meaning of the language of ORS 419C.486 may well prevent the Oregon Youth Authority from requiring a youth offender to complete alcohol treatment prior to parole if an alcohol offense were not part of the jurisdictional basis, as the Department of Human Resources

would be prevented from requiring someone to complete sex offender therapy prior to the return of their child from foster care if sex offending behavior were not a part of the jurisdictional basis.

Public safety, offender accountability and reformation all require global and comprehensive treatment plans for youth offenders and the limited time such an offender may be deprived of liberty distinguish the delinquency situation from that of the dependency, where jurisdiction is far more open-ended.

Likewise, the involvement of the family in a youth offender's case planning is different than the involvement of the family in a treatment program designed to ameliorate the shortcomings of the family as a whole. The involvement of the family, thus, is proposed to be appropriately limited and to be consistent with youth offender's situation.

Finally, recognizing that there are many social service agencies and government entities that may be involved with a particular youth offender, and that continuing such involvement may be consistent with the custody of the Oregon Youth Authority, the Authority is reminded to incorporate the efforts of these into its own planning.

Section Two of the bill is a far more simple and technical amendment. It changes language regarding "combined facilities," to ensure that dependent children/wards and delinquent youth offenders are not mixed. If a facility is configured to house or accommodate both, the "youth care center" is where delinquents will be housed and only following a court review of the admission.

Section Three is an amendment relating to the statutory scheme for differentiating among the statuses of young people who are involved in the dependency or delinquency systems.

ORS Chapter 419A.112 provides that "mature children" may have access to reports about their case in the course of the Citizen Review Board process. This statute was written at a time when "children" meant both those whose cases had been resolved to the effect that they were within the jurisdiction of the court and those whose cases were pending adjudication. When children in the former category were defined as "wards" by statutory change they were not included in this statute as among those entitled to reports. This amendment changes that exclusion.

Supplement to Juvenile Code Split Report
to Address Senate Bill 233-2 Amendments

Prepared by Timothy Travis
Approved at
Oregon Law Commission Meeting
February 17, 2005

For information regarding the composition of the Sub Work Group and the background of this proposal please refer to the report submitted on January 18, 2005 to the Oregon Law Commission.

These -2 amendments deal with the statutes regarding reports to the court and the process of review of cases of youth offenders who are in the custody of the Oregon Youth Authority. These amendments update the language of the statutes to conform with current editorial conventions and current delinquency policy.

When the policy of the State of Oregon in regard to juvenile delinquency was summarized in the phrase "best interest of the child," the statutes were written in language appropriate to that value system, the value system that saw delinquency as the other side of the coin, and springing from the same sources, as child abuse and neglect. Now that the policy foundation in delinquency has shifted to "public safety, offender accountability and reformation," different statutory terms are more useful and descriptive. In these amendments, for example, in §8, page 6, line 10 "care, treatment" is replaced with "custody, placement," and in §7, page 5, lines 17-18 the term "substitute care" is replaced with "an out-of-home placement in the legal custody of the youth authority or a private agency."

These amendments also change language in the statutes that describe the contents of reports that the Oregon Youth Authority submits to the courts and the Citizen Review Board. Such reports have changed substantially since the pre-Senate Bill One days when the statutes were written. These amendments, for example, in §8, on page 6, lines 12-13 provide that information contained in the youth offender's reformation plan can be withheld from the youth offender or the youth offender's parents in certain circumstances. At the time this statute was originally written, there was no such thing as a reformation plan.

The process of holding review hearings on youth offenders is also updated to reflect the changes that have taken place in delinquency law since these statutes were originally written. In §7, on page 4, line 28 through page 5, line 3, the list of those who may request such a hearing be held is expanded to include parties who have come into existence since the system was designed. Thus, the Court Appointed Special Advocate, a local Citizen Review Board and the Oregon Youth Authority are added to the list. A further amendment will include the District Attorney, who, when the statutes were originally written, was less involved than they are now in such cases. The process is streamlined by a change made by §5, page 3, line 7. The circumstances under which the Oregon Youth Authority is required to submit a report on a youth offender are replaced with a provision that they be submitted when the court requests a report.

A new provision, in §7, page 5, lines 4-11, allows the court to hold such a hearing at any time (and not just, as is currently, when it receives a report on the youth offender), as well as allowing parties to the case and the Citizen Review Board, to request a hearing at any time. Again, the District Attorney will be added to this list by a further amendment. This provision codifies the current practice of Oregon courts which allow such hearings even though, technically, there is no legal basis to do so.

These amendments also do mundane editorial work, changing terms that no longer conform to the conventions used in writing Oregon statutes today. These are the kinds of changes that Legislative Counsel makes on a routine basis when a statute is being amended. Examples of these changes are found in §6, on page 8, lines 1-2 where "the hearing provided in" becomes "a hearing under."

The SB 233-2 amendments update an important part of the process regarding those in the custody of the Oregon Youth Authority. These amendments improve and clarify practice in regard to reporting to the court and the parties on the condition of youth offenders and in regard to how their cases are reviewed.

Amendment Note

The –2 Amendments discussed in the report supplement were adapted into the introduced bill in the Senate.

Juvenile Code Revision Work Group:

THE RIGHTS OF PUTATIVE FATHERS IN JUVENILE COURT

SB 234
with proposed amendments

Prepared by Prof. Leslie Harris
University of Oregon School of Law

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

Report Approved at
Oregon Law Commission Meeting on
January 18, 2005

I. Introduction

In a substantial number of juvenile court proceedings, the paternity of the child who is the subject of the case has not been established, or there is uncertainty about paternity. Since both a child's parents may have custodial rights that may be affected by the proceeding and because either or both parents may be important resources for the child, it is critical to identify the child's parents early and provide them with constitutionally adequate notice. The sections of the Oregon juvenile code that provide for notice to and protection of the custodial rights of unmarried biological fathers whose paternity has not been established are not consistent with requirements of the United States Constitution. Further, it is not clear that Oregon juvenile courts have the authority to resolve disputes regarding a child's paternity, and, even if it can be argued that they have this authority, the Oregon juvenile code does not provide procedures for resolving these disputes. The results are that the rights of putative fathers in juvenile court are not always adequately protected, and the interests of children may also be adversely affected.

This bill seeks to remedy these problems by 1) providing for notice to and protection of the substantive rights of all putative fathers whose rights are constitutionally protected and 2) creating authority for the juvenile court to resolve disputes regarding the paternity of a child who comes before it. The bill also authorizes a child and the Department of Human Services to challenge a voluntary acknowledgment of paternity of a child within the care and custody of the department under some circumstances.

II. History of the project

This project was proposed by the Oregon Law Commission Juvenile Code Revision Work

Group in 2003. Because the project had implications for child support enforcement and adoption practice, the putative fathers was large. The members appointed by the Commission were Emily Cohen, OSB Family Law Section; Esther Cronin, DHS/CAF Adoptions; Deanne Darling, Clackamas County Circuit Court Judge; Michele DesBrisay, Multnomah County Deputy District Attorney; Shani Fuller, DOJ Division of Child Support; David Gannett, OSB Family Law Section; KayT Garrett, DOJ Family Law Section; Linda Guss, DOJ Human Services Section; Leslie Harris, UO School of Law; Amy Holmes-Hehn, Multnomah County Deputy District Attorney; Linda Hughes, Multnomah County Juvenile Court Referee; Terry Leggert, Marion County Circuit Court Judge; Julie McFarlane, Juvenile Rights Project; Daniel Murphy, Linn County Circuit Court Judge; Robin Pope, OSB Family Law Section; Michael Serice, Deputy Director DHS Children, Adults and Families; Ronelle Shankle, DOJ Policy, Projects, & Legislative Coordinator; Catherine Stelzer, DHS/CAF Foster Care Unit; and Timothy Travis, OJD Juvenile Court Improvement Project.

The chair of the sub-work group was KayT Garrett, and the chair pro tem was Linda Guss. Leslie Harris was the reporter.

Interested persons who also participated in work group sessions included Sen. Kate Brown; Deborah Carnaghi, DHS/CAF Child Protective Services Unit; Anna Joyce, DOJ Family Law Section; Lisa Kay, Juvenile Rights Project; Maureen McKnight; Multnomah County Circuit Court Judge; Susan Moffet, OSB Family Law Section; and David Nebel, Oregon State Bar. Jason Janzen, Oregon Law Commission Legal Assistant, provided research support.

To prepare for this project, the work group familiarized itself with the major United States Supreme Court cases on the rights of unwed biological fathers, as well as cases from the Oregon Supreme Court and Court of Appeals. The group also analyzed the requirements of the federal Indian Child Welfare Act and the state plan requirements of the Social Security Act, to insure that the proposals would comply with the federal acts.

In fashioning this proposed legislation, the work group reviewed proposed amendments to the juvenile code drafted by the Word Usage sub-group of the 2001-2003 Interim Juvenile Code Work Group, selected sections of the 2000 Uniform Parentage Act, the 1988 Uniform Putative and Unknown Fathers Act, sections of a benchbook from Michigan dealing with absent parents and putative fathers, and information about putative father registries (including a research memo written by a law student and information from the National Conference of State Legislatures). Some members of the committee also looked at information from the ABA Center on Children and the Law and from other states, including California, Florida, Georgia, New Hampshire, New York, Texas and Utah.

III. The problems that this proposal addresses

Putative fathers are alleged biological fathers whose paternity has not been legally established in Oregon or elsewhere. In several respects the Oregon juvenile code does not deal adequately with the role of putative fathers. First, the sections of the code defining which putative fathers are entitled to notice of proceedings and to substantive rights does not include all such fathers who are likely to provide important resources for their children; in addition, the

definition is not consistent with decisions of the U.S. Supreme Court. Second, these provisions of the juvenile code are not consistent with similar provisions in ORS Chapter 109, which creates confusion and the risk that similarly situated families will be treated differently simply because cases concerning them are brought under different chapters of the Oregon code. Third, the juvenile code does not clearly provide authority to juvenile court judges to resolve disputes regarding paternity, even though such disputes arise fairly often.

A. The juvenile code and protection for the rights of putative fathers

The Oregon juvenile code currently provides that a putative father must be summoned and is entitled to the rights of a party if he has "provided or offered to provide for the physical, emotional, custodial or financial needs of the child or ward in the previous six months or was prevented from doing so by the mother of the child or ward." ORS 419B.839(1)(c); 419B.875(1)(c). The work group concluded that these provisions should be changed for two reasons. First, as a matter of policy, the juvenile code emphasizes the protection of a child's relationship with his or her parent or parents where the parent is able to provide adequately for the child. The provisions regarding participation of putative fathers may exclude some men who are committed to their children's well-being and whose rights should be protected for the sake of furthering the child's best interests. Second, the juvenile code provisions are inconsistent with decisions of the U.S. Supreme Court regarding the rights of unwed biological fathers.

A fundamental premise of the Oregon juvenile code, one that informs every aspect of the provisions regarding dependency proceedings, is that ordinarily children are best served by protecting their relationships with their families. See, e.g., ORS 419B.090(4). When a child's custodial parent is abusive or neglectful, it may well be in the best interests of the child to live instead with the other parent. The work group determined that at the beginning of a dependency case, this policy suggests that searches should be made for absent parents, including putative fathers, who have assumed or are willing to assume the responsibilities of parenthood. If such parents are found, they should be included in the proceedings and encouraged to establish relationships with their children. The work group was guided by the decisions from the U.S. Supreme Court in fashioning definitions of which putative fathers should be given notice and the opportunity to participate in the proceedings, even if they have not established legal paternity by one of the means set out in ORS 109.070.

The U.S. Supreme Court has held that unwed biological fathers who have demonstrated a commitment to the responsibilities of parenthood are entitled to notice of proceedings involving the custody of their children and to the same protections for their substantive parental rights that other parents enjoy.[1] Stanley v. Illinois, 405 U.S. 645 (1972), Quilloin v. Walcott, 434 U.S. 246 (1978), Caban v. Mohammed, 441 U.S. 380 (1979), and Lehr v. Robertson, 463 U.S. 248 (1983).

[1] ORS 109.094, a statute of general applicability, provides that once a man's paternity has been established, he has full parental rights, that is, the same procedural and substantive rights that a married father has. Thus, a man whose paternity has been established or declared under ORS 109.070 or 416.400 – 416.470 must be served with summons in a juvenile court proceeding, and he has the rights of a party. ORS 419B.839(1)(a); 419B.875(1)(b); 419B.819.

The provisions of the Oregon juvenile code discussed above are underclusive because they exclude fathers who have had substantial relationships with their children if they have not provided for the children within the most recent six months. Two opinions by the Oregon Court of Appeals might be interpreted as protecting the juvenile court statutes against successful constitutional challenges, but the work group concluded to the contrary for several reasons.

In P and P v. Children's Services Division, 66 Or. App. 66, 673 P.2d 864 (1983), the court held that on the facts of the case, the Oregon statutes pertaining to adoption without a putative father's consent satisfy due process and equal protection. The court held that it was constitutional to permit the adoption of a newborn infant without the putative father's consent, based on ORS 109.096. The putative father had not come forward, and the mother signed an affidavit to the effect that she had not had contact with him since the brief sexual encounter in which she became pregnant, and that she did not know his whereabouts. The court held that on these facts, due process did not require notice by publication. The second case, Burns v. Crenshaw, 84 Or. App. 257, 733 P.2d 922, *rev. den.*, 303 Or. 590, 739 P.2d 570 (1987), also involved the adoption of an infant without the putative father's consent. ORS 109.096(3) provides that a putative father who is not otherwise entitled to notice of proceedings regarding his child's custody is entitled to reasonable notice if he has filed notice of the initiation of filiation proceedings with the Center for Health Statistics before the initiation of the custody proceeding. The father in that case had not filed such a notice, and so did not receive notice of the adoption proceedings, and the court rejected his constitutional objection. Because ORS 109.096 applies to juvenile court as well as other judicial proceedings involving custody, it might be argued that it solves any constitutional problem with the juvenile court provisions. However, the work group rejected this conclusion.

First, after Burns, the Court of Appeals decided two cases which held that the rights of a putative father who did not receive notice of a custody case involving his child had been violated, even though he had not filed a notice of filiation proceedings with the Center for Health Statistics. In these cases the adoptive parents had reason to know the father's identify and that he had attempted to provide support to the child, but suppressed this information from the court. In each case, the Court of Appeals held that the proceedings were invalid because of this conduct. Vanlue v. Collins, 99 Or.App. 469, 782 P.2d 951 (1989), *rev. den.*, 309 Or. 334, 787 P.2d 888 (1990); Gruett v. Nesbitt, 173 Or.App. 225, 21 P.3d 168, (2001). It is likely that a juvenile court proceeding similarly could involve a putative father who had not filed a notice of filiation proceedings but who had played a significant role in his child's life outside the six-month time limit of ORS 419B.839 and that the child's mother, a DHS worker, or others involved in the case would have knowledge of this. This father would be entitled to notice and substantive rights, even though the existing statutes would not require that he be given this protection.

The work group was also unwilling to rely on Burns because more recently, the U.S. Supreme Court has affirmed the constitutional significance of parents' custodial rights (*see* Troxel v. Granville, 530 U.S. 57, 120 S.Ct. 2054, 147 L.Ed.2d 49 (2000)), and Oregon cases following Troxel strongly protect parental rights. *See, e.g.*, In re Marriage of O'Donnell-Lamont, 337 Or. 86, 91 P.3d 721 (2004). While no Oregon Supreme Court case addresses the constitutionality of denying putative fathers procedural and substantive rights, a number of well-reasoned cases from highly regarded state Supreme Courts have held that due process requires

greater protection than the Oregon statutes would provide in some circumstances. *See, e.g.,* Matter of Raquel Marie X, 559 N.E.2d 418 (N.Y. 1990), appeal following remand, 570 N.Y.S.2d 605 (A.D. 1991); Adoption of Kelsey S, 823 P.2d 1216 (Cal. 1992); In the Matter of the Appeal in Pima County Juvenile Severance Action No. S-114487, 876 P.2d 1121 (Ariz. 1994 (en banc)).

B. Inconsistencies between the juvenile code and ORS Chapter 109

Provisions of the Oregon juvenile code referring to "parents" and "fathers" are not always consistent with each other, and in places it uses terms that are not defined in the code. Provisions of the juvenile code regarding the rights of putative fathers are not consistent with parallel provisions in ORS Chapter 109. The results are that the rights of putative fathers in juvenile court are not clear, and that similarly situated individuals may be treated differently, depending on whether they are involved in proceedings brought under Chapter 109 or under the juvenile code.

C. The juvenile court's authority to resolve disputes regarding paternity

It is not clear that Oregon juvenile courts have the authority to resolve disputes regarding a child's paternity. ORS 109.098 provides limited authority. However, this section only applies to putative fathers who are entitled to notice under ORS 109.096, which does not include all putative fathers who may be constitutionally protected.[2]

In addition, juvenile court cases sometimes involve paternity disputes that go beyond or do not even involve unwed fathers who have done nothing to establish paternity. This is so because it is possible for more than one man to have a claim to legal paternity under ORS 109.070, the basic statute on paternity that is applicable to all proceedings, including those in juvenile court. No provision of the juvenile code explicitly authorizes the court to resolve disputes that arise under conflicting provisions of ORS 109.070. Even if it can be argued that juvenile courts have authority to resolve paternity disputes, the Oregon juvenile code does not provide procedures for doing so.

IV. The objectives of the proposal

The proposed legislation addresses the three problems identified above.

Note: The proposed legislation was filed during the pre-session as SB 234 with the Joint Interim Judiciary Committee. Thereafter, the Sub-Work Group on Putative Fathers presented additional amendments to SB 234 to the Oregon Law Commission and the Commission

[2] ORS 109.096 currently includes juvenile court proceedings. In addition to putative fathers who have filed notice of the initiation of filiation proceedings, it requires that notice be given to a putative father who has resided with the child "during the 60 days immediately preceding the initiation of the proceedings, or at any time since the child's birth is the child is less than 60 days old when the proceeding is initiated," or who "repeatedly has contributed or tried to contribute to the support of the child during the year immediately preceding the initiation of the proceeding, or during the period since the child's birth if the child is less than one year old when the proceeding is initiated."

approved the proposed amendments. In the Senate, SB 234 was amended to include the Commission-approved amendments and others. This discussion incorporates only the amendments approved by the Oregon Law Commission.

A. Revisions to provide constitutional protection for putative fathers

The work group quickly came to consensus on this issue. The proposal recommends amendments to existing statutes governing notice and substantive rights of putative fathers that bring the definitions of those entitled to protection into compliance with the constitutional rules and are more consistent with the policy of protecting children's relationships with parents who are willing and able to provide for them. This change requires abandonment of the bright-line rule that only requires examination of the putative father's conduct in the six months preceding the action.

B. Reconciling provisions of the juvenile code and ORS Chapter 109

The proposed legislation makes substantial progress toward achieving this goal, but does not accomplish it fully. The reason is that the aims of the juvenile court process, child support enforcement, and the adoption system, all of which may be affected by changes in these statutes, are not fully reconcilable, and, most critically, the work group realized that it was not charged with nor configured to resolve all of these conflicts.

The proposal reconciles several basic aspects of the relationship between the juvenile code and Chapter 109. First, it recommends that the juvenile code incorporate by reference some definitions and procedures in Chapter 109, rather than restating them in the juvenile code. The reason is that when these restatements are made, they are not always entirely consistent with the original provisions of Chapter 109 and therefore create unnecessary differences. Further, referring to provisions in Chapter 109 rather than restating them in Chapter 419B creates fewer problems when provisions of Chapter 109 are amended.

Second, the proposal recommends that the substantive rules for establishing paternity continue to be located ORS 109.070, and, to that end, proposes an amendment to that statute regarding voluntary acknowledgments of paternity that will only have an impact in juvenile court proceedings. The work group considered making this provision a part of the juvenile code but concluded that it should be made part of 109.070 to further the goal of consolidating all the substantive rules regarding paternity in one place. ORS 109.070(2)(b) currently allows a voluntary acknowledgment of paternity to be challenged under specific circumstances by a party to the acknowledgment or by the state if child support enforcement services are being provided. This proposal expands the group allowed to challenge voluntary acknowledgments. Under the proposal the child or DHS, if the child is in the care and custody of DHS, may challenge a voluntary acknowledgment at any time after the first 60 days on the basis of fraud, duress or material mistake of fact, and the child may request genetic testing within the first year after the voluntary acknowledgment. While some members of the work group do not support expanding the opportunities for third parties to challenge voluntary acknowledgments of paternity because they believe that the intrusion by the state into private decisions by the family is unjustified, the

majority of the group endorses it in the limited circumstances allowed by the proposal. The proposal also clarifies the procedures and allocation of costs for challenges.

If the changes described above are enacted, significant substantive and procedural differences between the juvenile code and Chapter 109 will continue to exist. The most significant differences concern notice to and procedural rights of putative fathers in adoption and other private cases, compared to the rules in juvenile court. The work group explored possible solutions but concluded that it was not charged with recommending such extensive changes to Chapter 109 and was not properly constituted to make such recommendations. The Oregon Law Commission has approved a proposal to establish a work group to consider whether Oregon should enact the Uniform Parentage Act during the 2005-2007 interim; this group probably will address the issues that are left unresolved here.

C. The juvenile court's authority to resolve disputes regarding paternity

The work group agreed that the juvenile code needs to authorize the court to resolve conflicts regarding a child's paternity, to provide for constitutionally adequate notice to all affected parties, and to provide procedures for resolving the dispute. The group considered drafting detailed statutes that would accomplish these goals, but concluded that general provisions, which give judges authority to tailor proceedings to the needs of a particular case, are more suitable at this time.

V. Review of legal solutions existing or proposed elsewhere

The most comprehensive solution that the work group considered was the Uniform Parentage Act, which on its face does not apply to juvenile court but which deals with all of the issues that are before the work group and more. However, as noted above, taking on the question of whether to recommend enactment of part or all of the act was far beyond the scope of the work group's charge.

The ABA Center on Children and the Law recommends that the petition be served on every man who has a potential claim to paternity under state law if the mother was not married to the biological father at the time of the child's birth and that the juvenile court take affirmative steps to resolve paternity including genetic testing and, if necessary, a hearing in the juvenile proceedings to determine paternity formally. E-mail from Mark Hardin to Leslie Harris, March 10, 2004, and conversations between KayT Garrett and Mark Hardin.

A common way of protecting putative fathers is to create a putative fathers registry, which allows a man who believes he may be the father of a child born to someone not his wife to send in a postcard to a state-run list. Men on the list are entitled to notice of proceedings involving the children of whom they claim paternity. Since legislation creating a putative father registry would have impacts far beyond the juvenile court and since it is likely that the work group on the Uniform Parentage Act will consider such legislation, this work group considered but did not pursue the idea.

VI. The proposal

Note: The proposed legislation was filed during the pre-session as SB 234 with the Joint Interim Judiciary Committee. Thereafter, the Sub-Work Group on Putative Fathers presented additional amendments to SB 234 to the Oregon Law Commission and the Commission approved the proposed amendments. In the Senate, SB 234 was amended to include the Commission-approved amendments and others. This discussion incorporates only the amendments approved by the Oregon Law Commission.

A. Amendments to bring the definition of putative fathers entitled to notice and substantive rights into line with the policy goals of the Oregon juvenile code and with constitutional requirements.

1. **ORS 419A.004.** As used in this chapter and ORS chapters 419B and 419C, unless the context requires otherwise:

* * *

(16) "Parent" means the biological or adoptive mother and the legal [*or adoptive*] father of the child, ward, youth or youth offender. **As used in this subsection, 'legal father' means:** [*includes:*]

[*(a) A nonimpotent, nonsterile man who was cohabiting with his wife, who is the mother of the child, ward, youth or youth offender, at the time of conception;*]

[*(b) A man married to the mother of the child, ward, youth or youth offender at the time of birth, when there is no judgment of separation and the presumption of paternity has not been disputed;*]

[*(c) A biological father who marries the mother of the child, ward, youth or youth offender after the birth of the child, ward, youth or youth offender;*]

[*(d) A biological father who has established or declared paternity through filiation proceedings or under ORS 416.400 to 416.470; and*]

[*(e) A biological father who has, with the mother, established paternity through a voluntary acknowledgment of paternity under ORS 109.070.*]

(a) A man who has adopted the child, ward, youth or youth offender, or whose paternity has been established or declared under ORS 109.070, ORS 416.400 to 416.470 or by a juvenile court; and

(b) In cases in which the Indian Child Welfare Act applies, a man who is a father under applicable tribal law.

COMMENT: ORS 419A defines critical terms that are used throughout the Oregon juvenile code, ORS 419A, 419B, and 419C. The existing definition of "parent" includes all mothers and all legally recognized fathers. It implicitly treats adoptive fathers as having a different status than "legal" fathers and paraphrases the criteria for establishing paternity under 109.070. However, the definitions are not identical, creating the possibility that a putative father might be recognized

as a legal father under ORS 109.070 but not under the juvenile code, for no reason. This section amends the definition of "parent" to mean all mothers and all legally recognized fathers. In turn, legally recognized fathers are adoptive fathers and biological fathers whose paternity has been established under ORS 109.070, which applies generally, or under ORS 416.400 to 416.470, which creates an administrative procedure for establishing paternity in child support cases. The amendment further says that in cases governed by the Indian Child Welfare Act, if a man is a legal father under applicable tribal law but not under other provisions of Oregon law, he will be treated as a legal father under the juvenile code, as ICWA requires.

2. **ORS 419B.819.** (1) A court may make an order establishing permanent guardianship under ORS 419B.365 or terminating parental rights under ORS 419B.500, 419B.502, 419B.504, 419B.506 or 419B.508 only after service of summons and a true copy of the petition on the parent, as provided in ORS 419B.812, 419B.823, 419B.824, 419B.827, 419B.830 and 419B.833. **A putative father who satisfies the criteria set out in ORS 419B.839(1)(d) or 419B.875(1)(c) also must be served with summons and a true copy of the petition, unless a court of competent jurisdiction has found him not to be the child or ward's legal father or he has filed a petition for filiation that was dismissed.**

COMMENT: ORS 419B.819, the statute that defines who must receive a summons to a permanent guardianship or termination of parental rights proceeding, does not include putative fathers whose rights are constitutionally protected. This provision adds such a requirement. Ideally, putative fathers' claims will have been resolved before a permanent guardianship or termination of parental rights petition is filed, but this language is needed for those cases in which this issue is still open.

3. **ORS 419B.839.** (1) Summons in proceedings to establish jurisdiction under ORS 419B.100 must be served on:

(a) The [*legal*] parents of the child without regard to who has legal or physical custody of the child;

(b) The legal guardian of the child;

(c) A putative father of the child *[if he has provided or offered to provide for the physical, emotional, custodial or financial needs of the child in the previous six months or was prevented from doing so by the mother of the child;]* **who satisfies the criteria set out in ORS 419B.875(1)(c), except as provided in subsection (4) of this section;**

(d) A putative father of the child if notice of the initiation of filiation or paternity proceedings was on file with the Center for Health Statistics of the Department of Human Services prior to the initiation of the juvenile court proceedings, except as provided in subsection (4) of this section;

[*(d)*] **(e)** The person who has physical custody of the child, if the child is not in the physical custody of a parent; and

[*(e)*] **(f)** The child, if the child is 12 years of age or older.

(2) If it appears to the court that the welfare of the child or of the public requires that the child immediately be taken into custody, the court may indorse an order on the summons directing the officer serving it to take the child into custody.

(3) Summons may be issued requiring the appearance of any person whose presence the court deems necessary.

(4) Summons under subsection (1) of this section is not required to be given to a putative father whom a court of competent jurisdiction has found not to be the child's legal father or who has filed a petition for filiation that was dismissed."

COMMENT: ORS 419B.839 defines who is entitled to be served with a summons in dependency proceedings brought under ORS Chapter 419B. Subsection (1)(b) currently provides for summons to be served on a child's "legal" parents. The term "legal parent" is not defined in the juvenile code; ORS 419A.004(16), above, defines the term "parent," and that is the term properly used here.

ORS 419B.839 currently provides for notice to some putative fathers, but the qualifying language of subsection (1)(c) does not accurately describe the fathers whose rights are constitutionally protected and who should, as a policy matter, be included in dependency proceedings, as discussed above in Part III.A of this report. This amendment deletes the inaccurate language and adds language that requires notice to all putative fathers who have the rights of a party, as defined in ORS 419B.875(1)(c) and to putative fathers who have filed a notice of filiation or paternity proceedings with the Center for Health Statistics. This notice would most often be filed by the putative father or, if administrative proceedings to determine paternity are pending in Oregon, by the Division of Child Support. This language is derived from ORS 109.096 and is added because a later section of this proposal recommends deleting references to the juvenile court in ORS 109.096 (see below).

Subsection (4) provides that a putative father who could make a claim under section (1) does not have to be summoned if he was previously a party to proceedings that resulted in a finding that he was not the father or if he filed filiation proceedings and then dismissed them voluntarily. This is a standard application of *res judicata* principles.

4. **ORS 419B.875.** (1) Parties to proceedings in the juvenile court under ORS 419B.100 and, except as provided in paragraph (h) of this subsection, under ORS 419B.500 are:

(a) The child or ward;

(b) The [*legal*] parents or guardian of the child or ward;

(c) A putative father of the child or ward [*if he has provided or offered to provide for the physical, emotional, custodial or financial needs of the child or ward in the previous six months or was prevented from doing so by the mother of the child or ward;*] **who has demonstrated a direct and significant commitment to the child or ward by assuming or attempting to assume responsibilities normally associated with parenthood, including but not limited to:**

(A) Residing with the child or ward;

(B) Contributing to the financial support of the child or ward; or

(C) Establishing psychological ties with the child or ward.

* * *

(4) A putative father who satisfies the criteria set out in subsection (1)(c) of this section shall be treated as a parent, as that term is used in this chapter and ORS chapters 419A and 419C, until the court confirms his paternity or finds that he is not the legal father of the child or ward.

(5) A putative father whom a court of competent jurisdiction has found not to be the child or ward's legal father or who has filed a petition for filiation that was dismissed is not a party under subsection (1) of this section.

COMMENT: ORS 419B.875 identifies the parties to a dependency proceeding under ORS Chapter 419B and defines the rights of a party.

The proposal recommends changing section (1)(b) to refer to a child's "parents" instead of "legal parents" and is needed for consistency with the proposed changes in ORS 419A.004(16), discussed above.

The proposal suggests that paragraph (1)(c) be amended to include putative fathers who are constitutionally entitled to participate in proceedings regarding their children – those who have "demonstrated a direct and significant commitment to the child by assuming or attempting to assume responsibilities normally associated with parenthood." This amendment also adds a nonexclusive list of conduct that may support a finding that a man had made the necessary demonstration.

Section (4) is a new provision which provides that a putative father who makes a claim under ORS 109.875(1)(c) is to be treated as a party until his claim is resolved by a court.

Section (5) is a new section that makes clear that a putative father who could make a claim under section (1) is not a party if he was previously a party to filiation proceedings that he initiated that were later dismissed or any proceeding that resulted in a finding that he was not the father. This is a standard application of *res judicata* principles.

B. Amendments to coordinate the juvenile code and Chapter 109.

1. **ORS 109.070.** (1) The paternity of a person may be established as follows:

* * *

(e) By filing with the State Registrar of the Center for Health Statistics the voluntary acknowledgment of paternity form as provided for by ORS 432.287. Except as otherwise provided in [*subsection (2)*] **subsections (2) to (4)** of this section, this filing establishes paternity for all purposes.

* * *

(2) [*(a)*] A party to a voluntary acknowledgment of paternity may rescind the acknowledgment within the earlier of:

[*(A)*] **(a)** Sixty days after filing the voluntary acknowledgment [*of paternity*]; or

[*(B)*] **(b)** The date of a proceeding relating to the child, including a proceeding to establish a support order, in which the party wishing to rescind the **voluntary** acknowledgment is also a party to the proceeding. For the purposes of this *[subparagraph]* **paragraph**, the date of a proceeding is the date on which an order is entered in the proceeding.

[*(b)(A)*] **(3)(a)** A signed voluntary acknowledgment of paternity filed in this state may be challenged **in circuit court**:

[*(i)*] **(A)** At any time after the 60-day period on the basis of fraud, duress or material mistake of fact[. *The party bringing the challenge has the burden of proof.*] **by:**

(i) A party to the voluntary acknowledgment;

(ii) The child named in the voluntary acknowledgment; or

(iii) The Department of Human Services or the administrator, as defined in ORS 25.010, if the child named in the voluntary acknowledgment is in the care and custody

of the department pursuant to ORS chapter 419B and the department or administrator has a reasonable belief that the voluntary acknowledgment was the result of fraud, duress or material mistake of fact.

[*(ii)*](**B**) Within one year after the voluntary acknowledgment has been filed, unless *[the provisions* of *paragraph (c) of this subsection apply*] **subsection (4) of this section applies.** No challenge to the voluntary acknowledgment may be allowed more than one year after the voluntary acknowledgment has been filed, unless *[the provisions of sub-subparagraph (i) of this subparagraph apply]* **subparagraph (A) of this paragraph applies.**

[*(B)*] **(b)** Legal responsibilities arising from the voluntary acknowledgment of paternity, including child support obligations, may not be suspended during the challenge, except for good cause.

(c) The party bringing a challenge under this subsection has the burden of proof.

[*(c)*] **(4) (a)** No later than one year after a voluntary acknowledgment of paternity form is filed in this state [*and if genetic parentage tests have not been previously completed*], a party to the **voluntary** acknowledgment**, the child named in the voluntary acknowledgment** or the state, if child support enforcement services are being provided under ORS 25.080, may apply to the court or to the administrator, as defined in ORS 25.010, for an order requiring that the parties and the child submit to genetic parentage tests. **The state Child Support Program shall pay the costs for genetic parentage tests performed under this paragraph subject to recovery from the party who requested the tests.**

[*(d)*] **(b)** If the results of the tests **performed under paragraph (a) of this subsection** exclude the male party as a possible father of the child **or the court determines under subsection (3) of this section that the male party is not the father of the child,** a party **to the challenge** or the state, if child support enforcement services are being provided under ORS 25.080, may apply to the court for [*an order*] **a judgment** of nonpaternity. **The party submitting the application for a judgment of nonpaternity to the court shall send a certified true copy of the judgment to the State Registrar of the Center for Health Statistics and to the Department of Justice as the state disbursement unit.** Upon receipt of [*an order*] **a judgment** of nonpaternity, the *[Director of Human Services]* **State Registrar of the Center for Health Statistics** shall correct any records [*maintained by the State Registrar of the Center for Health Statistics*] **it maintains** that indicate that the male party is the parent of the child.

[(e) The state Child Support Program shall pay any costs for genetic parentage tests subject to recovery from the party who requested the tests.]

(c) Support paid prior to a judgment of nonpaternity under paragraph (b) of this subsection shall not be returned to the payer.

COMMENT: A voluntary acknowledgment of paternity signed by both the mother and an alleged father and filed with the State Registrar of the Center for Health Statistics "establishes paternity for all purposes." ORS 109.070(1)(e). *See also* ORS 432.287. ORS 109.070(2)(a) provides that a voluntary acknowledgment can be rescinded by a party no later than 60 days after filing the voluntary acknowledgment of paternity or the date of a proceeding relating to the child, including a proceeding to establish a support order, in which the party wishing to rescind the acknowledgment is also a party to the proceeding, if that proceeding occurs sooner than 60 days after the acknowledgment was filed. The provision is unchanged by this bill.

ORS 109.070 (2)(b) provides that a voluntary acknowledgment can be challenged under

two circumstances outside this 60-day rescission period. The proposed amendment expands the group of interested parties who can bring challenges to voluntary acknowledgments. ORS 109.070(2) currently allows a voluntary acknowledgment to be challenged by the following persons under the following circumstances:

1) Within a year after the voluntary acknowledgment form is filed by a party to the acknowledgment or by the state in cases in which the state is providing child support enforcement services, provided that genetic parentage tests have not been completed previously. The person or agency contemplating a challenge under this provision may apply to the state for an order requiring that the parties and the child submit to genetic testing. If the tests exclude the man who signed the acknowledgment as the child's father, a party or the state agency may apply for an order of nonpaternity, and the records in the Center for Health Statistics are to be corrected. The state Child Support Program pays for the test, subject to recovery from the party who requested the tests.

2) At any time on the basis of fraud, duress or material mistake of fact. Though the section does not explicitly say so, its provisions appear to be limited to challenges by a party to the acknowledgment.

The proposed amendment would clarify that challenges on the basis of fraud, duress or material mistake of fact may be brought by a party, and, more importantly, it allows additional challenges to voluntary acknowledgments. In particular, the proposal would permit but not require a child (or, as a practical matter, the child's attorney) or the Department of Human Services if the child were in the department's care and custody under ORS chapter 419B to challenge paternity on the basis of fraud, duress or material mistake of fact; the department would have to have a reasonable factual foundation for the challenge. A child could also ask the court to order genetic testing within a year of the acknowledgment's signing.

Under the proposal, the state Child Support Program would continue to pay for genetic tests, subject to recovery from the party that sought the testing. If the tests excluded the man as the child's biological father, a party to the challenge could apply for a judgment of nonpaternity. When the judgment issued, state vital statistics records would be corrected. If the man had paid any child support pursuant to the voluntary acknowledgment, he would not be entitled to a refund.

All of the proposed changes to the existing statute, except those allowing children and DHS to challenge acknowledgments of paternity, are technical and intended to clarify existing law.

Allowing children and DHS to challenge voluntary acknowledgments would have the greatest impact in juvenile court dependency cases. If enacted, this amendment would create a simple and expeditious way for a child or DHS to exclude from parental status a man acknowledged as the father by the child's mother who was not in fact the child's biological father. Absent this provision, such a man would be entitled to the procedural and substantive rights of legal parents in dependency cases, unless and until his parental rights were legally relinquished or terminated involuntarily.

2. **ORS 109.096** (1) When the paternity of a child has not been established under ORS 109.070, the putative father *[shall be]* **is** entitled to reasonable notice in adoption [*, juvenile court,*] or other court proceedings concerning the custody of the child, **except for juvenile**

court proceedings, if the petitioner knows, or by the exercise of ordinary diligence should have known:

* * *

(4) Except as otherwise provided in subsection (3) of this section, the putative father [*shall be*] **is** entitled to reasonable notice in [*juvenile court or other*] court proceedings **concerning the custody of the child, other than juvenile court proceedings,** if notice of the initiation of filiation proceedings as required by ORS 109.225 was on file with the Center for Health Statistics prior to the initiation of the [*juvenile court or other court*] proceedings.

* * *

COMMENT: ORS 109.096, which concerns notice to putative fathers of proceedings involving their alleged children, currently applies to juvenile court proceedings. In light of the amendments to the juvenile code discussed above, this section should no longer apply to juvenile proceedings.

3. **ORS 109.098.** (1) If a putative father of a child by due appearance in a proceeding of which he is entitled to notice under ORS 109.096 objects to the relief sought, the court:

(a) May stay the adoption[, *juvenile court*] or other court proceeding to await the outcome of the filiation proceedings only if notice of the initiation of filiation proceedings was on file as required by ORS 109.096 (3) or (4).

* * *

COMMENT: ORS 109.098 concerns the procedure that a court must follow if a putative father appears in a proceeding regarding the custody of his alleged child. The section currently applies to juvenile court proceedings. The reference to juvenile court proceedings should be deleted, consistent with the proposed amendment to ORS 109.096.

4. COMMENT: The amendments to ORS 419A.004(16), 419B.819, and 419B.839, discussed above, serve to improve the coordination between Chapter 109 and the juvenile code, in addition to making needed changes in the definition of which putative fathers are protected in juvenile court. The provision discussed in the next section, regarding juvenile court authority to resolve paternity disputes, was also drafted to facilitate coordination with Chapter 109.

C. Provisions to authorize the juvenile court to resolve paternity disputes.

SECTION 9. (1) If, in any proceeding under ORS 419B.100 or ORS 419B.500, the juvenile court determines that the child or ward has no legal father or that paternity is disputed as allowed in ORS 109.070, the court may enter a judgment of paternity or a judgment of nonpaternity in compliance with the provisions of ORS 109.070, 109.124 to 109.230, 109.250 to 109.262, and 109.326.

(2) Before entering a judgment under subsection (1) of this section, the court must find that adequate notice and an opportunity to be heard was provided to:

(a) The parties to the proceeding;

(b) The man alleged or claiming to be the child or ward's father; and

(c) The Administrator of the Division of Child Support of the Department of Justice or the branch office providing support services to the county in which the court is located.

(3) As used in this section, "legal father" has the meaning given that term in ORS 419A.004(16).

COMMENT: This provision explicitly authorizes the juvenile court to adjudicate paternity disputes involving children who are alleged to be dependent or as to whom a termination of parental rights petition has been filed. Recognizing the wide variety of circumstances under which such disputes may arise, the proposed statute does not set out detailed provisions regarding notice and hearings, but rather leaves to the court's discretion the determination of to whom notice and an opportunity to be heard must be provided. In cases in which the Child Support Program is involved, its representatives must receive notice so that it can participate and insure that its records are consistent with the final judgments of the court. The work group contemplated that "adequate notice" would require the petitioner to serve formal summons on parties who are not before the court and alleged or claimed fathers who are not before the court. Less formal means of notice to parties who are before the court and the Child Support Program would satisfy the "adequate notice" requirement.

VII. Conclusion

The proposed bill should be adopted to make the statutory provisions regarding the participation of putative fathers in juvenile court proceedings more consistent with existing policy and with constitutional requirements, to improve the coordination between the juvenile code and Chapter 109, and to authorize juvenile courts to resolve paternity disputes regarding children who are before them.

VIII. Amendment Note

Commission-approved amendments related to the putative father project were among the amendments made in the Senate and passed in the House. Those amendments were incorporated into the above report when presented to the Commission.

In addition, amendments were made that were not Commission-endorsed amendments, but fit within the relating clause of the bill. Such amendments included amendments to allow for the disestablishment of paternity in certain cases when blood tests show that a legal father is not the biological father. The bill was also amended to remove the conclusive presumption providing that a cohabitating husband is the father. DHS or CSP was also given authority to challenge voluntary acknowledgements of paternity in certain circumstances. These non-Law Commission endorsed amendments sunset on January 2, 2008. The Commission plans to again address some of these issues for 2007 with its Uniform Parentage Act law reform project.

Civil Rights Work Group:

DISCRIMINATION AGAINST DISABLED PERSONS BY PLACES OF PUBLIC ACCOMODATION

SB 235

Prepared by Wendy J. Johnson
Oregon Law Commission
Deputy Director

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

Report Approved at
Oregon Law Commission Meeting on
February 17, 2005

Introductory Summary

For the 2005 Legislative Session, the Oregon Law Commission's Civil Rights Work Group proposes this bill with the following objective:

> To require places of public accommodation to remove barriers and provide auxiliary aids and services when necessary to provide disabled persons access to goods, services, facilities, privileges, advantages, and accommodations offered by places of public accommodation.

History of Reform Efforts

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 unlawful employment practices and other unlawful discrimination practices. The intent of the reorganization completed with HB 2352 (2001) was to make the statutes easier to understand and use, with only minor substantive amendments.

During the process of working on the reorganization bill, the Civil Rights Work Group identified a list of more substantive problems that the Group hoped to address later. The Work Group did present two clean-up bills in the 2003 session, HB 2275 and HB 2276. However, those two bills only fixed unintended consequences of the reorganization bill. HB 2275 (2003) restored "age" as a protected class in the public accommodation provisions and HB 2276 (2003) restored the remedies for certain injured worker rights.

The Law Commission authorized the Civil Rights Work Group to continue again for the 2005 session, charged with the task of addressing the more substantive problems identified earlier. This session the Civil Rights Work Group presents five bills with each addressing an identified gap, ambiguity, or conflict in the present civil rights laws.

Sen. Vicki Walker served as the Chair of the Civil Right Work Group[1] in 2005. The Work Group needed to meet only once, having received bill drafts and materials in advance of the meeting. The Group met on January 26 and then finalized their recommendations to the Commission via email. The meeting took place at Willamette University in Salem and was open to the public. Several discussions among Work Group members took place before and after the meeting via electronic correspondence.

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[1] The Work Group included the following members:

Jeffrey Chicoine	Newcomb, Sabine, Schwartz, and Landsverk LLP
Barbara Diamond	Smith, Diamond & Olney
Corbett Gordon	Fisher & Phillips LLP
Bob Joondeph	Oregon Law Center
David Nebel	OSB
Marcia Ohlemiller	BOLI
Louis Savage	DCBS

Interested Participants:

Patricia Altenhofen	Cascade Employers
Leslie Bottomly	Ater Wynne LLP
Barbara Brainard	Stoel Rives LLP
Clay Creps	Bullivant, Houser, Bailey PC
Patricia Haim	Amburgey & Rubin PC
Sandra Hansberger	Lewis & Clark Clinic
Victor Kisch	Tonkon Torp LLP
Stacey Mark	Ater Wynne LLP
Andrea Meyer	ACLU
Karen O'Kasey	Hoffman, Hart & Wagner LLP
Kathy Peck	Williams, Zografos & Peck PC
Edward Reeves	Stoel Rives LLP
Dennis Steinman	Kell, Alterman & Runstein LLP
Diana Stuart	Goldberg, Mechanic, Stuart & Gibson LLP
Nathan Sykes	Schwabe, Williamson & Wyatt PC
Annette Talbott	BOLI
Jerry Watson	Oregon Law Commission

Doug McKean, Deputy Legislative Counsel, provided drafting and research assistance.

Statement of the Problem Area

The Americans with Disability Act, 42 U.S.C. §§ 12101 et seq., prohibits discrimination on the basis of disability in employment, activities of state and local government, public accommodations, commercial facilities, transportation, and telecommunications. Title III covers specifically businesses and nonprofit service providers that are public accommodations. Public accommodations are entities who own, lease, lease to, or operate facilities such as restaurants, retail stores, hotels, movie theaters, private schools, convention centers, doctors' offices, homeless shelters, transportation depots, zoos, funeral homes, day care centers, and recreation facilities including sports stadiums and fitness clubs.

The ADA requires that public accommodations comply with basic nondiscrimination requirements that prohibit exclusion, segregation, and unequal treatment. They also must comply with specific requirements related to architectural standards for new and altered buildings; reasonable modifications to policies, practices, and procedures; effective communication with people with hearing, vision, or speech disabilities; and other access requirements. Additionally, public accommodations must remove barriers in existing buildings where it is easy to do so without much difficulty or expense, given the public accommodation's resources.

Oregon has a corollary state statutory provision that is found in ORS 659A.142. But, Oregon's public accommodation statute has been construed to provide less protection from disability discrimination than the federal statute. Oregon's Bureau of Labor and Industries' administrative rules, however, do provide for more protections; these administrative rules were designed to more closely match the federal standards.

The Federal District Court of Oregon, however, has consistently held that Oregon state law (specifically ORS 659A.142(3)) does not mandate the "reasonable accommodation" requirements that the ADA requires. The Court seems to have ignored or discounted the BOLI rules altogether. See e.g. Sellick v. Denny's , Inc., 884 F. Supp. 388, 393 (D. Or. 1995); Independent Living Resources v. Oregon Arena Corp., 982 F. Supp. 698, 773 (D. Or. 1997); Alford v. City of Cannon Beach, 2000 WL 33200554, 14-15 (D. Or. Jan. 17, 2000); Oregon Paralyzed Veteran of America v. Regal Cinemas, Inc., 142 F. Supp. 2d 1293 (2001), rev'd on other grounds 339 F. 3d 1126 (2003). The District Court has reasoned that ORS 659A.142 "was not intended to provide a right to recover damages for deficiencies in the design of a structure and that 'the language of the statute . . . suggests active conduct of some sort, especially conduct that is targeted at a specific individual." Independent Living Resources, 982 F.Supp. at 773. Likewise, the Honorable Robert E. Jones has ruled that the statute does not impose a "reasonable accommodation" requirement for public accommodations. Sellick v. Denny's Incorporated, 884 F.Supp. 388, 393 (D.Or.1995). There has been no appellate analysis of the statute in the Oregon state courts. There is very little legislative history on the statute.

These opinions point out the need to amend the state statute to not only prohibit overt discrimination against disabled persons but also to clearly require places of public accommodation to actively provide reasonable accommodations, so as to truly make such places and services accessible. One of the reasons for reform is that it would be better for places of public accommodation to need to comply with one standard—that is, it isn't logical for the

actions of a place of public accommodation to meet the state standard but fail the federal standard. Amending the ORS will also assure that BOLI's administrative rules detailing public accommodation requirements and exceptions are within the scope of the authorizing statute.

Objective of the Proposed Bill

The objective is to amend ORS 649A.142 to more closely parallel the federal ADA public accommodation requirements. Oregon's present statute does not clearly mandate what is often referred to as "reasonable accommodation" requirements. Protection from disability discrimination is not truly meaningful without such a requirement.

Proposal

See SB 235 (2005) and Proposed Amendment, SB 235-1.

Section 1

Section 1 of the bill amends ORS 659A.142.

The changes in subsections (1) and (2) reflect Legislative Counsel drafting style changes to ORS 659A.142.

Deletion of the phrase "resort or amusement" in subsection (3)(a) reflects the fact that the term "public accommodation" include resorts and amusement places and is thus redundant and confusing. See ORS 659A.400;[2] §12181(7), 42 USC 126 (1994)(ADA definition of "public accommodation").

The new provisions provided for in subsections (3)(b), (c), (d), are intended to codify what is commonly referred to as the ADA's reasonable accommodation requirements. The actual text of this section of the bill is derived from a blending of the ADA, the ADA implementing regulations, and Oregon Bureau of Labor and Industries (BOLI) administrative rule wording.[3] Note though that the phrase "reasonable accommodation" is not used in the bill because that phrase is not used in Title III of the ADA, but is a term used in speaking about the area of law by those who practice ADA law. Regarding the list of things offered by a public accommodation, the bill uses the ADA list of "goods, services, facilities, privileges, advantages, and accommodations" for consistency.

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[2] **659A.400. Place of public accommodation, defined**
(1) A place of public accommodation, subject to the exclusion in subsection (2) of this section, means any place or service offering to the public accommodations, advantages, facilities or privileges whether in the nature of goods, services, lodgings, amusements or otherwise.

(2) However, a place of public accommodation does not include any institution, bona fide club or place of accommodation which is in its nature distinctly private.

[3] See Americans with Disability Act, § 12181-12182, 42 USC 126 (1994); 28 CFR § 36.301 (2004); 28 CFR § 36.305 (2004); and OAR 839-006-0300 through OAR 839-006-0335 (all attached).

Specifically, subsection (3)(b) requires the removal of physical barriers to enter and use facilities. This subsection is modeled after §12182(b)(2)(A)(iv), 42 USC 126 (1994) of the ADA and OAR 839-006-0310(1).

Subsection (3)(c) requires places of public accommodation to provide auxiliary aids and services to ensure equal access to goods, services, facilities, privileges, advantages, and accommodations. This subsection is modeled after §12182(b)(2)(A)(iii), 42 USC 126 (1994) of the ADA and OAR 839-006-0320(1),(2).

Subsection (3)(d) requires the removal of physical and administrative barriers to accessing goods and services.

Subsection (3)(d)(A) is modeled after §12182(b)(1)(D), 42 USC 126 (1994) of the ADA (regarding administrative barriers), §12182(b)(2)(A)(iv), 42 USC 126 (1994) of the ADA (regarding structural barriers), and OAR 839-006-0330(1).

Subsection (3)(d)(B) is modeled after §12182(b)(2)(A)(iv), (v), 42 USC 126 (1994) of the ADA (regarding required alternative steps if removal is not readily achievable) and OAR 839-006-0330(2).

The examples listed in (3)(d)(B)(i)-(v) come largely from 28 CFR § 36.305 (2004) and OAR 839-006-0330(2).

Subsection (3)(d)(C) is modeled after 28 CFR § 36.301(c) and OAR 839-006-0330(3) which provide that a place of public accommodation may not impose charges on disabled persons for the recovery of costs of barrier removal. Also, the ADA definition of "readily achievable" implies that the costs will be paid by the facility because the factors to be considered in determining whether removal is readily achievable include the cost of the needed action, the financial resources of the facility, and the overall financial resources of the entity. §12181(9), 42 USC 126 (1994).

Subsection (3)(e) provides the "direct threat" exception to the reasonable accommodation requirements. This subsection is modeled after §12182(b)(3), 42 USC 126 (1994) and OAR 839-006-0335(1).

Subsection (4)(a) provides BOLI with authority to adopt administrative rules necessary for the administrative and enforcement of subsection (3). The Civil Rights Work Group decided to leave the details of the reasonable accommodation requirements to administrative rule. Thus, subsection (3) provides the essential elements and protections but does not provide a lot of details. This was done because this area of law changes often and BOLI is able to keep up with case law and federal law advances more expeditiously than the legislature. Also, BOLI has already developed rules in this area.

Subsection (4)(b) provides that subsection (3) of the bill is to be construed to the extent possible in the manner that is consistent with the ADA. The Civil Rights Work Group's goal

was to have the statute parallel the federal ADA. This section helps ensure that questions of statutory construction will be resolved to follow the ADA.

Section 2

This section deletes "resort or amusement" because the term "public accommodation" includes resorts and amusement placement and is thus redundant and confusing. See ORS 659A.400; §12181(7), 42 USC 126 (1994)(ADA definition of "public accommodation").

Section 3

Section 3 provides that amendments to the ORS made by this bill apply only to conduct occurring on or after the effective date of the Act. An emergency clause is provided and thus the Act will become effective upon passage.

Amendment Note

Amendments to the bill were made in the Senate. These amendments were approved by the Work Group and the Law Commission. The amendments simply were finalized after the bill was pre-session filed. The amendments were incorporated into the above report discussion.

Civil Rights Work Group:

STATUTE OF LIMITATIONS FOR PUBLIC ACCOMMODATION DISCRIMINATION CLAIMS

SB 236

Prepared by Wendy J. Johnson
Oregon Law Commission
Deputy Director

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

Report Approved at
Oregon Law Commission Meeting on
February 17, 2005

I. Introductory Summary

For the 2005 Legislative Session, the Oregon Law Commission's Civil Rights Work Group proposes a bill that provides for a one-year statute of limitation for filing a claim in court for unlawful discrimination in places of public accommodations.

II. 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 unlawful employment practices and other unlawful discrimination practices. The intent of the reorganization completed with HB 2352 (2001) was to make the statutes easier to understand and use, with only minor substantive amendments.

During the process of working on the reorganization bill, the Civil Rights Work Group identified a list of more substantive problems that the Group hoped to address later. The Work Group did present two clean-up bills in the 2003 session, HB 2275 and HB 2276. However, those two bills only fixed unintended consequences of the reorganization bill. HB 2275 (2003) restored "age" as a protected class in the public accommodation provisions and HB 2276 (2003) restored the remedies for certain injured worker rights.

The Law Commission authorized the Civil Rights Work Group to continue again for the 2005 session, charged with the task of addressing the more substantive problems identified

earlier. This session the Civil Rights Work Group presents five bills with each addressing an identified gap, ambiguity, or conflict in the present civil rights laws.

Sen. Vicki Walker served as the Chair of the Civil Rights Work Group[1] in 2005. The Work Group needed to meet only once, having received bill drafts and materials in advance of the meeting. The Group met on January 26 and then finalized their recommendations to the Commission via email. The meeting took place at Willamette University in Salem and was open to the public. Several discussions among Work Group members took place before and after the meeting via electronic correspondence.

III. Statement of the Problem Area

Oregon statutes provide that is an unlawful practice for any person to deny full and equal accommodations, advantages, facilities and privileges of any place of public accommodation or

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[1] The Work Group included the following members:

Jeffrey Chicoine	Newcomb, Sabine, Schwartz, and Landsverk LLP
Barbara Diamond	Smith, Diamond & Olney
Corbett Gordon	Fisher & Phillips LLP
Bob Joondeph	Oregon Law Center
David Nebel	OSB
Marcia Ohlemiller	BOLI
Louis Savage	DCBS

Interested Participants:

Patricia Altenhofen	Cascade Employers
Leslie Bottomly	Ater Wynne LLP
Barbara Brainard	Stoel Rives LLP
Clay Creps	Bullivant, Houser, Bailey PC
Patricia Haim	Amburgey & Rubin PC
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Diana Stuart	Goldberg, Mechanic, Stuart & Gibson LLP
Nathan Sykes	Schwabe, Williamson & Wyatt PC
Annette Talbott	BOLI
Jerry Watson	Oregon Law Commission

Doug McKean, Deputy Legislative Counsel, provided drafting and research assistance.

to aid and abet such discrimination. See ORS 659A.403, 659A.406. Individuals filing public accommodations discrimination claims have one year after the discriminatory act to file a complaint with the Bureau of Labor and Industries. See ORS 659A.820. However, individuals may also take their claims directly to circuit court. There is no codified statute of limitations for bringing a public accommodations claim in court. The general reason for this bill is based on the theory that all civil rights statutes should provide for clear rights and remedies, including the statute of limitations. Having a clear statute of limitations ensures finality.

IV. Objective of the Proposal

This bill provides for a one-year statute of limitations for filing a public accommodations discrimination suit in court. Currently, there is no specific statute of limitations for these types of claims found in the Oregon Revised Statutes. The Work Group proposes a one-year statute of limitations because it is consistent with both the amount of time to file a complaint with BOLI, and is the same statute of limitations as most unlawful employment practice discrimination claims. See ORS 659A.875(1) (providing one year statute of limitations for civil actions under ORS 659A.885). While public accommodation discrimination is different than employment discrimination, the two have similar policy goals and the same statute of limitations is logical.

V. The Proposal

See SB 236 (2005).

Section 1

Section 1 amends ORS 659A.875 and inserts a new subsection (4) to provide for a one year statute of limitations for civil actions alleging an unlawful practice in violation of ORS 649A.403 or ORS 659.406. The present subsections (4) and (5) are renumbered to subsections (5) and (6).

Section 2

Section 2 provides that amendments to the ORS made by this bill apply only to conduct giving rise to a cause of action occurring on or after the effective date of the Act. No emergency clause is provided and thus the Act will become effective on the customary date of January 1, 2006.

Civil Rights Work Group:

STATUE OF LIMITATIONS FOR OCCUPATIONAL SAFETY AND HEALTH DISCRIMINATION CLAIMS

SB 237

Prepared by Wendy J. Johnson
Oregon Law Commission
Deputy Director

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

Report Approved at
Oregon Law Commission Meeting on
February 17, 2005

Introductory Summary

Oregon statutes provide that it is an unlawful employment discrimination violation for employers to discriminate against an employee or prospective employee for making certain health and safety complaint(s) concerning the workplace. ORS 654.062(5). Oregon statutes, however, do not define the statute of limitations for filing a civil action in court. This bill will simply codify a one-year statute of limitations.

History of Reform Efforts

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 unlawful employment practices and other unlawful discrimination practices. The intent of the reorganization completed with HB 2352 (2001) was to make the statutes easier to understand and use, with only minor substantive amendments.

During the process of working on the reorganization bill, the Civil Rights Work Group identified a list of more substantive problems that the Group hoped to address later. The Work Group did present two clean-up bills in the 2003 session, HB 2275 and HB 2276. However, those two bills only fixed unintended consequences of the reorganization bill. HB 2275 (2003) restored "age" as a protected class in the public accommodation provisions and HB 2276 (2003) restored the remedies for certain injured worker rights.

The Law Commission authorized the Civil Rights Work Group to continue again for the 2005 session, charged with the task of addressing the more substantive problems identified earlier. This session the Civil Rights Work Group presents five bills with each addressing an identified gap, ambiguity, or conflict in the present civil rights laws.

Sen. Vicki Walker served as the Chair of the Civil Rights Work Group[1] in 2005. The Work Group needed to meet only once, having received bill drafts and materials in advance of the meeting. The Group met on January 26 and then finalized their recommendations to the Commission via email. The meeting took place at Willamette University in Salem and was open to the public. Several discussions among Work Group members took place before and after the meeting via electronic correspondence.

---

[1] The Work Group included the following members:

Jeffrey Chicoine	Newcomb, Sabine, Schwartz, and Landsverk LLP
Barbara Diamond	Smith, Diamond & Olney
Corbett Gordon	Fisher & Phillips LLP
Bob Joondeph	Oregon Law Center
David Nebel	OSB
Marcia Ohlemiller	BOLI
Louis Savage	DCBS

Interested Participants:

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Diana Stuart	Goldberg, Mechanic, Stuart & Gibson LLP
Nathan Sykes	Schwabe, Williamson & Wyatt PC
Annette Talbott	BOLI
Jerry Watson	Oregon Law Commission

Doug McKean, Deputy Legislative Counsel, provided drafting and research assistance.

Statement of the Problem Area

The legislature has clearly provided a right to employees and prospective employees to file a claim with the Bureau of Labor and Industries or to file a claim in court, when an employer discriminates based on the employee making certain health and safety complaint(s) concerning the workplace. ORS 654.062(5). The same statute also provides that the employee or prospective employee must file a complaint with the Bureau within 30 days of having reasonable cause to believe that a violation has occurred. Oregon statutes, however, do not define the statute of limitations for filing a civil action in court. The general reason for this bill is based on the theory that all civil rights statutes should provide for clear rights and remedies, including the statute of limitations. Having a clear statute of limitations ensures finality.

Objective of the Proposed Bill

The objective is to amend ORS 654.062 to clearly provide for a one year statute of limitations for filing an action in court. This statute already provides a statute of limitations for filing an action with the Bureau of Labor and Industries.

Proposal

See SB 237 (2005) and SB 237-1 Proposed Amendments.

Section 1

This section amends ORS 654.062. A new subsection (6) to this statute is created by this bill, and the substance of subsection (5) is reorganized: part of the old subsection (5) becomes part of subsection (6). This bill would make subsection (5) define the unlawful employment practice, and subsection (6) would define the statute of limitations for both the Bureau of Labor and Industries filings and civil action filings made in court.

The bill's new subsection (6)(b) is simply a renumbering and reordering of the substance in the present (5)(c).

The bill's language in the new (6)(c), is the substantive heart of the bill. This section (with the SB 237-1 amendment) would codify a one year statute of limitations. The Work Group considered a shorter statute of limitations of 180 days, but ultimately determined that one year was preferable because of the time needed to consult counsel and investigate. A one year statute of limitations is also consistent with the statute of limitations for most unlawful employment practice discrimination claims. See ORS 659A.875(1) (providing one year statute of limitations for civil actions under ORS 659A.885).

The rest of the amendments made in this bill are word and style changes that comport with present Legislative Counsel drafting protocols.

Section 2

Section 2 provides that amendments to the ORS made by this bill apply only to conduct giving rise to a cause of action occurring on or after the effective date of the Act. An emergency clause is provided and thus the Act will become effective upon passage.

Amendment Note

This bill was amended in the Senate to include the –1 amendments discussed above in the report. The –1 amendments, however, were replaced by –2 amendments that also added a new Section 3. Section 3 simply added an emergency clause to the bill so that the bill takes effect on its passage.

Civil Rights Work Group:

MISCELLANEOUS REMEDY AMBIGUITIES

SB 238

Prepared by Wendy J. Johnson
Oregon Law Commission
Deputy Director

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

Report Approved at
Oregon Law Commission Meeting on
February 17, 2005

Introductory Summary

Oregon statutes provide that it is generally an unlawful discrimination violation for employers to discriminate against employees who are volunteer firefighters when they require a leave of absence to perform their duties, employees who use tobacco products during nonworking hours, and members of the Legislative Assembly whose employment is interrupted by reason of performance of official duties. See respectively ORS 476.574, ORS 659A.315, and ORS 171.120. Oregon statutes, however, do not define the remedies that are available for violation of these statutes. ORS 659A.885 is the statute that generally provides for the remedies for the various unlawful employment discrimination practices found throughout Oregon's statutes. This bill then would define the remedies available for violations of these provisions in ORS 659A.885.

History of Reform Efforts

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 unlawful employment practices and other unlawful discrimination practices. The intent of the reorganization completed with HB 2352 (2001) was to make the statutes easier to understand and use, with only minor substantive amendments.

During the process of working on the reorganization bill, the Civil Rights Work Group identified a list of more substantive problems that the Group hoped to address later. The Work Group did present two clean-up bills in the 2003 session, HB 2275 and HB 2276. However, those two bills only fixed unintended consequences of the reorganization bill. HB 2275 (2003)

restored "age" as a protected class in the public accommodation provisions and HB 2276 (2003) restored the remedies for certain injured worker rights.

The Law Commission authorized the Civil Rights Work Group to continue again for the 2005 session, charged with the task of addressing the more substantive problems identified earlier. This session the Civil Rights Work Group presents five bills with each addressing an identified gap, ambiguity, or conflict in the present civil rights laws.

Sen. Vicki Walker served as the Chair of the Civil Rights Work Group[1] in 2005. The Work Group needed to meet only once, having received bill drafts and materials in advance of the meeting. The Group met on January 26 and then finalized their recommendations to the Commission via email. The meeting took place at Willamette University in Salem and was open to the public. Several discussions among Work Group members took place before and after the meeting via electronic correspondence.

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Nathan Sykes	Schwabe, Williamson & Wyatt PC
Annette Talbott	BOLI
Jerry Watson	Oregon Law Commission

Doug McKean, Deputy Legislative Counsel, provided drafting and research assistance.

Statement of the Problem Area

The legislature has clearly provided a right to file a claim with the Bureau of Labor and Industries or to file a claim in court for certain unlawful discrimination by an employer based on the employee's service as a volunteer firefighter, use of tobacco during nonworking hours, or service as a member of the Legislative Assembly. The problem is that the legislature has not defined the remedies available to an employee when a claim is successful. The general reason for this bill is based on the theory that all civil rights statutes should have clear rights and remedies so as to provide clarity in the law and avoid litigation on such matters.

Objective of the Proposed Bill

The objective is to amend ORS 659A.885 to clearly provide for remedies for the employment discrimination violations of ORS 171.120, ORS 476.574, and ORS 659A.315. This statute already provides for the remedies of over twenty other unlawful employment discrimination violations. Oregon's present statutes do not define the remedies. Protection from unlawful employment discrimination is not meaningful without clear remedies.

Proposal

See SB 238 (2005) and Amendments.

Section 1

Section 1 amends **ORS 659A.885(2)** to include violations of ORS 171.120, ORS 476.574, and ORS 659A.315. This amendment, to include these violations in the list of subsection (2), establishes a reference back to the remedies provided in (1) of the same statute. **ORS 659A.885(1)** provides for the following rights and remedies:

- a right to file a civil action in circuit court to be tried before a judge with *de novo* review on appeal
- injunctive relief
- prevailing party costs and reasonable attorney fees at trial and on appeal
- other equitable relief as may be appropriate, including
    - reinstatement of the employee
    - hiring of the person
    - back pay

The Civil Rights Work Group discussed also amending **ORS 659A.885(3)** to include violations of ORS 171.120, ORS 476.574, and ORS 659A.315. Such an amendment would authorize the court to award additional remedies to those provided in 659A.885(1). ORS 659A.885(3) provides for the following remedies:

- a right to file a civil action in circuit court to be tried before a jury with review by

the standard in Section 3, Article VII (amended) of the Oregon Constitution (any evidence review for factual issues).

- compensatory damages or $200 (whichever is greater)
- punitive damages

The Work Group and the Commission discussed at length whether it was appropriate to put violations of ORS 171.120, ORS 476.574, and ORS 659A.315 into only the subsection (2) list or both the subsection (2) and (3) lists. Obviously the subsection (3) provision provides more compensation for an employee and the potential remedies also punish an employer more. The Work Group concluded that there were not readily discernible distinctions for the variances for finding some employment discrimination claims in only the subsection (2) list and some in both the subsection (2) and (3) lists.

For example, ORS 659A.230 is in both lists, but ORS 659A.194 is only in the subsection (2) list. The former statute provides that it is an unlawful employment practice to discriminate against employees who initiate or aid in administrative, criminal or civil proceedings. The latter statute provides that it is an unlawful employment practice to discriminate against an employee who is a crime victim that attends a related criminal proceeding. These two provisions seem similar and would seem to have similar public policy justifications; however, the two have very different remedy provisions.

Another example is that the provisions regarding discrimination against disabled persons (ORS 659A.100 to ORS 659A.145) provide for both the subsection (2) and (3) remedies, but discrimination based on race, religion, color, sex, national origin, marital status or age under ORS 659A.030 provides only for subsection (2) remedies.

Still another example is that a violation of ORS 659A.043 permits remedies under both subsections and ORS 659A.063 permits remedies only under subsection (2). Both of these statutes relate to discrimination of employees who are injured on the job.

The Work Group noted that of the three employment discrimination claims this bill addresses, the tobacco use provision would seem to be the least attractive to receive the subsection (3) remedies. The Work Group was more inclined to support jury trials, and compensatory and punitive damages for firefighters and legislators. The Work Group ultimately decided to provide all three of these violations with the same remedies in the bill, but leave it to the Oregon Law Commissioners to recommend the bill as is, or to recommend deletion of one or more of the provisions from the subsection (3) list.

The Commission, at its February 17, 2005 meeting, decided to amend the introduced bill and remove the ORS 659A.885(3) remedies. The Commission decided to add the ORS 659A.885(4) remedies for ORS 476.574 (volunteer firefighters) and ORS 171.120 (Legislative Assembly members), but not for the ORS 659A.315 (tobacco use) claims.

ORS 659A.885(4) provides that the court may provide for the following remedies:

- the ORS 659A.885(1) remedies (see discussion above)
- compensatory damages or $250 (whichever is greater)

These remedies represent a middle ground position. The Commissioners decided that as a policy matter they didn't support costly jury trials and punitive damages for any of these three types of claims, but they did determine that compensatory damages were appropriate. The statute already provides for this middle ground approach in subsection (4) and thus the SB 238-1 amendments make that change.

ORS 659A.885(5) is also amended. This amendment is simply a conforming amendment to the amendments made in SB 239, which is also an Oregon Law Commission sponsored bill. The amendment standardizes the list of protected classes to provide consistency to the ORS.

Section 2

Section 2 simply makes style and word edits to ORS 171.120 (Legislative Assembly discrimination provision) to conform with Legislative Counsel drafting protocols. The section is not intended to make substantive law changes.

Section 3

Section 3 simply makes style and word edits to ORS 659A.315 (use of tobacco products discrimination provision) to conform with Legislative Counsel drafting protocols. The section is not intended to make substantive law changes.

Section 4

Section 4 provides that amendments to the ORS made by this bill apply only to conduct giving rise to a cause of action occurring on or after the effective date of the Act. No emergency clause is provided and thus the Act will become effective on the customary date of January 1, 2006.

Amendment Note

Amendments to the introduced bill were made in the Senate. The amendments reflected the remedies the Commission endorsed at its February 17, 2005 meeting. The above report explains the bill and the amendments.

Civil Rights Work Group:

STANDARDIZING LIST OF PROTECTED CLASSES IN CIVIL RIGHTS LAWS

SB 239

Prepared by Wendy J. Johnson
Oregon Law Commission
Deputy Director

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

Report Approved at
Oregon Law Commission Meeting on
February 17, 2005

I. Introductory Summary

For the 2005 Legislative Session, the Oregon Law Commission's Civil Rights Work Group proposes a clean-up bill which modifies the list of protected classes throughout ORS Chapter 659A, and also makes word and style changes that follow Legislative Counsel drafting protocols.

II. 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 unlawful employment practices and other unlawful discrimination practices. The intent of the reorganization completed with HB 2352 (2001) was to make the statutes easier to understand and use, with only minor substantive amendments.

During the process of working on the reorganization bill, the Civil Rights Work Group identified a list of more substantive problems that the Group hoped to address later. The Work Group did present two clean-up bills in the 2003 session, HB 2275 and HB 2276. However, those two bills only fixed unintended consequences of the reorganization bill. HB 2275 (2003) restored "age" as a protected class in the public accommodation provisions and HB 2276 (2003) restored the remedies for certain injured worker rights.

The Law Commission authorized the Civil Rights Work Group to continue again for the 2005 session, charged with the task of addressing the more substantive problems identified

earlier. This session the Civil Rights Work Group presents five bills with each addressing an identified gap, ambiguity, or conflict in the present civil rights laws.

Sen. Vicki Walker served as the Chair of the Civil Rights Work Group[1] in 2005. The Work Group needed to meet only once, having received bill drafts and materials in advance of the meeting. The Group met on January 26 and then finalized their recommendations to the Commission via email. The meeting took place at Willamette University in Salem and was open to the public. Several discussions among Work Group members took place before and after the meeting via electronic correspondence.

III. Statement of the Problem Area

Presently, one or more of the protected classes are left out of various provisions of Chapter 659A, or are listed in an inconsistent order. Various statutes in Chapter 659A do not

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Jeffrey Chicoine	Newcomb, Sabine, Schwartz, and Landsverk LLP
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Annette Talbott	BOLI
Jerry Watson	Oregon Law Commission

Doug McKean, Deputy Legislative Counsel, provided drafting and research assistance.

follow present drafting protocols established by Legislative Counsel.

IV. Objective of the Proposal

This bill will standardize the list of protected classes in Oregon's civil rights statutes except where it appears the legislature purposely left a category out. An inconsistent list, and to a lesser extent, an inconsistent order, of protected classes creates an unintended implication that the omitted class is not protected by the statute. Standardizing the list clarifies potential ambiguities that exist in the face of inconsistency. In addition, form and style changes have been proposed throughout the bill as some of the sections within are old and are in need of polishing.

In sum, most of the amendments simply reorder the list of protected classes so that the order is consistent throughout Chapter 659A. In some of the amendments, however, the Work Group added one or more protected classes that are missing as the result of oversight. In others, a protected class was added because the Work Group felt its inclusion is consistent with the purposes and provisions of Chapter 659A.

V. The Proposal

See SB 239 (2005).

A. General Principles

As mentioned, the general principle behind this bill is to provide consistency to Oregon's civil rights statutes.

B. Section-by-Section Highlights

Section 1 amends ORS 654.062, and deletes the list of protected classes in (5)(b) because it is unnecessary to the meaning of the section.

Section 2 amends ORS 659A.003, (which explains the public policy underlying Chapter 659A) by adding disability to the list of protected classes and reordering the listed protected classes. The order of the protected classes used for the lists begins with the order used in Title VII of the Civil Rights Act of 1964. The five classes protected by the federal Act—race, color, religion, sex and national origin are first in the list. Beyond those five, the other protected classes are put in this order: marital status, age and disability. Since the disability statutes are separate from the other statutes that concern employment, public accommodation, and housing discrimination, the lists of protected classes often end with age. This works well for drafting because often the reference to age is followed by "if the individual is 18 years of age or older."

Sections 3 through 10 amend various provisions within Chapter 659A, and primarily involve form and style changes that lend to the Chapter's consistency and follow drafting protocols from Legislative Counsel. These sections also reorder the list of protected classes for consistency. In addition, in a few of the places throughout the bill, the phrase "bona fide occupational requirement," and "bona fide job qualification" were changed to "bona fide occupational qualification." The

phrase "bona fide occupational qualification," is well known in its abbreviated form as BFOQ in state and federal civil rights law. The Bureau of Labor and Industries uses BFOQ in its rules.

Section 11 expands the rulemaking authority delegated to the Commissioner for the Bureau of Labor and Industries (BOLI) by granting him/her the authority to make rules regarding the protected class of those with a disability. Adding disability is consistent with the purposes and other provisions of the chapter; the omission appears to also have been an oversight. The section also adds the protected class of marital status into the subsections of ORS 659A.805 where it was not included in the lists. Those omissions appear to have been oversights. Finally, the protected classes of familial status and source of income are included in ORS 659A.805 as appropriate. ORS 659A.420 *et seq.* presently defines unlawful discrimination in real property transactions and includes these additional classes of familial status and source of income. See ORS 659A.421(1). Adding these classes provides consistency in the ORS.

Section 12 adds marital status, age and disability to the lists of discrimination problems that BOLI may empower advisory agencies and councils to study. The omission of these protected classes appears to have been an oversight.

Section 13 simply reorders the list of protected classes for consistency and makes style and word edits that comply with Legislative Counsel drafting protocols.

VI. Conclusion

The proposed bill amends ORS 654.062, 659A.003, 659A.006, 659A.012, 659A.030, 659A.403, 659A.406, 659A.409, 659A.421, 659A.424, 659A.805, 659A.815 and 659A.885. The bill will make Chapter 659A consistent by recognizing a standardized list of protected classes in Oregon's civil rights statutes.

VII. Amendment Note

Amendments were made in the House to resolve conflicts with another Law Commission bill, SB 237. Both bills amend ORS 654.062 and thus technical conflict amendments were proposed by Legislative Counsel.

Judgments/Enforcement of Judgments Work Group:

JUDICIAL SALES

SB 920

Prepared by
Gerald G. Watson
Staff Attorney
Oregon Law Commission

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

This summary was prepared by Oregon Law Commission Staff after the Oregon Law Commission's approval of SB 920, at its April 11, 2005 meeting. Due to time constraints, the report was never formally approved by the Oregon Law Commission, but was reviewed by the Judgments Work Group.

SB 920 (LC 1198) substantially revises laws relating to execution sales. The purpose is primarily to update and clarify legal procedures dealing with judicial sales under writs of execution. Writs of execution are set forth at ORS 18.465-18.598 of the current statute.

Sections 1-14 of SB 920 deal with the purposes for which writs of execution may be used, the required form of such writs, the procedures by which such writs are initially issued, and the manner in which a sheriff levies on real and personal property. Those topics are generally covered currently by ORS 18.465-494. With the exception of ORS 18.472, dealing with execution on judgments awarding child support, the specific provisions in ORS 18.465-494 are deleted by SB 920, to be replaced by Sections 1-14 of SB 920. The proposed statutory provisions in Sections 1-14 of SB 920 provide substantially more detail in two areas: first, certain specific instructions are to be provided by the judgment creditor to the sheriff with all writs of execution (see Section 7); second, a more detailed description of <u>how</u> different types of property (real property, tangible personal property and intangible personal property) are to be levied upon (see Section 8-11) is provided.

ORS 18.505-18.518 remain largely unchanged from their current format. Those provisions deal with the circumstances under which, and the procedures by which, a writ of execution may be "challenged." With the exception of a minor housekeeping amendment to ORS 18.505, those provisions are not affected by SB 920.

Sections 15-37 of SB 920 deal with the procedures for sale once property has been levied upon. These provisions are designed to replace ORS 18.532-562, each of which is deleted by SB 920. Sections 15-37 substantially reorganize and clarify the procedures with regard to sale of personal and real property. Those sections also make relatively minor substantive changes in the existing law of execution.

Sections 15-19 deal with the sale of "residential property." As with current law (see ORS 18.536), the sale of residential property under SB 920 requires specific court authorization. The definition of "residential property" in Section 15 includes real property with 1-4 residential units, as well as condominium units, manufactured dwellings, and floating homes under certain circumstances. This definition of residential property is somewhat broader than the comparable language contained in existing ORS 18.536. The procedure for obtaining an order authorizing sale of residential property is set out in detail in Sections 16-19. Those procedures, although reorganized, are substantially similar to those currently required by ORS 18.536.

Sections 20-24 deal with the requirements for providing Notice of Sale for both personal and real property, including but not limited to "residential" property. These provisions substantially expand upon the current notice requirements of ORS 18.532. Section 20 requires a judgment creditor to prepare a list of all persons entitled to written notice of an execution sale and to include this list in the instructions provided to the sheriff called for by section 7 of the Act. While ORS 18.532 provides for general notice by posting (for sale of personal property) and by publication (for real property or a mobile home), with specific written notice only to the judgment debtor, Section 20 calls for written notice to the judgment debtor and any attorney for a judgment debtor for both personal and real property, as well as additional written notice to persons with a lien of record in real property or recorded interest in real property acquired after the judgment lien attached. Sections 21 and 22 (as to personal property) and Section 23 (as to real property) set forth specific requirements concerning how notice is to be provided and the time within which such notices are to be provided. Sections 21 and 23 additionally provide a new method of providing general notice-- publication on the internet. Section 24 authorizes the State Court Administrator to establish and maintain a website for this purpose.

Sections 25-37 set forth requirements for the conduct of an execution sale. These sections replace current ORS 18.538-562 and ORS 18.594-598. SB 920 provides much greater detail concerning how a judgment creditor is to make bids (see Section 28), as well as the manner in which payment is to be made (Section 29). These provisions are substantially new and do not have any counterparts in existing law. Section 34 deals with confirmation of the sale of real property. It replaces ORS 18.548. Section 34 clarifies an ambiguity in current law, by providing that the sale of real property is "conclusively established" unless an appropriate person files an objection within 10 days after the sheriff's return is filed. Current law provides only that the plaintiff seeking a writ of execution is entitled, on motion, to have a court order confirming the sale after 10 days (ORS 18.548(1)). The conclusive presumption eliminates the inference that it is necessary to obtain a court order to confirm the sale unless an objection is filed. Section 35 expands upon existing ORS 18.548(3), by setting forth in some detail the costs of sale which can be recovered by the judgment debtor. Section 33 deals with the right of possession after sale. It replaces ORS 18.594, but does not substantially alter the purpose, intent, or effect of the existing provision. Section 36 deals, in part, with the effect of sale on the

judgment debtor's title where the property is subject to redemption. The intent of this section is to clarify, but not alter the substantive law set forth in ORS 18.598. Section 36 provides that if the judgment debtor redeems the property, it is treated as if the sale had "never occurred" as far as liens of record are concerned. ORS 18.598, on the other hand, indicates only that the "judgment debtor shall be restored to the estate of the judgment debtor," language which is arguably ambiguous. Section 37 is new. It allows an individual court to direct by judgment that a specific execution sale be conducted in a manner different than otherwise set forth in SB 920. However, to limit the potential for different procedures to be adopted by courts across the state, Section 37 also provides that only the Chief Justice of the Supreme Court is authorized to establish (by court rule) an alternative procedure generally applicable to execution sales.

Sections 38-48 deal with the circumstances under which, and the procedures by which, the judgment debtor or other redemptioners may redeem real property from execution sale. Redemption is currently governed by ORS 18.565-588.

Section 38 replaces ORS 18.565. Under existing law, only an interest in real property may be redeemed. All other execution sales are absolute. Section 38 substantively changes current law by allowing redemption of a "manufactured dwelling" where it is "sold together with real property," as well as redemption for an interest in a land sale contract and the right to receive payments under a contract for the sale of real property, under some limited circumstances. These changes reflect the greater complexity of interests that judgment debtors may have in real property today. Sections 39 and 40 clarify who may redeem and the time for redemption, but are not intended to make any substantive changes other than clarifying that successors in interest are proper redemptioners. Sections 41-43 provide new detailed descriptions of the amounts which must be paid by a redemptioner to the purchaser, or previous redemptioner. Section 44 and 45 provide a more detailed procedure for redemption than is found in the current statute. Sections 44 and 45 include procedures for notifying the person from whom redemption is to be made, providing proof of service, and an accounting. Section 45 also provides a mechanism for objecting to the accounting. Existing statutory provisions provide only that in redeeming property, the redeemer shall "pay the amount" due. Section 46 provides greater clarity by specifically indicating the forms of payment that are acceptable, and the procedure to be used by the sheriff's office in dealing with payment.

Sections 49-53 are new and are not included, to any substantial degree, in the existing provisions of ORS 18.465-598. Sections 49-52 provide special rules for specific types of property. Special rules are provided with regard to manufactured dwellings and floating homes (Section 49), a purchaser's interest in a land sale contract (Section 50), a seller's right to receive payments under a contract for the sale of real property (Section 51), and equitable interests in real property. Section 53 provides a mechanism for the sheriff to refer disputes concerning the sheriff's performance of any duties under the Act to the court for resolution and additional instructions.

Sections 55-73 make housekeeping changes to other statutory sections, primarily, but not exclusively in ORS Chapter 18. Those changes typically involve renumbering provisions for consistency with changes made in Sections 1-54 of SB 920, or adding parallel language (notably references to manufactured dwellings, floating homes and homestead exemptions).

Amendment Note:

SB 920 was amended in both the House and the Senate. The amendments were developed through the Law Commission's work group process and had the support of the Judicial Sales Sub-Work Group of the Judgments Work Group. The amendments provided additional clarification of execution and redemption processes including: (a) clarification of those persons to receive notices; (b) the types of financial instruments that can be used for payment at sale or redemption; and (c) the manner in which proceeds are to be distributed upon sale of redemption of property.

Juvenile Code Revision Work Group:

RIGHTS AND PROCEDURES FOR PARENTS IN CERTAIN PRIVATE ADOPTION PROCEEDINGS

SB 921

Prepared by Wendy J. Johnson
Oregon Law Commission
Deputy Director

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

Report Approved at
Oregon Law Commission Meeting on
February 17, 2005

Introductory Summary

For the 2005 Legislative Session, the Oregon Law Commission's Juvenile Code Revision Work Group proposes this bill with the following objectives:

to require the petitioner in certain private adoption proceedings to serve a summons with motion and order to show cause on birth parents who do not consent to the adoption

to abandon the present outmoded requirement that the court serve a citation to show cause on these parents

to codify the substantive right to court-appointed counsel to birth parents in these private adoption proceedings and require that notice of the right to counsel be provided to the parent with the summons and motion and order to show cause

to make the procedures and the substantive provisions used in family court to handle the termination phase of these private adoption petitions clear and equivalent to procedures used in juvenile court termination of parental rights cases

History of Reform Efforts

Several members of the Juvenile Code Revision Work Group met in February 2003 and determined that there were significant problems with the existing putative father provisions in the juvenile code and with other references to fathers, parents, and paternity throughout the ORS. In June 2003, the Oregon Law Commission authorized the formation of a Putative Father Sub-Work Group of the Juvenile Code Revision Work Group. The focus of the Putative Father Sub-Work Group was to explore and define the rights that putative fathers are entitled to in juvenile court proceedings. The issues addressed in this bill were later brought to the attention of the Putative Father Sub-Work Group by Judge Maureen McKnight; the Sub-Work Group decided that the additional ORS Chapter 109 adoption issues were related enough to be included in the same law reform project because they both involved rights of fathers and putative fathers, specifically notice rights.

Sen. Kate Brown served as Chair of the full Juvenile Code Revision Work Group. KayT Garrett, an Assistant Attorney General with the Family Law Section of the DOJ, served as Chair of the Putative Father Sub-Work Group with Linda Guss, also an Assistant Attorney General, serving as Chair pro tem. The Putative Father Sub-Work Group met monthly during the legislative interim. Towards the end of that project, the Sub-Work Group determined that the issues addressed in this bill, and the statutes involved didn't fit within the relating clause of the larger putative father bill (SB 234). Additional expertise was also needed to complete this bill that now focuses on parents in adoption proceedings. Several discussions among Work Group members took place before and after the Putative Father Sub-Work Group meetings via electronic correspondence. Additional participants were included with adoption expertise. This bill was the result of email collaborations and informal meetings. The bill has been well circulated and discussed among adoption attorneys, family law attorneys, judges, legal aid attorneys, indigent defense attorneys, and state attorneys.[1] The bill with the attached revisions has the consensus of all involved.

Statement of the Problem Area

In essence, legally what happens in privately-initiated adoption petitions filed in family court is that the birth parent's parental rights are terminated and the adoptive parents are granted parental rights. These proceedings involve two stages: (1) a determination of whether the birth parent's consent has been given, or can instead be dispensed with because of neglect, desertion, or other statutorily recognized exception; and (2) a determination of whether the adoption is in

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[1] Special thanks to the following persons who assisted with the bill:

Scott Adams, attorney in private practice; David Gannett, attorney in private practice; KayT Garrett, AAG, Family Law Section; Prof. Leslie Harris, University of Oregon Law School; Sybil Hebb, Oregon Law Center; Judge Maureen McKnight, Multnomah County Judge; Susan Moffett, attorney in private practice; David Nebel, OSB; Robin Pope, attorney in private practice; Robin Selig, Oregon Law Center; Ingrid Swenson, Office of Public Defense Service; and William Taylor, Judiciary Committee Counsel. Doug McKean, Deputy Legislative Counsel, provided excellent drafting services for the project.

the child's best interests. These proceedings are highly similar to state-initiated termination of parental rights (TPR) cases heard in juvenile court that are followed by adoption of the child. The statutory grounds are essentially similar, the standards of proof are the same, and the enormity of the parent's interest and the drastic and irrevocable nature of the State's actions are identical. The similarity of these two proceedings grounded the 1990 decision of the Oregon Supreme Court which held that indigent parents facing termination of their parental rights in private adoptions have the same right to court-appointed counsel that Oregon statute provides for parents facing termination of parental rights in juvenile court. Zockert v. Fanning, 310 Or 514 (1990) (holding that the Oregon Constitution's equal privileges guarantee required appointment of counsel).

The problem in the present law is that the Fanning decision (which establishes a right to court-appointed counsel in private adoptions) has never been codified in the ORS. In addition, there is not a statutory provision requiring notice to these parents of their right to counsel. The right to counsel is essentially meaningless if parents are not aware of the right. The procedure for these private adoptions also needs reform and updating. For example, parents are presently served notice of a pending adoption petition by what is called a citation. The citation process is archaic and disfavored by judges and lawyers. The citation generally does not provide parents with the information they need to object or not object to the adoption. The procedure should more closely follow the procedures used in termination of parental rights cases in juvenile court.

Objective of the Proposed Bill

The objective of this bill is to amend ORS 109.330 to provide a clear statutory procedure for certain privately initiated adoption proceedings where birth parent parental rights can be terminated in family court. The goal is to provide equivalent procedures of those used in juvenile court termination of parental rights proceedings. The procedure will include notice of the right to court-appointed counsel. The bill will also codify the substantive right to court-appointed counsel articulated in Zockert v. Fanning, 310 Or 514 (1990) which is based on the pronounced similarities between privately-initiated adoptions handled by family courts and state-initiated termination of parental rights (TPR) cases heard in juvenile court.

Proposal

See SB 921 (2005) and proposed conceptual amendments attached.

Section Highlights

Section 1

Section 1 of the bill amends ORS 109.330.

An adoption petition can not proceed without the proper consent of the parents unless the court finds a basis to dispense with the necessity of that consent. See ORS 109.350, ORS 109.312. To get consent or to have consent waived, parents must receive proper notice of an adoption petition. The bill is not intended to change existing law on the two-part substantive

showing requirements for entering a judgment of adoption, i.e. 1) consent or statutory exception to consent; and 2) best interests of the child. The changes in subsection (1) of this bill would require the petitioner of an adoption to properly serve the parent in the adoption cases provided for in ORS 109.330 with a summons and motion and order to show cause why the adoption should not be ordered without the parent's consent. The adoption cases covered in ORS 109.330, include parents who no longer have legal custody of the child based on divorce (ORS 109.314), parents who have been adjudged mentally ill or deficient (ORS 109.322), parents who are imprisoned under a sentence of at least three years (ORS 109.322), and parents believed to have willfully deserted or neglected the child (ORS 109.324).

Presently, parents are provided service by an archaic citation procedure where the petitioner provides the citation to the court for signature and then the petitioner serves the citation on the parent. This procedure is an anomaly that is outmoded and can be confusing. In addition, the citation that the parent receives does not clearly communicate to the parent what is happening, the parent's rights, and how the parent should properly respond. Instead the parent is served with an adoption petition that provides a citation to appear at a specific date and time. Neither the court nor the adoptive parents may know in advance if the parent plans to appear because no written response to the petition is required. This lack of knowledge impairs both docketing and litigation preparation. The bill would replace the citation procedure with the more traditional service method of service of a summons with motion and order to show cause. This person is used commonly in domestic relations cases and is familiar to courts and practitioners. Under the bill, the parent would be informed that he/she must file a written response (objecting or not objecting) within 30 days of service-- thus informing the petitioner and the court if the matter will be contested. Only if a response is filed contesting the adoption will a hearing on the consent issue be necessary; the court would then provide notice of a hearing. If no response is filed, the court will proceed in the parent's absence to take any action allowed by law: that is, the statutory exception to consent from the parent will have been met.

Subsection (1) of Section 1 would require following the ORCP 7D, E, and F service of process and proof of service rules for the service of summons, motion and order to show. There is one exception and that is that the time for response for service made by publication under ORCP 7D(6) will not be 30 days counting from the date of the <u>first</u> publication as ORCP 7C(2) would require. Instead, it will be 30 days from the date of the <u>last</u> publication. This exception is necessary so that the requirement is consistent with the juvenile termination of parental rights provision found in ORS 419B.812(9).

The new subsection (2) details the requirements of the contents of a summons. The summons must inform the parent of the consequences for failure to timely file a written answer. The consequence is that the court may take any action authorized by law, including entering a judgment of adoption if the court finds adoption to be in the child's best interest. See subsection (2)(a). These provisions track the applicable consequences and summons provisions found in the juvenile code for termination of parental rights cases. See ORS 419B.819.

Subsection (2)(b) requires that the summons inform the parent of the requirements of a proper answer to the summons and that the answer must be filed within 30 days of service, or if service is by publication, within 30 days from the date of the last publication. See ORS

419B.819(2)(c) (analogous 30 days for response in juvenile court). To make it easier for parents (who often respond without the assistance of a lawyer), the subsection provides an answer form for parents to fill out that includes all of the required components of a proper written answer. See Section (2)(b)(B) of the bill. It allows parents to object or not object to the adoption.

Subsection (2)(c) requires notice in the summons of the hearing process, including notice that the court will schedule hearing(s) and order the parent to appear.

Subsection (2)(d) also requires the summons to include a notice of the right to be represented by an attorney in the proceeding and notice that if the parent meets the state's financial guidelines, the parent is entitled to have an attorney appointed at the state's expense. The parent's constitutional right to court-appointed counsel in adoption proceedings was recognized in Zockert v. Fanning, 310 Or 514 (1990). That right is without meaning if parents are not given notice of their right to counsel. This provision is really the heart of the need for this bill.

Subsection (2)(e) requires the summons to include a statement that the parent has the responsibility to maintain contact with the parent's attorney and to keep the attorney advised of the parent's whereabouts. This provision is analogous to the provision in the juvenile code. See ORS 419B.819(4)(d).

The new subsection (3) is simply the substantive law provision that provides 30 days for parents to respond with an answer (as described above in the summons requirements), and the answer requirements. The answer needs to include the parent's telephone or contact telephone number and address or contact address as defined in ORS 25.011, which could be the parent's residence, mailing or contact address.

The new subsection (4) is to be modeled after ORS 419B.518 which provides the right to counsel provision for termination of parental rights proceedings. The substantive right to court-appointed counsel for parents in private adoption proceedings was recognized in Zockert v. Fanning, 310 Or 514 (1990), but that right has never been codified in statute. Putting the right in statute will put courts and practitioners on clear notice of the right.

The new subsection (5) provides substantive provisions regarding the hearing process and duties of the court in informing the parent of hearing or hearings relating to the motion and order to show cause or the adoption petition. The provision gives flexibility to the courts by allowing an oral order or a written order. The provision is analogous to that used for termination of parental rights proceedings in ORS 419B.820.

The new subsection (6) provides a substantive law provision that provides that if the parent fails to file the required written answer or fails to appear for a hearing, the court, without further notice, may take any action that is authorized by law, including moving towards entry of a judgment of adoption without the parent's consent. This provision is analogous to ORS 419B.820(3) used for termination of parental rights proceedings.

The new subsection (7) is the present subsection (2), just renumbered with legislative counsel drafting clarifications. The provision allows the court to also provide notice to others deemed necessary when the child has no living parent, guardian, or next of kin in the state.

Section 2

This section is a conforming amendment section, amending ORS 109.308. The reference to the present citation procedure is deleted and the new summons with motion and order to show cause procedure is substituted. The summons procedure is described above in Section 1.

Section 3

This section is provided by Legislative Counsel to ensure proper ordering of the statutes when published.

Section 4

This section is a conforming amendment section, amending ORS 109.314. The reference to the present citation procedure is deleted and the new summons with motion and order to show cause procedure is substituted. The summons procedure is described above in Section 1. Additional non-substantive form and style changes are made to the statute that follow Legislative Counsel drafting protocols and provide terminology consistency to the ORS. For example, the term "divorce" is changed to "marital dissolution."

Section 5

This section is a conforming amendment section, amending ORS 109.322. The references to the present citation procedure are deleted and the new summons with motion and order to show cause procedure is substituted. The summons procedure is described above in Section 1. Additional non-substantive form and style changes are made to the statute that follow Legislative Counsel drafting protocols and provide terminology consistency to the ORS. For example, the phrase "welfare of the child will be best promoted" is substituted with "best interests of the child."

Section 6

This section is a conforming amendment section, amending ORS 109.324. The reference to the present citation procedure is deleted and the new summons with motion and order to show cause procedure is substituted. The summons procedure is described above in Section 1. Additional non-substantive form, style, and numbering changes are made to the statute that follow Legislative Counsel drafting protocols and provide terminology consistency to the ORS.

Section 7

This section is a conforming amendment section, amending ORS 109.326. The reference to the present citation procedure is deleted and the new summons with motion and order to show cause procedure is substituted. The summons procedure is described above in Section 1. Additional non-substantive form and style changes are made to the statute that follow Legislative Counsel drafting protocols and provide terminology consistency to the ORS.

Section 8

This section provides that the substance of the bill applies to petitions for adoptions filed on or after the effective date of the Act. The bill does not contain an emergency clause and thus the effective date would be the traditional date of January 1, 2006.

PROPOSED CONCEPTUAL AMENDMENTS TO LC 1649

Section 1

On page 1, at line 19, delete the reference of (2)(b) and replace it with (3).

On page 2, subsection (2)(a) should be rewritten to emphasize the two separate levels of consideration prior to entry of a judgment of adoption: 1) consent or consent is not required; 2) adoption is in the best interests of the child.

On page 2, at line 21, insert "or contact telephone number" after "telephone number."

At page 3, at line 5 add the following to the form: "I do not object to the proposed adoption." Also insert a box before the sentence " I do not consent to the proposed adoption." (Having alternative boxes for parents to check makes the process easy and makes the parent's decision clear.)

On page 3, at lines 17-19, amend so that it states ADDRESS OR CONTACT ADDRESS:
TELEPHONE OR CONTACT TELEPHONE:

On page 4, at (4), replace the present text which is modeled after ORS 419B.205 (dependency provision regarding right to counsel) with the wording modeled after ORS 419B.518 (termination of parental rights provision regarding right to counsel), which provides as follows:

> "If the parents are determined to be financially eligible, and request the assistance of appointed counsel, the court shall appoint an attorney to represent them at state expense. Appointment of counsel under this section is subject to ORS 135.055, 151.216 and 151.219."

Section 5

At line 26, delete the extra "the."

Section 7

ORS 109.326, as amended in the bill, requires a summons and a motion and order to show cause in accordance with ORS 109.330 to be served on the husband who is not the father. However, the sample answer in the amended ORS 109.330 doesn't apply exactly because the father will be served with a motion and order to show cause why his "parental rights should not be terminated," not a motion and order to show cause why the "proposed adoption should not be ordered without his consent." Either the sample needs to be amended or ORS 109.326 needs to be amended by the Legislative Counsel drafter to take care of this problem.

Amendment Note

Amendments to this bill were made in the Senate that reflect the proposed conceptual amendments discussed above that were approved be the Law Commission. Another amendment was made in the House, and that amendment had the endorsement of the Putative Father Sub-Work Group. The amendment provides that service of summons by posting is one of the acceptable methods of service. Service by posting requires a court order. The bill specifically referenced service by publication (which also requires a court order) and thus the context suggested that posting might not be permitted. The House amendment clearly allows for posting and thus when a parent cannot be found, a court may permit service by posting which is far less expensive than publication.

Automobile Insurance Work Group:

SELF-INSURED VEHICLES UNDER LIABILITY AND UM/UIM INSURANCE STATUTES

SB 922

Prepared by Joel DeVore
Study & Work Group Member

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

Report Approved at
Oregon Law Commission Meeting on
November 19, 2004

I. Introductory Summary

The proposed legislation would patch two holes in auto insurance coverage caused by self-insured vehicles. First, this bill would assure that the owners of self-insured vehicles provide the statutorily minimum automobile liability coverage of $25,000 per injured person or $50,000 per accident for the drivers of those self-insured vehicles who drive with the owners' consent. In effect, this bill would extend to self-insurers the existing requirement that ordinary auto policies must provide coverage for permissive drivers. ORS 806.080(1)(b). Self-insurance would then mirror traditional insurance.

Second, this bill would assure that if liability coverage failed to exist sufficient to pay the damages caused by a self-insured vehicle, that the injured person could collect on the injured person's own uninsured or underinsured motorist (UM/UIM) coverage. Today, the UM/UIM statute unwittingly declares that self-insured vehicles can never be treated as an uninsured or underinsured vehicle, even when self-insurance provides no recovery at all. ORS 742.504(2)(e)(B). When self-insurance fails or falls short, the injured person's own UM/UIM coverage will not now do its job of making up the difference.

II. History of the Project

At the prompting of several sources, the Oregon Law Commission's Program Committee identified Oregon's auto insurance statutes, particularly the uninsured and underinsured motorist provisions, as a subject for inquiry. *See* ORS 173.338(1) (Commission to discover defects and anachronisms and recommend law reform).

In 2003, an Auto Insurance Study Group considered 22 issues and prioritized the topics for remedial legislation.[1] Nine issues were deemed the highest priority. On February 27, 2004, the Oregon Law Commission approved the creation of a Work Group.[2] On April 29, 2004, the Work Group found consensus on five particular problem areas to address for the 2005 Legislative Session.[3] The Work Group agreed that any remedial legislation should be segregated into separate bills to promote passage and to avoid "gut and stuff" changes. On October 27, 2004, five bills were recommended by the Work Group for consideration by the full Oregon Law Commission. This proposed bill involves two interrelated issues arising from self-insured vehicles.

III. Statement of the Problems

A. Liability Insurance

Fifteen years ago, the Oregon Supreme Court established a fundamental principle in Oregon's Financial Responsibility Law, the set of statutes that declare the basic requirements of auto liability insurance. The court construed the statutes to require that insurance policies on cars must provide liability coverage for anyone who drives with the permission of the owner. Viking Ins. Co. v. Perotti, 308 Or 623, 784 P2d 1081 (1989); Viking Ins. Co. v. Petersen, 308 Or 616, 784 P2d 437 (1989). The legislature confirmed its agreement by codifying the requirement in the next session. 1991 Or Laws ch 768, §8 (now ORS 806.080(1)(b)).

Not everyone is required to buy insurance on their vehicles. Another way to comply with the Financial Responsibility Law is to become "self-insured." ORS 806.060. Any entity which owns 25 or more vehicles may get a certificate of self-insurance from the Department of Transportation so long as the entity promises that it will "pay the same amounts" required by the Financial Responsibility Law. ($25,000 per person / $50,000 per accident). ORS 806.130.

The Oregon Court of Appeals construed the self-insurance statute narrowly, holding that it implied no requirement that a permissive driver of the car be covered by the car's "self-insurance." The requirement to "pay the same amounts" did not imply that the self-insurer must pay under the same circumstances required by the Financial Responsibility Law. Farmers Ins. Co. v. Snappy Car Rental, Inc., 128 Or App 516, 876 P2d 833 (1994) (permissive user not covered); see also Neal v. Johnson, 154 Or App 500, 962 P2d 706 (1998) (no permission).

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[1] The Study Group was chaired by Commission member, Martha Walters, and was comprised of Justice Edwin Peterson, Senator Charlie Ringo, Dean Heiling, John Bachofner, and Joel DeVore.

[2] The Work Group consisted of the Study Group with the addition of four members: Stephen Murrell, Tom Mortland, Neal Jackson, and Richard Lane.

[3] Of the Study Group's "highest priority" issues, the Work Group tabled four issues with the following numeric rankings: (1) the reported conflict between PIP offsets under ORS 742.542 and PIP reimbursement under ORS 742.544; (2) the denial of underinsurance coverage when government negligence causes injury; (8) adding a statutory authorization for medical exams to the PIP statute; and (9) revising or clarifying the UM/UIM time limit in ORS 742.504(12).

Unlike everyday auto insurance, the "self-insurance" on self-insured cars provides nothing when a permissive driver drives. In this regard, self-insurance does not mirror a fundamental requirement of the Financial Responsibility Law.

Self-insurers can be anyone with 25 or more vehicles. Typically, such fleets are owned by corporate entities, utilities, and car rental businesses. Usually, permissive drivers carry their own liability coverage. However, a recurring problem arises when the driver lies about coverage, has been excluded from coverage, or has had coverage canceled. When the driver's own liability coverage fails, there is no coverage for the permissive driver of the self-insured car. Self-insured cars and traditionally insured cars are not treated alike.

B. Uninsured and Underinsured Motorist Coverage

By definition, the uninsured and underinsured motorist statute declares that an "uninsured vehicle" is not a self-insured vehicle. ORS 742.504(2)(e)(B). When the UM/UIM statute was adopted in 1967, the assumption may have been that a self-insured vehicle will always provide enough money to pay damages. That assumption is wrong for two reasons. First, self-insured vehicles do not provide coverage for permissive drivers. As in the Snappy Car case, there may be no money at all. Second, when self-insurance does pay, it is only required to pay the minimal limits of $25,000 per person or $50,000 per accident. Thompson v. Estate of Pannell, 176 Or App 90, 98, 29 P3d 1184 (2001).

Today, injured Oregonians can discover that, not only may the driver of the self-insured car have no liability money, but injured persons will be denied their own uninsured motorist coverage. An injured person may have purchased basic $25,000 / $50,000 UM coverage, but a "self-insured" car is, by definition in the statute, never an uninsured car. Even when drivers of self-insured cars *do* have liability coverage, such as $25,000 / $50,000, the injured person's own *under*insured motorist coverage will automatically and invariably fail. The accident victim may have a severe injury and $100,000 / $300,000 UIM coverage, but a "self-insured" car is, by definition, never an *under*insured car, either.

IV. Objectives of the Proposal

The objectives of the proposal are to assure that self-insurance complies fully with the Financial Responsibility Law. ORS 742.450 to ORS 452.468; ORS Ch 806. Permissive drivers of self-insured cars would be afforded basic liability coverage just as they must be in cars covered by traditional insurance.

If for any reason, the self-insurer is non-complying or self-insurance fails, or if, after paying its basic limits, self-insurance falls short of paying an injured Oregonian's damages, then the injured person's own UM or UIM coverage would pay in the normal way.

Nothing in this proposal is intended to eliminate the existing requirement that a claimant must first exhaust the underlying liability limits by judgment or settlement in one of the ways provided in ORS 742.504(4)(d).

V. The Proposal

The proposal is now identified as SB 922.

VI. Conclusion

It is doubtful that self-insurance was ever intended to provide coverage that is less than the Financial Responsibility Law. We can be certain that no Oregonian expects their own UM/UIM insurance to fail completely, just because the wrong-doer happens to drive a self-insured car. These statutory "defects and anachronisms" well warrant reform. *See* ORS 173.338(1)(a).

VII. Amendment Note

An amendment was made to SB 922 to further clarify the intent of the bill. A new section 1a was added. That section makes it clearer that a self-insurer is required to provide the minimum payments established under ORS 806.070 only when the motor vehicle liability insurance policy of a customer of the self-insurer or an operator of the self-insured vehicle does not provide the minimum required payments established in ORS 806.070. That is, if a customer or operator has proper insurance under Oregon law, the self-insurer will not be liable.

Automobile Insurance Work Group:

MATCHING MINIMUM LIMITS AND MULTIPLE CLAIMANTS UNDER UM/UIM INSURANCE STATUTES

SB 923

Prepared by Joel DeVore
Study & Work Group Member

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

Report Approved at
Oregon Law Commission Meeting on
November 19, 2004

I. Introductory Summary

The proposal would finish an amendment that may have been done incompletely by the 1997 legislature. This bill would assure that when multiple claimants divide the wrongdoer's "per accident" liability insurance limit into small amounts, that an injured claimant may rely on the claimant's own underinsured motorist (UIM) coverage for the balance of their "per person" limit.

II. History of the Project

At the prompting of several sources, the Oregon Law Commission's Program Committee identified Oregon's auto insurance statutes, particularly the uninsured and underinsured motorist provisions, as a subject for inquiry. *See* ORS 173.338(1) (Commission to discover defects and anachronisms and recommend law reform).

In 2003, an Auto Insurance Study Group considered 22 issues and prioritized the topics for remedial legislation.[1] Nine issues were deemed the highest priority. On February 27, 2004, the Oregon Law Commission approved the creation of a Work Group.[2] On April 29, 2004, the work group found consensus on five particular problem areas to address for the 2005 Legislative

[1] The Study Group was chaired by Commission member, Martha Walters, and was comprised of Justice Edwin Peterson, Senator Charlie Ringo, Dean Heiling, John Bachofner, and Joel DeVore.

[2] The Work Group consisted of the Study Group with the addition of four members: Stephen Murrell, Tom Mortland, Neal Jackson, and Richard Lane.

Session.[3] The Work Group agreed that any remedial legislation should be segregated into separate bills to promote passage and to avoid "gut and stuff" changes. On October 27, 2004, five bills were recommended by the Work Group for consideration by the full Oregon Law Commission. This proposal involves finishing a statutory repair begun in 1997.

III. Statement of the Problem

A problem with matching liability and UM/UIM limits occurs when three or more claimants divide the liability limits into amounts smaller than the per person UM/UIM limit. Traditionally, there was deemed to be no UM or UIM coverage when limits of a liability policy matched the limits of a UM/UIM policy, because the law blindly declared the at-fault car not to be uninsured or underinsured. See, e.g., Shisler v. Fireman's Fund Ins. Co., 87 Or App 109, 741 P2d 529 (1987).

For example, an injured person might recover only $10,000, because other injured people recovered the $40,000 balance of the wrong-doer's "per accident" limit ($50,000). It would seem logical to turn to the injured person's own UM/UIM coverage for the unpaid damages. Historically, however, the injured person would have been denied the person's own UM/UIM coverage for the $15,000 balance of the $25,000 "per person" UM/UIM limit.

In 1997, the legislature revised ORS 742.502, intending to fix this problem. 1997 Or Laws Ch 808. Rather than defining underinsurance by comparing the UIM policy limit with the liability limit that an offending vehicle "is insured for," the 1997 amendment changed the frame of reference to a comparison of the UIM policy with the amount that is recovered from the liability policy. See DeVore, Vega v. SB 645: Underinsured Motorist Coverage & the Exhaustion Clause, 34 Willamette L Rev 327 (Spring 1998). It was a change made as a concession to injured people in return for the legislative override of the Vega decision, a decision involving a different and larger UM/UIM issue. *Id.*

Recently, the Court of Appeals confirmed that the 1997 fix did fix the problem B at least with regard to matching underinsured motorist coverage when the coverage is *above* the statutory minimum $25,000 per person / $50,000 per accident. Takano v. Farmers Ins. Co., 184 Or App 479, 56 P3d 491 (2002). The case happened to involve matching higher limits.

Doubts, however, have been raised whether the 1997 amendment to ORS 742.502 accomplished the task when the UM/UIM policy is for an amount of $25,000 per person. Key counsel for insurers have pointed out that the problem language in ORS 742.502(2) was not fixed in 1997. Only subsection (3) was changed. The language in the two subsections is parallel. As a result, the matching limits / multiple claimants problem could occur when a *minimum* limits

[3] Of the Study Group's "highest priority" issues, the Work Group tabled four issues with the following numeric rankings: (1) the reported conflict between PIP offsets under ORS 742.542 and PIP reimbursement under ORS 742.544; (2) the denial of underinsurance coverage when government negligence causes injury; (8) adding a statutory authorization for medical exams to the PIP statute; and (9) revising or clarifying the UM/UIM time limit in ORS 742.504(12).

liability policy ($25,000 / $50,000) collides with a minimum limits UM/UIM policy ($25,000 / $50,000).

Surprisingly, the multiple claimants problem recurs with regularity. Assuming more people buy cheaper insurance, people colliding with matching minimum limits may be more common than people colliding with matching higher limits. To avoid short-changing injured Oregonians, the 1997 fix needs to be finished.

IV. Objective of the Proposal

The objective of the proposal is to simply extend the same changes of phrase in ORS 742.502(3) to subsection (2). To be doubly certain that the slight changes of phrase do not depend upon a casual reader's appreciation of nuances, a new subsection (5) would be added to say in plain English that underinsurance coverage is available when the limits of UM coverage equal the limits of a liability policy and the amount recovered is less than the limits of the UM coverage.

Nothing in these changes is intended to eliminate the existing requirement that a claimant must first exhaust the underlying liability limits by judgment or settlement in one of the ways provided in ORS 742.504(4)(d).

V. The Proposal

The proposal is SB 923.

VI. Conclusion

The substantive change, which underlies this proposal, already occurred in 1997. The earlier amendment may have been incomplete. If left unattended, this statute could short-change injured claimants in matching minimum limits situations. This proposal will finish the drafting job and avoid unnecessary litigation.

VII. Amendment Note

An amendment was adopted in the Senate. The objective of this bill was achieved on page 2 at lines 18-23 of the introduced bill. The amendment made in the Senate was not to this section. The technical amendment was made to restore the word "benefits" where it had been deleted because case law has given meaning to that word and no unintended consequences were desired. Legislative Counsel had made the word style changes when drafting the original bill.

Automobile Insurance Work Group:

UM COVERAGE TO INSUREDS INJURED BY STOLEN CARS

SB 924

Prepared by Steve Murrell
Work Group Member

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

Report Approved at
Oregon Law Commission Meeting on
November 19, 2004

I. Introductory Summary

Currently insureds injured by their own car when it is operated by a thief do not receive any compensation for pain and suffering from insurance. This is an anomaly in insurance coverage because individuals injured by other stolen cars do receive compensation for pain and suffering from the Uninsured Motorist (UM) provisions of their own auto insurance policy. The purpose of the bill is to change the terms of mandated UM coverage to provide pain and suffering compensation when an insured is injured by their car while it is operated by a thief.

In addition to expanding UM coverage the bill requires any insured making a UM claim involving theft of the insured vehicle to report the theft to law enforcement and cooperate with prosecution of the thief as a condition of coverage. These reporting and cooperation provisions are intended to discourage collusive or fraudulent claims.

II. History of the Project

This particular legislation is a continuation of the project started by the Oregon Law Commission's Automobile Insurance Study Group that reported to the Commission in early 2004. The original report identified 22 issues for reform that were divided into high, medium and low priority issues. This issue was rated as the 5th highest priority for reform. After the initial report to the Commission, an Automobile Insurance Work Group was formed that included the members of the original Study Group and additional

representatives from the plaintiff bar and insurance industry.[1] The expansion of UM coverage to provide compensation for injuries sustained by the insured vehicle was one of five issues that the work group reached consensus on to recommend legislative action by the Commission for the 2005 Legislative Session.

III. Statement of the Problem Area

As previously mentioned, insureds injured by their own car when it is stolen do not receive compensation for pain and suffering damages. This happens because automobile liability policies only provide coverage if the insured car is operated with the owner's permission. A car thief does not have permission to operate the stolen vehicle and therefore has no liability insurance to compensate anyone injured by operation of the car.

Because there is no liability coverage in this situation the injured party usually collects compensation from their own policy under the Personal Injury Protection (PIP) and Uninsured Motorist (UM) coverages. PIP pays for medical expenses and lost wages and UM coverage compensates for pain and suffering damages; between these two coverages the insured receives full compensation up to the limits of their policy.

The problem arises when the stolen car is also owned by the person the thief injures. In that case, the injured person only receives compensation under PIP for medical bills and lost wages and does not receive any pain and suffering compensation from their UM coverage. The reason that this happens is because the UM statute states that the insured car cannot be an uninsured car by definition. ORS 742.504 (1)(e)(A); Cole v. Farmers Ins. Co., 108 Or App 277 (1991). The result is that an insured, injured by the insured vehicle when it is operated by a thief, receives only compensation for medical expenses and lost wages under PIP and no compensation for pain and suffering.

The proposed bill will allow compensation for pain and suffering from the UM coverage when an insured is injured by a thief operating the insured car. Currently insurers in Oregon have very few claims involving injury of the insured by a thief operating the insured car and this change will allow those individuals sustaining this type of loss to receive the same compensation as individuals injured by cars other than the insured vehicle.

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[1] The membership included the following:

Martha Walters, Chair	John Bachofner
Justice Edwin Peterson	Joel Devore
Senator Charlie Ringo	Stephen Murrell
Dean Heiling	Tom Mortland
Neal Jackson	Richard Lane

IV. Objectives of the Proposal

This proposal has two objectives. The first objective is to expand mandated Uninsured Motorist coverage to include pain and suffering compensation for an insured injured by the insured vehicle when it is stolen and operated by a thief. The Work Group was in complete consensus with no issues of concern on this objective.

The second objective is to discourage collusion and fraud by conditioning coverage on the insured reporting the theft to law enforcement and cooperating with prosecution of the thief. While the whole Work Group agreed with this provision conceptually, there was some concern that the condition may be interpreted too strictly in practice and place unreasonable burdens on an insured. The Work Group agrees that this provision is not problematic so long as it is understood that intent of this provision is to impose a duty on the insured to cooperate that is consistent with current Oregon case law on the duty to cooperate under automobile liability coverage. This body of case law is well developed and balances the insurer's need for cooperation while not imposing too great of burden on an insured.

V. Review of Legal Solutions Existing or Proposed Elsewhere

In 2003, HB 2632 and HB 2073 were introduced in the legislature to address this issue. The Work Group draft is similar to and conceptually modeled after language in those bills.

HB 2632 was sponsored by Rep. Max Williams and Sen. Charlie Ringo working with the insurance industry. The bill received a hearing but failed to move forward even though there was no opposition to its passage.

HB 2073 was a bill proposing a number of changes in insurance law including this issue that did not receive a hearing.

VI. The Proposal

The proposal is SB 924 (LC 842) which is attached to this report. SB 924 (LC 842) expands Uninsured Motorist coverage by adding a definition of stolen car in the UM statute on page 4 lines 14-24 and then changing the definition of an uninsured motor vehicle at page 5 line 14 to include a stolen vehicle. Page 5 line 16 clarifies that a stolen vehicle is an exception to the insured vehicle qualifying as an uninsured vehicle.

The provisions that require the insured to report the theft to law enforcement and cooperate with prosecution of the thief as a condition of coverage are included in the definition of a stolen vehicle on page 4 at lines 19-24.

VII. Conclusion

The legislation proposed by SB 924 (LC 842) will expand Uninsured Motorist coverage to include compensating the insured when they are injured by their own vehicle while it is operated by a thief. This change in the law will make coverage more consistent and coherent by providing pain and suffering compensation to insureds whenever they are injured by a car operated by a thief and is an appropriate improvement in law for the Oregon Law Commission to take action on.

VIII. Amendment Note

A technical amendment was made in the House to resolve conflicts with another Law Commission bill, SB 925. Both bills amend ORS 742.504.

Automobile Insurance Work Group:

OVERLAPPING INSURANCE IN UM/UIM STATUTE

SB 925

Prepared by Joel DeVore
Study & Work Group Member

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

Report Approved at
Oregon Law Commission Meeting on
November 19, 2004

I. Introductory Summary

The proposed legislation would clarify a poorly written provision of the model uninsured (UM) or underinsured motorist (UIM) policy that appears in ORS 742.504(9). It is a "model" provision of the sort that is included in each insurance policy in order to declare what happens when the policy overlaps or covers the same injury as does another similar UM or UIM policy. Clarification would expedite claims and avoid disputes.

II. History of the Project

At the prompting of several sources, the Oregon Law Commission's Program Committee identified Oregon's auto insurance statutes, particularly the uninsured and underinsured motorist provisions, as a subject for inquiry. *See* ORS 173.338(1) (Commission to discover defects and anachronisms and recommend law reform).

In 2003, the Auto Insurance Study Group considered 22 issues and prioritized the topics for remedial legislation.[1] Nine issues were deemed the highest priority. On February 27, 2004, the Oregon Law Commission approved the creation of a Work Group.[2] On April 29, 2004, the Work Group found consensus on five particular problem areas to address for the 2005

[1] The Study Group was chaired by Commission member, Martha Walters, and was comprised of Justice Edwin Peterson, Senator Charlie Ringo, Dean Heiling, John Bachofner, and Joel DeVore.

[2] The Work Group consisted of the Study Group with the addition of four members: Stephen Murrell, Tom Mortland, Neal Jackson, and Richard Lane.

Legislative Session.[3] The Work Group agreed that any remedial legislation should be segregated into separate bills to promote passage and to avoid "gut and stuff" changes. On October 27, 2004, five bills were recommended by the Work Group for consideration by the full Oregon Law Commission. This proposal involves a provision that can confound insurers and delay resolution of claims.

III. Statement of the Problem

The problem with the overlapping insurance provision in ORS 742.504(9) is that it is difficult to understand, which leads to unnecessary disputes between insurers, or between insurers and their insureds. The subsection fails to state the obvious. That is, UM/UIM coverage under a policy is primary while the insured is occupying a vehicle owned by the named insured under the policy's coverage. The statute beats around the bush, but just does not say what is primary to begin with. The bulk of the statute could be written more clearly to say when coverage is secondary or excess.

By contrast, the PIP statute does dictate which policy is primary and which is excess, thereby keeping life simple and avoiding disputes. *See* ORS 742.526. Revision of the UM/UIM statute would better parallel the relative clarity of the PIP statute on the priority of overlapping policies.

IV. Objectives of the Proposal

A new subsection (A) says plainly that, while occupying a vehicle owned by the named insured, the insured's policy is primary.

A rewritten subsection (B) says that an insured's coverage is excess when occupying a car not owned by the insured.

The provisions permit the insurer to include anti-stacking language, which limits the overlapping coverage to the greater of the two policies. This is the current law.

Even so, because the provisions of ORS 742.504 are only model, minimum terms, any insurer is free to provide greater coverage, including coverage that stacks overlapping policies.

V. The Proprosal

The proposal is SB 925 (LC 843).

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[3] Of the Study Group's "highest priority" issues, the Work Group tabled four issues with the following numeric rankings: (1) the reported conflict between PIP offsets under ORS 742.542 and PIP reimbursement under ORS 742.544; (2) the denial of underinsurance coverage when government negligence causes injury; (8) adding a statutory authorization for medical exams to the PIP statute; and (9) revising or clarifying the UM/UIM time limit in ORS 742.504(12).

VI. Conclusion

Revision of ORS 742.504(9) would clarify the meaning of the statute's provision for overlapping UM/UIM coverage. Clarity may avoid future litigation.

Automobile Insurance Work Group:

BANKRUPT INSURANCE COMPANIES

SB 926

Prepared by Tom Mortland
Work Group Member

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

Report Approved at
Oregon Law Commission Meeting on
November 19, 2004

I. Introductory Summary

The proposed legislation would cover a gap in auto insurance coverage caused by a restrictive definition of an "uninsured vehicle." The current definition of "uninsured vehicle" includes a vehicle for which the insurance company writing liability coverage at the time of the accident becomes bankrupt, but only if the insurance company becomes bankrupt within two years of the date of the accident.

The modified definition proposed in SB 926 would define "uninsured vehicle" to include a vehicle for which the insurance company writing liability coverage at the time of the accident becomes bankrupt, without regard to when that bankruptcy occurs. Language requiring that the bankruptcy occur within two years is deleted from the statute by SB 926.

II. History of the Project

The Oregon Law Commission in 2003 created a Study Group to consider automobile insurance issues and to prioritize the same for possible remedial legislation. In 2004, the Commission approved the creation of a Work Group to consider issues identified by the Study Group. The Work Group[1] identified five problem areas appropriate for legislation in 2005.

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[1] The membership included the following:

Martha Walters, Chair	John Bachofner
Justice Edwin Peterson	Joel Devore
Senator Charlie Ringo	Stephen Murrell
Dean Heiling	Tom Mortland
Neal Jackson	Richard Lane

One of the five problem areas identified as appropriate for legislative action is the definition of "uninsured vehicle" which precludes UM/UIM claims where the liability insurer becomes insolvent more than two years after an accident.

III. Statement of the Problem

ORS 742.504(2)(i) currently defines "uninsured vehicle" to include a vehicle with respect to which there is collectible bodily injury liability insurance applicable at the time of the accident, but the liability insurance company within two years of the date of the accident becomes voluntarily or involuntarily declared bankrupt, or a receiver is appointed for such company, or the insurer becomes insolvent. Under this definition a UM/UIM claim is valid and timely if, but only if, the liability insurer's bankruptcy or insolvency occurs within two years of the accident. If the bankruptcy or insolvency occurs after two years a UM/UIM claim is no longer timely.

Insurer insolvencies can occur at any time, however, and there is no justifiable reason for invalidating UM/UIM claims which arise because of an insurer insolvency occurring more than two years following an accident. The insured seeking UM/UIM benefits has no control over the timing of the liability insurer's insolvency and should not be arbitrarily foreclosed from a claim where the insolvency occurs beyond two years, as is the case now.

IV. Objectives of the Proposal

SB 926 removes this arbitrary restriction by eliminating language requiring that insolvency of the liability insurer occur within two years following an accident. The modified definition of "uninsured vehicle" provides that a vehicle is uninsured in the event of the liability insurer's insolvency, regardless of when that occurs.

V. The Proposal

The solution proposed by the work group is SB 926.

VI. Conclusion

SB 926 would expand the definition of "uninsured vehicle" to include a vehicle for which the liability insurer becomes insolvent, regardless of when that insolvency occurs.

VII. Amendment Note

The bill was amended in the House to resolve wording conflicts in SB 926 caused by SB 925 (also an OLC auto insurance bill). The amendments were technical Legislative Counsel-generated amendments to ensure the text of ORS 742.504 will not have conflicting wording in SB 925 and SB 926. The focus of SB 926 remains removing the "within two years" reference in ORS 742.504(2)(i).

Eminent Domain Report:

APPRAISAL EXCHANGES

HB 2268

Prepared by
Wendy J. Johnson
Oregon Law Commission
Deputy Director

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

Report Approved at
Oregon Law Commission Meeting on November 19, 2004

I. Introductory Summary

In eminent domain cases, opinions of market value are generally the focus of the case. That number is based primarily upon the appraisals of the land owner and the government. But today, in many cases, even the experienced appraiser does not have the expertise to testify on the diverse specialties upon which fair market value opinions in appraisals are based. "Architects, planners, economists, agronomists, brokers, consultants, geologists, biologists, botanists and engineers of every stripe are finding their way into valuation proceedings."[1] For example, "though an appraiser may study the market and render an opinion of what the highest and best use of a property is for future development, the nature, scope, and suitability of the land for a particular development are questions for a land planner, engineer or architect."[2] Likewise, the type of property or feature of property at issue may affect the valuation process; for example, mineral rights cases may require the expertise of experts including geologists, petroleum engineers, quality engineers, etc. In short, while the appraisal remains the center of the eminent domain case, information from other experts or skilled persons that the appraiser relied upon are more and more necessary to understand the valuation theories of the case.

Discovery (specifically the discovery of appraisals) in eminent domain cases is different than traditional Oregon discovery rules. The difference is predicated upon the view that eminent domain actions are different than other forms of litigation in that eminent domain actions are

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[1] James D. Masterman, Opinion Testimony in Eminent Domain Trials (975 ALI-ABA Course of Study 87 (Jan. 12, 1995).
[2] Id.

principally concerned with the determination of the single issue of the amount of just compensation to be paid. These actions can be tried or settled with greater efficiency and less cost if there is pretrial disclosure of valuation data. For this reason, Oregon law, like most states, requires that parties exchange appraisals prior to an eminent domain trial. See ORS 35.346. That is, the condemner (government) is required to provide any written appraisal upon which the condemner relied in establishing the amount of compensation offered when providing the property owner with the initial offer. ORS 35.346(2). Likewise, the condemnee (property owner) must provide the condemner with a copy of the owner's appraisal not less than 60 days before trial or arbitration. ORS 35.346(4). In addition, each party to the proceeding is required to provide all parties with a copy of every appraisal obtained by the party as part of the case (this covers additional appraisals acquired after the initial exchanges). ORS 35.316(5)(b). Failure to provide a copy of an appraisal prohibits the use of the appraisal in arbitration or at trial. ORS 35.346(5)(a).

Oregon law does not presently require the exchange of information other than the appraisal reports, even though appraisals often reference information from other experts or persons with scientific, technical, or other specialized knowledge. The proposed bill would expand the discovery requirements to require the exchange of written reports, opinions, or estimates of non-appraisers relied upon in the appraisal. If an appraisal relied upon an unwritten report, opinion, or estimate of a non-appraiser, the party providing the appraisal would be required to describe the material in a manner adequate to allow identification of the source of the report, opinion, or estimate.

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 in the fall of 2001 and 2002 to prepare legislation for the 2003 session. Three bills were produced, namely House Bills 3370, 3371, and 3372.

In September 2003, the Oregon Law Commission authorized the Eminent Domain Work Group to continue their law reform work, picking up deferred issues, with a goal of recommending legislation for the 2005 session. The Group discussed several issues including the existing Oregon appraisal exchange statutes. One appraisal exchange issue is addressed with this bill.[3]

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[3] The group decided to defer recommending any changes in the law regarding other issues related to appraisals and valuation issues, including the following:

1. who can testify on market value in condemnation cases and what should be the discovery requirements (the Work Group decided to defer such issues as the appraisal certification licensing board governs in this area);
2. what is an "appraisal" for purposes of the appraisal exchange requirements (issues regarding drafts, updates, and reviews) (see State v. Stallcup, 195 Or App 239, 97 P3d 1229, 1236 (2004)(defining "appraisal");
3. discovery of appraisers' and expert witness' files;
4. the non-testifying appraiser and their appraisal report;

Meetings were held at Willamette University College of Law, the Oregon State Bar Offices, and the Stoel Rives law firm during both interims. The Work Group has included several attorneys in private practice (representing condemners and/or condemnees), state attorneys, city attorneys, appraisers, a federal judge, and a representative from the State Court Administrator's office.[4] In addition, David Heynderickx, Senior Deputy Legislative Counsel, has worked with the Group to draft bills. Each draft bill was thoroughly reviewed and thoughtfully discussed by the entire Work Group before the final version of the bill was accepted.

III. Statement of the Current Problems in the Law

Unnecessary surprise and gamesmanship occurs today with discovery in eminent domain cases. The requirement of the exchange of appraisal reports is less meaningful when the reports, opinions, and estimates relied upon in the appraisal are not exchanged. Present law does not require the exchange of reports, opinions, and estimates relied upon nor the identification of the source of such valuations. Valuation information constitutes the substance of the trial/arbitration, and pretrial disclosure is necessary if all parties are to fairly evaluate their claims for settlement purposes, determine the real areas of dispute, narrow the actual issues, avoid surprise at trial, and prepare properly for direct and cross-examination.

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5. testifying to values different from that in the exchanged report;
6. feasibility in triggering appraisal exchange deadlines from the date of filing the case rather than the date of trial; and
7. time lines of appraisal exchanges (first appraisals and subsequent appraisals) (the present 60 days before trial is often unhelpful because trial dates get moved or are set over often).

[4] Members for 2005 Session

Greg Mowe	Stoel Rives LLP
Jerry Curtis	Appraiser
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
David Ross	Salem City Attorney's Office
Donald Stark	Bullivant Houser Bailey PC
Joe Willis	Schwabe Williamson & Wyatt PC

Interested Participants for 2005 Session

Susan Grabe/ Jill Mallery	Oregon State Bar
Christy Monson	League of Oregon Cities
Bradd Swank	Office of State Court Administrator

IV. The Objectives of the Proposal

In creating this bill, the Work Group sought to establish a statute that provided clear, concrete, and useful requirements regarding production of those materials relied upon in an appraisal. The Group's intent was to balance the need to identify or review materials of experts or other skilled persons relied upon in appraisals, while at the same time keeping additional costs down and maintaining the adversarial process. The Group's recommended reform hopes to comport with goals of fairness in condemnation proceedings. As the Court of Appeals noted recently, the "overarching legislative intent [is] that the condemnation process be conducted without subterfuge, with full reciprocal pretrial disclosure of expert reports regarding valuation." State v. Stallcup, 195 Or App 239, 97 P3d 1229, 1236 (2004).

The Work Group was specifically concerned with the following issues:

1) The Group wanted to make sure that the materials required to be provided to the parties covered the types of materials that appraisals rely upon. For example, the term "report" alone was considered too narrow as it means different things to appraisers, real estate brokers, etc. Specific persons providing valuation information that the Group wanted to cover include but are not limited to engineers, geologists, real estate agents, and land use planners. Use of the terms "reports, opinions, or estimates" was intended to include the types of valuation data that all of these persons provide to appraisers.

2) The Group wanted to tie the requirement to disclose these reports, opinions, or estimates to the appraisal rather than to those persons who will or may testify as to these reports, opinions, or estimates at trial or arbitration. Those persons who prepare materials for a condemnation case but who are not linked to an appraisal would not be covered by the requirement.

3) The Group wanted to minimize extra costs to parties. The proposed legislation will not require parties to produce new documents, etc. to comply with the rule. That is, reports that were already created will need to be exchanged. For example, to keep costs down, the group specifically rejected the federal rules idea of requiring summary reports. Instead, the Group opted for disclosure of the actual report when there was a written report or simply identification of the source of the report, opinion, or estimate when it was unwritten. It was discussed that parties can use discovery tools to find out more from sources with unwritten materials as needed.

4) The Group wanted to cover both written, as well as unwritten reports, opinions, or estimates so that gamesmanship would be avoided.

5) The Group wanted to leave issues regarding sanctions for failure to meet these disclosure requirements to the trial and appellate courts.

V. Review of Legal Solutions Existing or Proposed Elsewhere

The Work Group looked to 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. Section 702 of the Model Act provides for very liberal rules of discovery with respect to valuation issues that go beyond traditional discovery in civil actions. The Group rejected expanding discovery requirements to the extent of those of the Model Act. In addition, the Work Group reviewed FRCP 26 and the eminent domain statutes from New York.

VI. The Proposal: See HB 2268 (LC 231)

Section 1: Subsection 8 of the section has the new recommended provision. This new provision requires discovery as a matter of right and without prior court approval of written reports, opinions or estimates relied upon in an exchanged appraisal. Written reports are intended to include electronic reports including emailed reports. This valuation data must be provided along with the appraisal whether or not the person who prepared the materials will testify at trial. The section also requires discovery, as of right, of the identity of the sources when there are reports, opinions, or estimates that were relied upon in an appraisal but were not in a written form.

Section 2: The bill will take effect on January 1, 2006, as is the tradition in Oregon following a legislative session. No emergency clause is provided.

VII. Conclusion

This bill is the product of thoughtful deliberation, including consideration by representatives of both condemners and condemnees. Enactment of this legislation will facilitate investigation, settlement, and trial/arbitration preparation in eminent domain cases, providing more comprehensive information as to the theories of value.

VIII. Amendment Note

An amendment to the bill was made in the House that substituted the word "provided" for the word "served" in the new ORS 35.346(8). The term "served" has legal formalities associated with it that were not intended. That is, the bill simply requires parties to provide the other side with a copy of any written report, opinion or estimate relied upon in an appraisal. Likewise, parties must provide the name and address of persons who provide unwritten reports, opinions or estimates relied upon in an appraisal.

Eminent Domain Report:

IMMEDIATE POSSESSION

HB 2269

Prepared by Wendy J. Johnson
Oregon Law Commission
Deputy Director

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

Report Approved at
Oregon Law Commission Meeting on
February 17, 2005

I. Introductory Summary

In eminent domain cases, generally there is no question of whether the property at issue will be condemned by the government. Instead, the value of the property is the focus of the case. The valuation negotiation process between condemner and condemnee sometimes culminates in trial when a settlement can not be reached. Should a case go to trial, it can take considerable time—more time than condemners can wait. For this reason and other reasons, sometimes there is a need for condemners to take the property immediately and complete the valuation process and potential trial later. This process, called immediate possession, is particularly common with condemners whom are putting in roadways, sewers, pipelines, etc. That is, it is sometimes in the best interest of the public to take the property immediately and complete the project to be done on the property.

At first, one might question why immediate possession would be lawful. The following summary of eminent domain power sheds light on the question. The power of eminent domain is an inherent power of the government; it is inherent in sovereignty. State of Ga. v. City of Chattanooga, 264 US 472, 480 (1924). The U.S. Constitution's Fifth Amendment, however, puts restrictions on the eminent domain power in the form of the just compensation clause and the due process clause.

The government may exercise its eminent domain power consistently with the 5th Amendment by physically seizing property without any prior notice, hearing, or compensation. In the U.S. Supreme Court decision of Hurley v. Kincaid, 52 S Ct 267, 76 L Ed 637 (1932), the Court held that a landowner was not entitled to an injunction to a taking because an action at law for compensation afforded the landowner with an adequate remedy. In other words, the due process that was required was the opportunity to be heard and offer evidence in a proceeding to

determine the just compensation for the property taken for a public use. The proceeding to determine the just compensation need not occur prior to possession. Id.[1]

Article 1, section 18 provides the taking provision in the Oregon Constitution and it is similar to the federal provision. In short, the Oregon Constitution also allows immediate possession before just compensation is assessed and paid.

Looking beyond the constitutions and looking at state law, one finds that Oregon does not presently have specific statutes regarding procedures for immediate possession. Rather, present state statutes provide only one additional requirement: that when a public condemner commences an action for condemnation and immediate possession of the property is considered necessary, a deposit in the amount estimated to be the just compensation for the property must be filed with the clerk of the court. ORS 35.265. However, at one time Oregon did have statutory procedure for immediate possession that required a motion, notice to the condemnee, and a hearing before the judge issued an order granting immediate possession. See ORS 35.050, 35.060 (1969), repealed in 1971.

The Oregon Supreme Court was faced with an immediate possession case in a mandamus proceeding after the immediate possession procedure was deleted from statute in State ex rel City of Eugene v. Woodrich, 295 Or 123, 665 P2d 333 (1983). In that case, Judge Woodrich had denied the City of Eugene an order of immediate possession. The Oregon Supreme Court held that the legislature did not unambiguously intend to "do away with the public condemner's powers to secure immediate possession altogether" with the deletions. The Court in part reasoned that the 1971 bill had "retained the provision for funding and depositing estimated just compensation when a public condemner considers it necessary to obtain immediate possession of the property, the provision now found in ORS 35.265." In this opinion, authored by Justice Hans Linde, the Court concluded that the legislature did not unambiguously foreclose immediate possession by public condemners nor challenges to such possession. The court ultimately issued the writ of mandamus brought by the city, thus requiring the court to enter an order of immediate possession; the court found that Judge Woodrich did not present an affirmative defense that the use for which the city demanded immediate possession actually would be unlawful.

Woodrich cautions that the trial court's authority to deny immediate possession is limited. The opinion mentions formulas for judicial review in immediate possession cases that other states had found including defenses of "fraud, bad faith, or abuse of discretion," but the court did not adopt such formulas. Instead the opinion discusses and adopts only one theory—the "defense of illegality." The court seemed particularly concerned about land use decisions and emphasized that a court could deny a condemner immediate possession of the property if the

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[1] See also, Stringer v. United States, 471 F.2d 381, 383 (5th Cir.), cert. den., 412 U.S. 943, 93 S.Ct. 2775, 37 L.Ed.2d 404 (1973) ("The question on which issue is joined is whether the government may exercise its eminent domain power consistently with the Fifth Amendment by physically seizing property without any prior notice, hearing, or compensation. The answer to this question is yes.")

proposed public use would be "unlawful," "assum[ing] that 'unlawful' differs from 'not presently necessary' in that 'unlawful' refers to a legal obstacle that requires a change in a general law, such as a statute, a regulation, or a local ordinance, charter, or general plan, rather than only a permit, approval, or other discretionary action or factual judgment concerning the specific project." Id. at 136.[2]

In sum, Oregon public condemners have the authority to take immediate possession of property to be condemned.

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 in the fall of 2001 and 2002 to prepare legislation for the 2003 session. Three bills were produced, namely House Bills 3370, 3371, and 3372.

In September 2003, the Oregon Law Commission authorized the Eminent Domain Work Group to continue their law reform work, picking up deferred issues, with a goal of recommending legislation for the 2005 session. The Group discussed several issues including immediate possession challenges. The immediate possession issue is addressed with this bill.[3]

Meetings were held at Willamette University College of Law, the Oregon State Bar Offices, and the Stoel Rives law firm during both interims. The Work Group has included several attorneys in private practice (representing condemners and/or condemnees), state attorneys, city

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[2] More recently, in Department of Transportation v. Schrock Farms, 140 Or App 140, 914 P2d 1116 (1996), the Court of Appeals held that ODOT had authority to condemn property on which it intended to build a highway despite the fact that applicable zoning and land use regulations did not permit the building of the highway at the time. The court relied largely on Woodrich.

[3] The group decided to defer recommending any changes in the law regarding other issues related to appraisals and valuation issues, including the following:

1. who can testify on market value in condemnation cases and what should be the discovery requirements;
2. what is an "appraisal" for purposes of the appraisal exchange requirements (issues regarding drafts, updates, and reviews) (but see State v. Stallcup, 195 Or App 239, 97 P3d 1229, 1236 (2004)(recently defining "appraisal");
3. discovery of appraisers' and expert witness' files;
4. the non-testifying appraiser and their appraisal report;
5. testifying to values different from that in the exchanged report;
6. feasibility in triggering appraisal exchange deadlines from the date of filing the case rather than the date of trial; and
7. time lines of appraisal exchanges (first appraisals and subsequent appraisals) (the present 60 days before trial is often unhelpful because trial dates get moved or are set over often).

attorneys, appraisers, a federal judge, and a representative from the State Court Administrator's office.[4] In addition, David Heynderickx, Acting Legislative Counsel, has worked with the Group to draft bills. Each draft bill was thoroughly reviewed and thoughtfully discussed by the entire Work Group before the final version of the bill was accepted.

III. Statement of the Current Problems in the Law

Condemners, condemnees, non-attorneys, attorneys, and judges alike do not have a statutory procedure to follow when immediate possession is requested by a public condemner or challenged by the condemnee. Unnecessary inconsistency and surprise occurs as each court handles the issue differently. The lack of a statute is particularly problematic for attorneys who haven't been involved in a case involving immediate possession. The fact of the matter is that public condemners do take immediate possession from time to time and immediate possession is a lawful practice as described above in Section I. The ORS only contains a provision requiring a deposit when immediate possession is considered necessary by public condemners. See ORS 35.265. *Compare,* ORS 35.275 (regarding immediate possession for private condemners).[5]

Public condemners around the state use different practices when they determine that immediate possession is necessary. The City of Portland for example routinely goes into circuit court and obtains an *ex parte* order to take immediate possession of property to be condemned. The Oregon Department of Transportation (ODOT) does not generally seek a court order before taking immediate possession. Instead, ODOT gives notice and if there are no objections, then

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[4] Members for 2005 Session

Greg Mowe	Stoel Rives LLP
Jerry Curtis	Appraiser
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
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Donald Stark	Bullivant Houser Bailey PC
Joe Willis	Schwabe Williamson & Wyatt PC

Interested Participants for 2005 Session

Susan Grabe/ Jill Mallery	Oregon State Bar
Christy Monson	League of Oregon Cities
Bradd Swank	Office of State Court Administrator

[5] Subsection (1) of ORS 35.275 provides that the private condemner must provide a motion for immediate possession to the court. Subsection (2) provides that on a hearing for the motion, the court will make a determination looking at the reasons for requiring speedy occupation and the prejudice to both parties. Subsection (3) provides for deposit requirements.

takes possession. If there is an objection raised based on the notice, ODOT generally requests a hearing. Still other condemners do not have a common practice for immediate possession.

Another related problem is that there is not clear guidance in the law on the grounds for challenging immediate possession.

IV. The Objectives of the Proposal

In creating this bill, the Work Group sought to establish a statute that codified an accepted process for those public condemners who need to take immediate possession of property to be condemned and who seek an order confirming that possession. The bill's process is not a mandatory process but it represents a good first step that may require amendment as the process is used in upcoming years. The Group's intent was to balance the needs of condemners and condemnees. The Group's recommended reform hopes to comport with goals of fairness in condemnation proceedings.

The Group specifically sought to address the following issues:

- What matters may be raised during a right to take challenge, and what issues does the court have jurisdiction over?
- What is the public policy distinction between ORS 35.265 (re public condemners) and ORS 35.275 (re private condemners)?
- When is there a waiver of making a right to take challenge? What issues must be made at a right to take hearing?
- What due process rights, if any, does a property owner have with respect to immediate possession and right to take challenges?
- What procedure and timing requirements make sense for right to take challenges?

V. Review of Legal Solutions Existing or Proposed Elsewhere

The Work Group looked to state and federal case law and prior Oregon statutes for guidance. The Work Group also looked at the Uniform Eminent Domain Code.

VI. The Proposal: See HB 2269 (LC 232 dated 12/14/04)

VII. Section by Section Analysis

Section 1:

This provision provides that the bill will become a part of ORS Chapter 35. Chapter 35 is the Eminent Domain and Public Acquisition of Property chapter.

Section 2:

This section was put in as a precaution to avoid any confusion and prevent unintended results. The provision is intended to make clear that public condemners retain all regulatory powers they have that are independent of their eminent domain power. This bill, regarding

immediate possession, is not intended to somehow diminish existing emergency powers (sometimes referred to as police powers) of public bodies. Such powers would include for example, the power to go upon private property when there is a health, safety, or environmental emergency. For example, if there is a broken sewer pipe, there is a flood, etc., emergency repair and possession may be necessary. Eminent domain and the use of immediate possession is just one available process.

Section 3:

This section provides a codified process for public condemners to use to take immediate possession of property to be condemned. It is a process of notice of immediate possession, opportunity for the condemnee to object to immediate possession, an expeditious hearing if there is an objection, and a court order confirming or denying the immediate possession.

(1) Permissive process for condemners: This subsection is intended to make clear that this bill is a permissive and non-mandatory process for obtaining immediate possession because it provides that a "public condemner may serve notice." The Work Group opted for a permissive statute because such a process is unnecessary in all circumstances. The Group reasoned that this more formalized process is too expensive and burdensome for condemners in certain cases. For example, the Oregon Department of Transportation (ODOT) conducts hundreds of condemnations each year for road projects. The legal grounds to object to one of ODOT's condemnations are so limited that generally there is not a concern that the immediate possession would be found unlawful; thus ODOT and some other condemners would not find necessary the benefit of obtaining an order confirming the public condemner's possession of the property. The Work Group anticipates that many public bodies will indeed make use of this process because at the end of the procedure, the condemner is provided with an order that can be enforced. In addition, as a matter of practice condemners generally provide notice of immediate possession that is quite similar to that in the bill. Condemners also prefer to know if there are legal objections to condemnation at the front end of the process. It saves all parties time and money to address such issues at the beginning.

Notice: Subsection (1) also provides that should a condemner choose to use this immediate possession process, notice must be served to all defendants in the action. Service is required to be in the manner provided by ORCP 9. The ORCP 9 process is standard for written motions and is a process familiar to the bench and bar. It also ensures that the papers will be filed with the court within a reasonable time after service along with proof of service. Finally, this subsection provides that notice is not a condition to taking immediate possession; this is true because the bill's process of immediate possession is not a mandatory process, but rather is a permissive process. It also means that if the notice was somehow improper, e.g. one of the parties didn't receive notice, the failure does not make the immediate possession unlawful.

(2) Permissive process for condemnees: The new codified process in this bill is also permissive for the condemnee (defendant). See subsection (2) which provides that a "defendant in a condemnation action may object." This means that a property owner may choose to not make any objections when served with the notice of immediate possession. See also the subsection (6) discussion below. The property owner remains free to choose to object by setting forth legal defense(s) in the answer at a later date as provided by ORS 35.295. Alternatively, the

condemnee may choose to make some or all their objections at an immediate possession hearing. Subsection (6), discussed below, expands on this provision by stating that making objections at the immediate possession hearing does not preclude the condemnee from making objections again later in the answer solely because of the earlier filed objections.

If a condemnee elects to make objections to immediate possession of the property, (2) provides that the condemnee must file written objection with the court within 10 days after notice is served. Ten days was the agreed upon time frame as it strives to strike a balance between condemners and condemnees-- it does not postpone a public condemner's possession for too long and it gives the condemnee some time to assess the case and consult an attorney.

As with the condemner's service of notice, the condemnee is required to file a written objection on the condemner as provided by ORCP 9. As noted above, the ORCP 9 process is standard for written motions and is a process familiar to the bench and bar. It also ensures that the papers will be filed with the court within a reasonable time after service along with proof of service. The objection must request that the court schedule a hearing at the earliest possible time.

Last, this subsection lists the issues that a court may consider upon objection. The list is short and reflects the fact that a trial court's authority to deny immediate possession is limited. After careful research, the Work Group concluded that the only issues that a court may consider upon immediate possession objection are (a) whether the condemnation is illegal; and (b) subject to the presumption of ORS 35.235(2), whether the condemnation proceedings were the result of fraud or abuse of discretion. See State ex rel City of Eugene v. Woodrich, 295 Or 123, 665 P2d 333 (1983) and discussion in Part 1 of this report. A condemnation may be illegal or an abuse of discretion for failure to follow statutory procedures. The Work Group adopts no position as to which procedures, if not complied with, require dismissal of a condemnation action. This bill is not intended to change existing substantive law relating to condemnation defenses. Since the decision to take immediate possession is part of the condemnation proceedings, such decision is reversible only for illegality, fraud or abuse of discretion. There was discussion in the Work Group that putting a process in statute may result in an increased number of immediate possession challenges. It was noted that today, in most cases, objections are not made and there is not a basis for a challenge. Listing the grounds is intended to make clear that the appropriate issues are quite limited and hopefully curtail unfounded objections.

(3) Order granted if no objection to immediate possession notice: This subsection provides that a condemner may file with the court a form of order confirming the condemner's possession of the property as of the date specified in the notice when there is no timely objection filed by the condemnee as provided by (2). Upon the condemner's filing the proper affidavit, the clerk of the court is required to affix the seal of the court to the form of order. Thereafter, the order may be enforced as other orders of the court. This subsection is significant to those condemners who are presently using an *ex parte* hearing process before taking immediate possession of property. The bill's process will be more efficient in such cases and save judicial time because a hearing will not be necessary when a condemnee does not make an objection.

(4) Form of notice: This subsection simply puts a form into statute of an acceptable notice of immediate possession.

(5) Expeditious hearing on any objection filed with the court: This subsection is a corollary to the request for a hearing in (2) that a condemnee must make if the condemnee wants to file objections to the immediate possession. The provision requires the courts to expeditiously consider objections to immediate possession. This provision will help standardize the process around the state. As explained earlier, there is not a constitutional right of a hearing, but see State v. Woodrich, 295 Or 123, 136 (1983), suggesting that a court can deny immediate possession if proposed public use would be "unlawful" and finding that legislature did not abolish immediate possession process. This provision in of the bill would provide for a statutory hearing when the process is followed and requested. Private condemners already have a process that includes a hearing. See ORS 35.275. The term "expeditious" hearing was used in the bill because courts across the state use a variety of terms; this term should cover the various practices used by trial courts, including expedited hearings, priority hearings, hearings put on the show cause calendar, etc.

(6) Preclusion issues: This subsection provides that the ability of the condemnee in a condemnation action to assert legal defenses in the answer is not affected solely by reason of the filing (or not filing) of an objection to a notice of immediate possession. The use of the word "solely" in subsection (6) was intended to allow for preclusion from asserting legal defenses in the answer in limited circumstances. This area of the law is not well developed in Oregon and thus the Work Group left some discretion to the judge in this area. For example, where parties fully litigate an issue at the immediate possession hearing, a court might find a condemnee precluded from raising the same objection again at trial by the law of the case. In short, as a policy matter, the Work Group believed that a property owner shouldn't get "two bites at the apple," but a "bite at the apple" should be meaningful and shouldn't include merely raising an issue. The Work Group reasoned that at the time of immediate possession a condemnee is at a disadvantage given the shortness of time for discovery and its difficult burden of rebutting the presumptions of ORS 35.235. This predicament was discussed in Northwest Natural Gas Company v. Georgia-Pacific Corporation, 53 Or App. 89, 98 (1981). That case involved a private condemner. Still, the issue of preclusive effect would seem to apply in a public condemner case as well. In that case, ¾ of an acre of timber property was taken for the purpose of running a natural gas pipeline to a production plant. Id. at 91. The defendant (property owner) apparently believed it was compelled to make certain legal challenges at the immediate possession proceeding. Id. at 97. The court explained however that,

> "If a motion for immediate occupancy is filed on the heels of the complaint, nothing in ORS Chapter 35 requires or forbids the condemnee to challenge the rebuttable presumptions in the proceeding on that issue. Hearings on immediate occupancy may be held 'any time after an action is commenced;' the hearing on the validity of the presumptions may be held at any time 'prior to trial.'" Id. at 98.

The court elaborated that,

> "Nothing in the statute precludes a condemnee from contesting only the issues involved in immediate occupancy and later presenting its evidence on the right to condemn the property under the circumstances, although this creates the risk to the condemner that its right may later be successfully challenged." Id.

This subsection of the bill then is intended to make sure that following the new process provided for in the bill does not somehow change the substantive law regarding preclusion or waiver. That is, this bill does not intend to change the law with respect to the ability of defendants to assert legal defenses in the answer under ORS 35.295.

VII. Conclusion

This bill is the product of thoughtful deliberation, including consideration by persons with expertise in representing both condemners and condemnees. Enactment of this legislation will facilitate the immediate possession process in public condemnation cases in Oregon.

VIII. Amendment Note

An amendment, recommended by the Oregon Law Commission, was made to this bill in the House. The amendment did a couple of things. First by amending Section 3(2)(b) and the notice form in (4), it clarified that an objection to immediate possession based on a theory of abuse of discretion, applies only to condemners acting under a delegation of authority. Second, the theory of an objection based on a condemner acting in bad faith was added to these same sections. Third, a new Section 3(7) was added to the bill to provide further emphasis and clarify that the immediate possession procedure provided for by the bill is optional. That is, some public condemners may choose not to follow it and for example, may provide a different type of notice or not seek a court order before taking immediate possession. Public condemners have immediate possession authority and this bill simply provides guidance and an option for those condemners who want to follow it, especially those who may not have an already established procedure.

Administrative and Judicial Child Support Work Group

HB 2275

Prepared by Shani Fuller
Manager for Policy, Rules & Legislation
Oregon Child Support Program

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

Report Approved at
Oregon Law Commission Meeting on
November 19, 2004

I. Introductory Summary

In the 2003 Legislative Session, new laws were adopted at ORS 25.091 and 416.448 to resolve the problems associated with the entry of multiple child support judgments involving the same obligor and child for the same time period.

Prior to adoption of ORS 25.091 and 416.448, there was no mechanism in Oregon law to deal with those situations where multiple child support judgments were entered; particularly where an administrative child support order was entered and a court judgment was then entered at a later date. Upon advice from legal counsel, the Oregon Child Support Program (CSP) treated the later in time court judgment as superseding the administrative child support order.

The CSP did not anticipate the large number of instances prior to January 1, 2004, where it treated a court judgment as superseding an administrative order. The new law directs a governing child support order or judgment (GCSO/J) be completed for each of these and the arrears reconciled. Applying the new law to these cases when the obligor has relied on the billing and enforcement seems inequitable and will likely be cause for increased litigation and complaints.

The accompanying bill HB 2275 limits the applicability of ORS 25.091 and 416.448 when the multiple child support judgments were entered prior to January 1, 2004. The concept clarifies that if the judgments were entered prior to January 1, 2004 and the CSP gave a later in time court judgment precedence over the earlier issued administrative child support order, the court judgment will be treated as superseding the administrative order. HB 2275 also clarifies the reconciliation of arrears process when a GCSO/J is completed to address confusion brought to light during discussions of the Work Group.

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. The Work Group recommended legislation that was adopted in the 2003 Legislative Session at ORS 25.091 and 416.448.

In October 2004, the Oregon Law Commission approved the CSP's request to reconvene the Work Group to discuss a clean up amendment to the legislation passed in 2003. The Work Group met one time in November 2004 and approved proposed legislation to address multiple child support judgments entered prior to January 1, 2004, and clarify the reconciliation of arrears process.

The Work Group included several attorneys in private practice, attorneys with the government entities dealing with support issues such as the Department of Justice, Division of Child Support and the Marion and Clackamas County District Attorney's Office, an administrative law judge with the Office of Administrative Hearings, two state court judges, and a representative from the State Court Administrator's Office.[1] Doug McKean from Legislative Counsel provided critical drafting assistance.

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[1] **Members:**

Prof. Sandra Hansberger, Chair	Lewis and Clark College of Law
Kevin Anselm	Office of Administrative Hearings, ALJ
David Gannett	David G. Gannett LLC
Drake Lightle	Gevurtz Menashe Larson & Howe PC
Carol Anne McFarland	Clackamas Co. District Attorney's Office, DA
Judge Maureen McKnight	Multnomah Co. Circuit Court
Judge Keith Raines	Washington Co. Circuit Court
Ronelle Shankle	Department of Justice, Attorney General's office
Carl Stecker	Marion Co. District Attorney's Office, DA
BeaLisa Sydlik	Office of State Court Administrator

Interested Participants:

Susan Grabe	Oregon State Bar
Wendy Johnson	Oregon Law Commission
David Kenagy	Oregon Law Commission
Judge Dale Koch	Multnomah Co. Circuit Court
Doug McKean	Office of Legislative Counsel
Bradd Swank	Office of State Court Administrator
William Taylor	Judiciary Committee Counsel
Shani Fuller	Department of Justice, Division of Child Support

III. Statement of the Problem Area

When multiple child support judgments have been entered for the same obligor and child for the same time period, ORS 25.091 and 416.448 direct the court or administrator to make a determination as to the controlling terms of each child support judgment, enter a GCSO/J and reconcile the arrears resulting from the multiple judgments. The entry of a GCSO/J does not affect any arrears that accrued under the multiple judgments prior to the date of entry. However, consistent with the Uniform Interstate Family Support Act, the amounts due under the multiple judgments are credited against each other. In other words, the obligor will not owe amounts due under both judgments, but will owe the higher of the two judgments during periods of time when the judgments overlap.

Prior to the adoption of the GCSO/J process in Oregon law, the CSP gave precedence to the later in time court judgment. If the CSP was enforcing an administrative child support order and later received a court judgment for the same obligor and child (and the court judgment was not a modification of the administrative order), the CSP treated the court judgment as superseding the administrative order and began billing the new amount of support contained in the court judgment.

The GCSO/J process does not contain any provision as to timeframes for applicability. The court or administrator is therefore required to apply the process to those circumstances outlined above, where the court judgment has been given precedence over the earlier administrative order. If the earlier issued administrative order contained a higher amount of support than the later in time court judgment, the reconciliation of arrears results in a higher arrears balance being owed by the obligor than what the CSP previously billed.

The CSP underestimated the number of cases where it had treated a court judgment as superseding the administrative order. With the implementation of ORS 25.091 and 416.448, the CSP became aware that there are several thousand cases that have the potential for being adversely impacted by the application of the GCSO/J process. This would be contrary to their reliance on CSP accounting and enforcement.

Additionally, in discussing the above problem with members of the Work Group and other interested parties, it became clear there was not a consistent understanding of how arrears are to be reconciled when a GCSO/J is entered.

ORS 25.091(10) and ORS 416.448(6) provide that a GCSO/J does not affect any amounts that accrued under the multiple judgments. This provision was written to mirror reconciliation of arrears for out-of-state multiple orders under both the Uniform Interstate Family Support Act and the Full Faith and Credit for Child Support Orders Act. Under those acts, a person owes the highest amount of support ordered until such time as a controlling order is recognized.

ORS 25.091(7) directs that a GCSO/J include a reconciliation of any monetary support arrears or credits for overpayments under all of the child support judgments. However, reading this provision together with ORS 25.091(10) and 416.448(6) does not provide adequate

instruction to practitioners or the public as to how the reconciliation of arrears is to be accomplished.

IV. The Objectives of the Proposal

In drafting proposed amendments to ORS 25.091 and 416.448, the Work Group sought two primary objectives. First, when the CSP has treated a court judgment as superseding an administrative order, the GCSO/J process should not operate to cause an adverse impact on those obligors who have relied on the accounting and enforcement of the CSP. Second, Oregon law should provide clear direction as to how arrears should be reconciled under multiple child support judgments when a GCSO/J is entered.

V. Review of Legal Solutions Existing or Proposed Elsewhere

The Work Group looked at the provisions of ORS 25.091 and 416.448 and determined that the court or administrator is required to apply the GCSO/J process to multiple judgments entered prior to January 1, 2004. The CSP provided input that this would have an adverse impact on thousands of cases.

In addressing the reconciliation of arrears issue, the Work Group reviewed the discussions and report of the original meetings of the group to determine the original intent of the legislation. The Work Group also looked at the provisions of the Uniform Interstate Family Support Act (UIFSA) and the Full Faith and Credit for Child Support Orders Act (FFCCSOA). While those Acts apply to multiple child support orders issued by multiple states, it was the intent of the original legislation that the process for reconciling arrears under multiple orders be consistent with the multiple state process.

VI. Proposal

Section 1: Section 1 of the proposed concept contains a limited exception to the GCSO/J process contained in ORS 25.091 and 416.448.

If all of the following are met, then the monetary support terms of an administrative child support judgment are terminated by the monetary support terms of a later-issued child support judgment of a court:

- Two child support judgments exist that involve the same obligor and same child for the same time period;
- The administrator was providing services under ORS 25.080;
- The later-issued child support judgment was entered before January 1, 2004; and
- The administrator gave the later-issued child support judgment precedence over the earlier-issued child support judgment originating under ORS 416.440.

This provision would affirm the practice of the CSP in treating a later in time court judgment as superseding a prior administrative order that was entered prior to January 1, 2004.

The Work Group anticipates that the number of cases to which this provision applies will diminish over time. The Work Group and Legislative Counsel therefore recommend that the provision not be formally codified into statute, but added as a note. At such time as the provision becomes obsolete, it would be removed from the ORS.

Section 2: In addition to cleaning up certain terminology in ORS 25.091 related to health benefit plans and judgment provisions, this section clarifies the process for reconciling child support arrears under multiple child support judgments when a GCSO/J is entered. More specifically, it makes clear that arrears accrue under each child support judgment until the GCSO/J is entered. When reconciling arrears, amounts collected and credited for a particular period under one child support judgment must be credited against the amounts accruing or accrued for the same period under any other child support judgment. For periods when the multiple judgments overlap, this will result in the obligor owing the amount due under the highest order, consistent with those processes under UIFSA and FFCCSOA.

Section 3: The changes to ORS 416.448 in this section are essentially the same as provided in Section 2.

VII. Conclusion

In conclusion, the adoption of ORS 25.091 and 416.448 created a much needed process for determining what action should be taken when multiple child support judgments are entered for the same obligor and child for the same time period. However, this process should not work an injustice for those obligors who have been receiving child support services and have relied on the CSP's action in treating the court judgment as superseding the administrative order. Further, the reconciliation of arrears process should be clarified to provide adequate notice and direction as to how arrears should be reconciled when a GCSO/J is entered to ensure consistent implementation of this statute.

For the reasons listed above, the Work Group urges the Oregon Law Commission to adopt the proposal as written.

Welfare Code Work Group

HB 2276

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From the Offices of the Executive Director
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and
Deputy Director
Wendy J. Johnson

Report Approved at
Oregon Law Commission Meeting on
January 18, 2005

Introductory Summary

For the 2005 Legislative Session, the Oregon Law Commission's Welfare Code Work Group proposes a bill with the following objective:

> To achieve consistency, update outmoded terms and references, remove obsolete provisions, and amend cross-reference provisions relating to assistance for elderly individuals and individuals who have a disability or blindness.

History of the Project

In 2004, the Oregon Law Commission authorized the creation of the Welfare Code Project Work Group to address anachronistic and obsolete provisions throughout ORS Chapters 412 (Aid to Blind and Disabled Persons) and 413 (Old Age Assistance).

This project is the first step in coordinating and updating all of Chapters 410 to 414, which are generally referred to as the "Welfare Code." ORS Chapters 410 to 414 are interspersed with obsolete provisions as well as inconsistent and conflicting statutes because of piecemeal additions and changes in federal law that have occurred since the enactment of Oregon's first welfare program in 1939. The statutes throughout these chapters no longer provide the clear guidance that is needed for the Department of Human Services (DHS) to best carry out its programs. Due to a lack of resources, changing federal law, state budget cuts, and present lawsuits regarding DHS programs, the Oregon Law Commission determined that a comprehensive approach to addressing Chapters 410 to 414 was not appropriate at this time. Recognizing the need to begin addressing the problems in the Welfare Code, however, the Oregon Law Commission approved a Work Group to focus on two of the five applicable

chapters: ORS Chapters 412 and 413. These statutes contain outdated provisions and are less impacted by the state budget and legal concerns that pertain to DHS programs.

The Welfare Code Work Group,[1] chaired by Commissioner Sandra Hansberger, met on three separate occasions to reorganize and update Chapters 412 and 413. The Group met to revise and reorganize the chapters on October 28 and December 7, 2004, and January 6, 2005. All meetings took place at the Oregon State Bar offices and were open to the public. The Work Group also communicated via email following the January 6th meeting to finalize their recommendations.

Statement of the Problem Area

Chapters 412 and 413 do not correspond with actual DHS programs for individuals who are blind, have a disability, or are elderly. The establishment of the federal Supplemental Security Income (SSI) program in 1972 replaced the prior Aid to Blind Persons, Aid to Disabled Persons, and Old-Age Assistance programs. The two chapters in Oregon's statutes that pertain to the prior programs, however, remained virtually unchanged. Thus, in current practice, federal procedures are carried out in DHS programs, but are not reflected in state statutory language. For example, ORS 412.025 and ORS 413.009 do not mirror actual eligibility requirements established under SSI. Additionally, ORS 412.620 and ORS 413.140 refer to county administered assistance programs, which are no longer used.

Chapters 412 and 413 also contain language unrepresentative of the respect and dignity that individuals receiving assistance deserve. ORS 412.095 is one such example as it refers to services for "crippled children." Another inappropriate provision is ORS 412.045(2), which restricts eligibility for aid when a blind person "publicly begs or otherwise solicits funds for own

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Lorey Freeman	Oregon Law Center
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Holly Robinson, Deputy Legislative Counsel, assisted the Work Group with drafting services.

benefit by wearing, carrying or exhibiting signs denoting blindness." One of the Work Group's goals was to update such outmoded terms and provisions.

Objective of the Proposal

The Work Group sought to create a bill that clearly defines current assistance programs and contains respectful terminology. This was done by incorporating updated and amended provisions of Chapters 412 and 413 into Chapter 411. Additionally, ORS chapters that cross reference Chapters 412 and 413 were amended. The incorporation of Chapters 412 and 413 into Chapter 411 are mostly found in sections 1 through 7 of the proposed bill. The focus of the reorganization of these chapters was not to make substantive changes, but to reflect current federal law and DHS practices. However, at times substantive changes were made but they were made with the consensus of the Work Group.

The most significant change to the previous chapters is the statutory codification of the Oregon Supplemental Income Program (OSIP), which is currently only established at the administrative level. Section 3 codifies the OSIP and its purpose. This section clearly reflects Oregon's current assistance programs and establishes who may seek assistance. The names of the specific federal programs (Aid to the Blind, Aid to the Disabled, and Old-Age Assistance) are deleted. Designing the bill in this way incorporates the federal programs without creating confusion and uncertainty as to which programs operate within Oregon. OSIP is referenced throughout the bill, instead of the federal programs, providing consistency and clarity.

In combining the two chapters, the Work Group coupled the reconsideration provisions found at ORS 411.111 and 413.120 into one section. This provision specifies the triggering events authorizing eligibility status reviews and is modeled after statutes permitting the Employment Department to reconsider decisions. Section 29 balances DHS's need to re-examine eligibility with the need to limit potential arbitrary reviews. It continues DHS's broad authority to reconsider decisions it previously made, but establishes that DHS must articulate a reason for the reconsideration, thereby reducing the possibility of meritless reviews.

The Work Group also focused on reconstructing archaic definitions to reflect current federal law. For example, the definition section, (section 2), incorporates the federal SSI definition of "disabled." Additionally, sections 2(2)(b)(A) and (B), relating to the qualifications of ophthalmologists and optometrists, were condensed and clarified.

In addition, the Welfare Code Work Group eliminated various obsolete and repetitive provisions contained in Chapters 412 and 413. For example, the appointment of a representative payee by DHS is not practical, and is more pragmatically done by someone outside the Department. Thus, the various provisions relating to DHS appointing a representative payee were deleted. Another obsolete practice, which was deleted in the bill, pertains to DHS providing burial services to a deceased individual who received Old Age Assistance under ORS 413.029. DHS has not provided burial services for years. Furthermore, in practice, DHS only recovers general assistance payments and then only those payments that are made in cash. Section 6(2) of the bill more clearly reflects this practice. This change, as with the others, is one of conformity with federal law and current practices and is not intended to make a substantive change.

The remainder of this part of the report provides a section by section description of HB 2276.

Section 1

This provision describes the organization of the bill: ORS 412.600 and sections 2 and 3, which incorporate certain Chapter 412 and 413 provisions, are added to ORS chapter 411.

Section 2

Section 2 establishes the definitions for the terms used throughout the provisions added to Chapter 411.

The term "assistance" replaces the term "aid," which is used in Chapters 412 and 413. Assistance is an updated term and its definition reflects that it includes both cash payments made pursuant to one of the three federal programs as well as assistance generally granted by DHS.

The definition of "blind" is virtually the same as that used in ORS 412.125(3). HB 2276, however, separates the ophthalmologist and optometrist licensing requirements into two separate provisions to more clearly reflect the requirements pertaining to each.

The definition of "disabled" is altered to match the federal SSI definition. The term "disabled" is used instead of switching to individual-oriented language, such as "person with a disability," because it is the term found throughout federal regulations and legislation. The term "bodily impairment" is changed to "a physical and or mental impairment." The Work Group was concerned that "bodily" could be interpreted to not include mental impairments. With this change, the bill more clearly reflects that both physical and mental impairments are recognized disabilities under federal law.

"Income," as defined in HB 2276, combines the separate definitions of "income" used in ORS 412.005(5) and ORS 43.005(2). The definition accurately represents the exclusions allowed under federal law in determining an applicant's or recipient's income.

The three separate, but uniform, definitions of "recipient" under Chapters 412 and 413 are molded into one by defining recipient as any individual that receives assistance under OSIP.

The definition of "resources" is transferred without substantial change from ORS 413.005(5).

Section 3

Section 3 performs several functions. First, it codifies OSIP in statute. Next, it explains that the purpose of OSIP is twofold: to supplement SSI and to administer the special needs program. The special needs program includes assistance in the form of cash or services. Lastly, section 3(2) is the provision authorizing DHS to grant assistance to eligible individuals.

Section 4

Section 4 establishes that both general assistance and public assistance are available under DHS. The phrase "general assistance" has two different meanings: it refers to the General Assistance Program and to money generally granted by DHS as assistance.

Burial expenses are deleted from section 4(2) because expenditures for burial services are an outdated practice. In certain situations, organizations independent of the state, such as a county or a mortuary, may offer free burial services to indigent individuals.

The definition of "public assistance" under 4(3) includes all the programs that are ordinarily considered public assistance programs. Changes made to the items listed as public assistance are for uniformity and clarity. These are not substantive changes. Most notably, the clarifying changes to distinguish the General Assistance Program from general assistance are continued in this subsection. Second, a reference to the Temporary Assistance for Needy Families' statutory provisions is added for clarity. This statutory reference is continued throughout the bill, wherever Temporary Assistance for Needy Families is specified, for consistency. Additionally, the names of the three federal programs (Aid to the Blind, Aid to the Disabled, and Old-Age Assistance) are removed and OSIP is added.

Section 5

The changes reflect current practices within DHS and clarify the Department's functions.

Section 6

Changes in this section reflect current practices within DHS and provide consistency with other statutory provisions. Filing an application is a current prerequisite to receiving assistance through DHS. DHS, in practice, only recovers general assistance payments from recipients and then only those that are cash payments. Deleting "public" is therefore not a substantive change. Additionally, "General Assistance Program" adjustments are incorporated into this provision for consistency.

Section 7

The changes in this section correspond to the changes made in section 4 and provide consistency within the statute. The term public assistance in section 7 includes more items, which are not ordinarily considered public assistance, than section 4 because DHS is authorized to make expenditures for more than just public assistance programs.

Sections 8 and 9

The changes provide consistency within the statute by referencing appropriate ORS provisions and chapter sections.

Section 10

By amending ORS 411.760 with "and section 3 of this 2005 Act", various 412 and 413 exemptions removed from section 3 are deleted from the bill. For example, ORS 412.115, the inalienability exception that allows 25% transferability of aid, is removed. This provision is not used in practice and the amount of aid to which this provision applies is $1.70, of which 25% is

minimal. Furthermore, even though this is a substantive change, it makes the statute consistent with Federal SSI provisions. (SSI is exempt from transfers.)

Section 11

The change provides consistency within the statute by referencing the appropriate chapter section.

Section 12

ORS 412.600 is the only recovery provision needed in practice and thus the only provision from 412 and 413 transferred into 411. Although the broad "public assistance" term was removed ("public" was removed from assistance in line 11), there is not a substantive change to this section because the bill accurately reflects the various types of assistance granted under DHS. Other textual changes are made for consistency and clarity.

Section 13

OSIP is added as a "category of aid" in place of the names of the three federal programs. Terms in subsection 13(1) are rearranged for greater clarity. The statutory reference to the Temporary Assistance for Needy Families program is added for consistency.

Sections 14, 15, 16, 17, and 18

Outdated terms, such as "defects," are updated and individual-oriented text replaces outmoded phrases. The remaining changes provide consistency within the statute by referencing appropriate ORS provisions and chapter sections.

Section 19

The change provides consistency within the statute by referencing the appropriate ORS provisions. Amendments are also made to accurately reflect federal law.

Sections 20, 21, 22, 23, and 24

The changes provide consistency within the statute by referencing appropriate ORS provisions and deleting repealed provisions.

Section 25

The removal of "old-age assistance" in line 22 is not a substantive change because of the inclusion of ORS 412.600, which provides consistency within the bill by referencing the appropriate ORS provision. To update the text, the outdated term "poor" is replaced with "needy".

Sections 26, 27, and 28

The changes provide consistency within the statute by referencing appropriate ORS provisions and deleting repealed provisions.

Section 29

This section specifies the grounds on which DHS can review a decision they previously made regarding a beneficiary's eligibility status. It provides greater clarity for when reconsideration outside of the appeals process is permissible by specifying the substantive reasons for a review. The wording in this section is based upon ORS provisions governing the

Employment Department's authority to review prior decisions and aligns with DHS practices in performing reviews. Although articulating the reasons within the statutory text is a substantive change, it continues the underlying intent of the review provisions found in ORS 413.120 and ORS 411.111 by maintaining DHS's broad authority to initiate reviews and protecting beneficiaries from meritless investigations. This section simply combines these two ORS provisions.

Section 30

The following provisions are repealed because the contemporary relevant substance of each is incorporated into a new or is covered by a preexisting ORS chapter provision: ORS 411.113 (Department to determine eligibility), 412.005 (Definitions for ORS 412.005 to 412.125), 412.025 (Determination of eligibility; rules), 412.035 (Residency requirements for eligibility), 412.065 (Application for aid; investigation of applicant; commencement of aid; notice to applicant), 412.075 (Appeal from failure to act on application or denial thereof or from modification or cancellation of aid), 412.095 (Recipient not to receive other public assistance; exceptions), 412.115 (Aid is inalienable; exception), 412.125 (Availability of laws, regulations and state plan), 412.510 (Definitions for ORS 412.510 to 412.630), 412.520 (412.530 (Amount of aid to be granted), 412.570 (Information concerning applicant; subpoena powers; authorization of personnel to obtain information), 412.580 (Appeal from failure to act on application of denial thereof or from modification or cancellation of aid), 412.610 (Aid is inalienable; exception), 413.005 (Definitions), 413.009 (Eligibility for old-age assistance; rules), 413.019 (Amount of old-age assistance), 413.068 (Department to supervise assistance administration), 413.070 (Records), 413.090 (Application for assistance; action thereon), 413.100 (Appeal from failure to act Eligibility for aid to disabled; rules), on application or denial thereof or from modification or cancellation of assistance), 413.110 (Cancellation or reduction of assistance upon receipt of property or income), 413.120 (Reconsideration and change of amount of assistance; rules), 413.130 (Assistance is inalienable), 413.200 (Liability of certain estates for assistance paid; exceptions; certain transfers of property voidable), and 413.240 (Rules).

Certain provisions are repealed because they are outdated. ORS 412.045 (Certain persons ineligible for aid) is not in line with DHS practices. It does not state a time limit for how long an inmate is ineligible to receive assistance and could inaccurately be interpreted that a person who is arrested overnight would be ineligible to receive assistance for her/his lifetime. Additionally, the provision inappropriately restricts eligibility for begging. Similar provisions in ORS 412.520 (Eligibility for aid to disabled; rules) are not included in the bill. The appointment of a representative payee by DHS is not practical, and is more feasibly appointed by someone outside of the Department. Thus, ORS 412.113 (Payments to representative payee; qualifications of representative) and 413.165 (Payments to representative payee authorized; appointment of guardian, conservator or representative) are repealed. Section 2(1)(a) is amended to reflect that a payment may be made on behalf of a recipient. This applies to all assistance granted under OSIP. The many conservator, guardian, and payee provisions from Chapters 412 and 413 are thereby repealed as obsolete. ORS 412.540 (Certification that applicant is disabled) is deleted because a doctor is already required to sign off on all presumptive Medicaid recipients and section 2 individually requires an examination.

The following provisions are repealed because they are obsolete provisions: 411.114 (Eligibility and payment agreements with the federal government), 412.015 (Purpose of ORS

412.005 to 412.125), 412.055 (Standard of need; amount of aid), 412.085 (Request for restoration of aid), 412.105 (Payment of aid to guardian or conservator), 412.108 (Department may petition for appointment of guardian, conservator or other representative; payment of costs), 412.560 (Application for aid), 412.590 (Reconsideration, cancellation and reduction of aid), 412.620 (Effect of removal by recipient to another county or state), 412.625 (Application of ORS 412.108 and 412.113 to aid to disabled), 412.630 (Payment of aid to guardian or conservator), 413.029 (Burial of deceased old-age assistance recipient), 413.140 (Effect of removal by recipient to another county or state), 413.160 (When assistance is paid to guardian or conservator), 413.220 (Jurisdiction of violations of chapter).

ORS 413.230 (Conflict of this chapter with federal requirements) is repealed since federal law automatically preempts state law in this area; thus, textual confirmation is redundant.

Self-Sufficiency and Disability Trust Funds

ORS 412.700 and 412.710, which pertain to Self-Sufficiency and Disability Trust Funds remain in Chapter 412.

Proposal

See HB 2276 (2005) and -1 amendments.

Conclusion

This bill is the first step towards addressing the problems throughout the Welfare Code. Applicable and updated provisions from outdated Chapters 412 and 413 are interwoven into ORS chapter 411, largely found in sections 1 through 7 of HB 2276. Lesser comprehensive changes were made throughout other sections of Chapter 411 for uniformity and to update outdated language. This bill is an accurate version of current DHS programs and simplifies Oregon's statutes by eliminating obsolete and outmoded statutory provisions. The bill makes the code easier to understand and use.

Amendment Note

The –1 amendments described above were replaced by –2 amendments. All of the –1 amendments were incorporated into the –2 amendments that were made in the House. The additional amendments made with the –2 amendments were to make it clearer in section 3 that the Oregon Supplemental Income Program (OSIP) has already been in existence for years and thus references to the program being "created" by the bill were deleted.

Judgments/Enforcement of Judgments Work Group:

JUDGMENTS

HB 2359

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And
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From the Offices of Executive Director
David R. Kenagy
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Report Approved at
Oregon Law Commission Meeting on
February 17, 2005

I. OVERVIEW

In 2003, the Legislative Assembly passed HB 2646,[1] the massive revision of judgment laws produced by the Oregon Law Commission. As can be seen from the report approved by the Commission for that bill,[2] the new law made numerous significant changes in the substantive law and procedures governing judgments in Oregon. As with any significant revision of the law, especially one with 582 sections, the need for corrections and clarifications became apparent after the bill passed. More importantly, the clearer terminology of the bill brought to light interesting questions relating to the nature of judgments and the types of judicial decisions that should be the subject of judgments.

II. WORK GROUP

Many members of the HB 2646 Work Group participated in preparing the draft that became HB 2359 (2005).[3] In addition, Judge Jack Landau and Judge Virginia Linder of the

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[1] Chapter 576, Oregon Laws 2003.

[2] The report is available at
http://www.willamette.edu/wucl/oregonlawcommission/home/work_groups4.html

[3] **Work Group Members:**

Cleve Abbe	Lawyers Title Insurance
Gary Blacklidge	Greene & Markley PC

Court of Appeals joined the group on several occasions. The Work Group met some 8 times, and also completed work electronically via email.

The Work Group was chaired by Commissioner Sandra Hansberger.

III. SECTION BY SECTION ANALYSIS OF SIGNIFICANT SECTIONS

Section 2 (appeals; jurisdictional aspects of HB 2646). One interesting question that was addressed by the Work Group was the degree to which the requirements of House Bill 2646 (2003) are jurisdictional for the purposes of seeking appellate review. In particular, the question had been raised as to whether or not the requirement that a judgment be correctly labeled as a

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Craig Chisholm	Steward Title Insurance
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limited, general or supplemental judgment could be held to be a jurisdictional requirement for the purposes of seeking appellate review of a judgment.

The Work Group was aware that the Court of Appeals was considering this question, and in *Garcia v. DMV,*[4] the Court found that the labeling requirements of HB 2646 were not jurisdictional for the purpose of appeal. In *Garcia*, the Court administrator incorrectly noted in the register that a limited judgment had been rendered, when in fact the judgment document itself clearly indicated that the judgment was a general judgment. The Court of Appeals, on its own motion, raised the issue as to whether this clerical error defeated the jurisdiction of the Court of Appeals to review the judgment.

The opinion concludes that failure to correctly label a judgment as a limited, general or supplemental judgment is not jurisdictional for purposes of appeal. The court noted that while such clerical errors could be corrected in the register, a holding that such judgments were not really "judgments" until the correction was made would mean that "mistakes like this one and similar ones in titles and in register notations that go undiscovered until years after the fact would render those judgments a nullity in the interim, with all the ensuing chaos and uncertainty that will follow their late discovery."[5]

The Work Group agreed with the conclusions of the majority opinion in the case, but noted that four judges of the Court of Appeals dissented.[6] Section 2 of HB 2359 is intended to codify the result in *Garcia*. It does so by providing an exclusive list of the requirements of ORS Chapter 18 that <u>are</u> jurisdictional for the purposes of appeal. As can be seen from the language of this section, these requirements are fairly minimal: The judgment document must be plainly labeled as a judgment, the document must meet minimal form requirements provided in ORS 18.038(4) (e.g. be signed by a judge) and the judgment must be entered in the register of the court as required by ORS 18.058(1).

<u>Sections 3, 4 and 6 (requests for relief that are proper subjects for judgment).</u> The Work Group also spent significant amounts of time discussing the types of claims that are appropriate for decision by judgment. This discussion was prompted in part by concerns about the HB 2646 definition of a "judgment" as "the concluding decision of a court on one or more <u>claims</u> in one or more actions, as reflected in a judgment document.[7]" HB 2646 left "claim" undefined, except to indicate that claim included a charge in a criminal action.[8]

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[4] 195 Or App 604 (2004).

[5] 195 Or App at 620.

[6] Judges Brewer, Deits, Haselton and Wolheim.

[7] ORS 18.005(9).

[8] ORS 18.005(4).

The concern raised about the definition of "judgment" related to whether the effect of HB 2646 was to broaden the types of disputes that were appropriate for decision by judgment. For instance, a motion to compel discovery could broadly be viewed as a "claim," yet it is quite clear that such motions have never been regarded as being appropriate for decision by a judgment.

As with the case of the issue addressed in section 2 of HB 2359, the Court of Appeals issued an opinion during the Work Group's discussion that discussed what a "claim" is for the purpose of the HB 2646 definition of "judgment." In *Galfano v. KTVL-TV*,[9] the court found that a claim for attorney fees was a "claim" that appropriately could be included in a judgment.

The Work Group was unanimous in deciding that HB 2646 was not intended to change pre-existing law on the types of issues that are appropriate for decision by judgment as opposed to order. The solution arrived at by the Work Group to provide more clarity was to eliminate the use of the term "claim," and to substitute a defined term, "request for relief." A "request for relief" is "a claim, a charge in a criminal action or any other request for a determination of the rights and liabilities of one or more parties in an action that a legal authority allows the court to decide by judgment." Section 4(15). As can be seen, this definition hinges on a finding that some "legal authority" authorizes use of a judgment. The amendments to ORS 18.005 by section 4 (12) of HB 2359 provide a definition of "legal authority" that contains two parts that are fairly obvious (a statute or Oregon Rule of Civil Procedure), one that may not be readily apparent (controlling appellate court decisions in effect December 31, 2003) and one that is new (a rule or order of the Chief Justice adopted under section 3 of HB 2359).

Section 3 of the bill clarifies the Chief Justice's authority to do two things. First, the Chief Justice may authorize or require that specific requests for relief that are not governed by other legal authority be decided by a judgment. This section is designed to clarify that the Chief Justice has the flexibility to allow, or require, the use of a judgment for certain types of relief not otherwise covered by statute, rule or case law. Second, the Chief Justice may authorize or require the use of a limited or supplemental judgment for specific requests for relief that are not governed by other legal authority. This provision is designed to clarify that the Chief Justice has the ability by rule or order to provide for the use of limited or supplemental judgments in situations in which it may not be obvious from other legal authorities. See also ORS 1.002 (providing authority to Chief Justice).

Finally, Section 6 of the bill makes a flat statement of the principles discussed above: ORS Chapter 18 does not impose any requirement that a court use a judgment for any decision of the court if a legal authority allows or authorizes the court to make the decision by order or other means.

Sections 9 and 10 (reinstatement of liens). Section 9 deals with special release of lien issues arising out of child and spousal support awards. Under certain circumstances, general release of lien documents are filed releasing all property of the judgment debtor within a

[9] 196 Or App 425 (2004).

particular county from the lien or apparent liens of certain support awards. Under certain circumstances, it is appropriate to establish a new lien against the property of the support debtor.

This section provides authority for the administrator of the Division of Child Support to file a notice of reinstatement of the lien in the county clerk lien record. The filing of the notice has the effect of creating a new lien as of the date of recording of the notice of reinstatement. The priority of the reinstated lien is set by the date of recording of the notice of reinstatement.

One common example of the need for a reinstated lien is when a support award is contingent on the dependent child being in the care of the state. In those cases, the support award is automatically suspended, without the entry of a court order or judgment, when the child leaves state custody. Without further court action, the same support order becomes reinstated when the child returns to state care. In this type of case, if the parent has made all required support payments at the time the child leaves state care, it is sometimes appropriate for the state to enter a general release of lien reflecting the status that all past support has been paid in full and that no current support is accruing. If, at a later date, the child goes back into care, the support obligation resumes. At that point, it is appropriate for the administrator of the Division of Child Support to record a notice reinstating the lien as of that date to reflect that support is again accruing.

Another common example arises in cases involving abused spouses. Under federal law, the abused spouse may claim good cause to prevent the state from collecting assigned child support. As part of the good cause process, it is not uncommon for general real property releases to be issued against all the property of a debtor within a county to facilitate the good cause declaration. If at a later time the parent decides that good cause is no longer necessary, it is appropriate for the Division of Child Support to be able to reestablish its liens and to reinstate that collection mechanism.

Sections 12 and 13 (creation of judgment lien). The amendments to ORS 18.042 and 18.048 by sections 12 and 13 of HB 2359 are principally designed to address concerns that the language of those statutes might be used to challenge the validity of judgment liens. Under the preexisting law and HB 2646, to create a judgment lien the judgment document is required to have a separate section labeled in the manner required by law. If a judgment contains a separate section, properly labeled, the clerk of the court makes the appropriate judgment lien entries in the court records. The clerk relies upon the existence of the separate section to make those entries.

The amendments to ORS 18.042 and 18.048 by sections 12 and 13 eliminate any possibility that the content of that separate section can affect the validity of the lien. For example, the separate section is required to include the debtor's driver license number, if known. This argument creates the possibility of separate litigation to void a judgment because the judgment creditor preparing the judgment failed to include a driver license that was known to the judgment creditor. To avoid this unintended consequence, ORS 18.042 and 18.048 have been revised to clarify that the only condition for creating a lien is the existence of the separate section and the entry in the register of information from that separate section. While inaccuracies in the materials provided in the separate section may still create issues regarding matters of enforcement of the lien, they do not affect the existence of the lien itself.

Other amendments to ORS 18.042 by Section 12 of HB 2359 incorporate language regarding Social Security numbers of judgment debtors to make the statute consistent with chapter 380, Oregon Laws 2003.

Section 15 (support awards). Circuit courts maintain records concerning judgments entered by the court. Under the current law, the records are required to note "whether the money award is a support award." Since there are judgments with money awards that are only partially a "support award," the required statement may be misleading. As revised, the court will note "whether the money award *includes* a support award." (emphasis added). Thus a dissolution of marriage judgment that gives a money award for property settlement and a money award for child support will be noted as including a support award instead of the misleading notation that the entire money award is a support award.

Sections 19, 20 and 22 (lump sum support awards). Sections 19, 20 and 22 amend ORS 18.150, 18.152, and 18.180, respectively. These amendments are made in conjunction with the amendments to the definitions of "child support award" and "support award" in Section 4. The purpose of these amendments is to provide one term to refer to support judgments, whether as installments, lump sums, or both, and to avoid misleading entries in the court records regarding child support judgments.

The current definitions of "child support award" and "support award" are limited to support payable "in installments." But these definitions do not include all types of support judgments. There are also judgments that include lump sum support as well as judgments for lump sum support only without current support installments.

These limited definitions also lead to misleading entries in the court computer records. The current law requires the court to note in the register (which is maintained as a computer record by the court and part of the court's OJIN system) if the judgment is a "support award." ORS 18.075(3)(d). In cases with lump sum support awards only, the court computer records are misleading because the register will only show an ordinary money award instead of a child support judgment. This is important because there are significant differences between the types of judgments. For example, child support judgments expire after 25 years while ordinary money awards expire after 10. Also, certain exemptions from execution and garnishment are not available against a child support judgment.

To make these changes, section 4 of this act amends the definitions of "child support award" and "support award" to eliminate the "in installments" limitation. Thus lump sum support awards are included within the definition of "child support award" and "support award." The definitional change also requires the section 19 amendments to ORS 18.150. Under both the current and the amended version of ORS 18.150, lump sum support awards have the effect specified by subsection (2) of that section. The inclusion of lump sum support awards as a type of "support award" requires the new clause describing the effect of the lump sum support award as part of the description of the effect of the support award portion of a judgment.

Similarly, Section 20 amends ORS 18.152 to clarify that a support arrearage lien is also created for unpaid lump sum support awards since those are now within the definition of a "support award."

As part of this same set of changes, Section 22 amends ORS 18.180 to use the revised definition when describing the expiration of judgment period for lump sum support awards.

Section 21 (unrecorded conveyances). Section 21 rewrites ORS 18.165. This section establishes the priority between an unrecorded conveyance of real property and the lien created by the entry of a judgment. The House Bill 2646 workgroup deferred consideration of this issue, but recognized that the language of the statute was misleading and needed to be addressed.

As currently written, ORS 18.165 is not consistent with the statute's interpretation by the Oregon Supreme Court. See *Chaffin v. Solomon*, 255 Or 141 (1970), *Wilson v. Willamette Industries*, 280 Or 45 (1977), and *Bedortha v. Sunridge Land Company, Inc.* 312 Or 307 (1991). Considering those cases, and balancing the interests of maintaining the integrity of the recording system and the interests of the holder of an unrecorded conveyance, the Work Group reached the following consensus on a rewrite of the statute.

Judgments have lien effect upon entry or recording. Under ORS 18.165, a judgment lien on particular real property will generally have priority over a prior conveyance of that real property unless that conveyance was recorded before the judgment's lien arose.

There are four exceptions to this general rule:

1. If the grantee is a purchaser in good faith for valuable consideration and records the conveyance document within 20 days of the conveyance, the conveyance grantee will have priority over the judgment creditor. The phrase "purchaser in good faith for valuable consideration" has the same meaning for this statute as it does for ORS 93.640, the statute generally describing the effect of unrecorded instruments.

2. If the judgment creditor has actual notice, record notice, or inquiry notice of the conveyance, when the judgment is entered or recorded to create the judgment lien, the conveyance grantee will have priority over the judgment creditor. The inquiry standard created by this section is the same as that which exists under ORS 93.640 for determining the "good faith" of a purchaser. Thus, to the same extent that a purchaser of real property would have an inquiry duty to maintain status as a "purchaser in good faith," the judgment creditor has the same inquiry duty.

3. When ORS 93.645 establishes that the rights of a purchaser under a land sale contract have priority over the lien of a judgment creditor, the fulfillment deed delivered to the purchaser will also have priority over the judgment lien. For example: A sells Blackacre to B using a land sale contract. B records the land sale contract. C then obtains a judgment against A. Under ORS 93.645, when the purchaser has fully performed in accordance with the contract, the fulfillment

deed delivered to purchaser B has priority over the judgment lien of creditor C and has the effect of extinguishing the lien against the property. This subsection makes clear that the result is not changed by this section.

4. The fourth exception codifies the general rule that purchase money security interests have priority over other interests. Thus, if a judgment debtor acquires property and gives a mortgage or trust deed to finance the acquisition of the property, the trust deed or mortgage given as security to acquire the property has priority over the preexisting judgment lien.

This section also includes definitions of "conveyance" and "memorandum of conveyance" which were modeled on the provisions in ORS 93.640.

Section 27 (scope of appellate review). As discussed in the Work Group report on HB 2646, that bill eliminated references to decrees, substituting references to judgments. As a consequence of that change, ORS 19.415, describing the scope of review by an appellate court had to be revised. Under the language of that statute, *de novo* review was provided for "decrees in suits in equity." HB 2646 substituted the phrase "a judgment in a case that constituted a suit in equity under common law."

The Work Group became aware that some attorneys might argue that the common law did not encompass suits in equity. Since the HB 2646 Work Group obviously did not intend to eliminate *de novo* review of equitable proceedings,[10] the HB 2359 Work Group decided to substitute a reference to "equitable proceedings" to make clear that any matter treated as an equitable proceeding by the court is to continue to be subject to an appeal as an equitable proceeding.

Section 28 (contempt). The current law requires that all decisions imposing a sanction for contempt be entered as general judgments. Since each case should have only one general judgment, this has been confusing to practitioners. Particularly troublesome are those instances in which a court had previously entered a general judgment granting a decree of dissolution of a marriage. The logic of the judgment title would suggest that the appropriate title for the contempt judgment in that case would be a supplemental judgment. Equally confusing were circumstances in which a contempt judgment was to be entered concerning a pre-trial matter resulting in the opportunity for two general judgments in the same case.

To eliminate confusion, this revision simply requires that the decision must be entered as a judgment. Depending upon the circumstances, the contempt judgment will either be a limited, general, or supplemental judgment.

Section 29 (dissolution of marriage). ORS 107.105 controls the entry of judgment in actions seeking dissolution of marriage. In the process of rewriting the section to conform to the

[10] It would have been surprising if the report of the Work Group failed to mention such a significant change to appellate law.

new judgment provisions, provision for recovery of costs and expenses reasonably incurred in the action was inadvertently omitted. This section merely restores the provision inadvertently deleted.

Section 30 (administrative child support order). When an administrative child support order is entered in the register of a circuit court, it has the force, effect and attributes of a judgment. This section adds additional language to ORS 416.440 to confirm that the entry in the register includes the notations in the separate record required by ORS 18.075(3).

Section 31 (attorney fees and costs). The amendments to ORCP 68C remove an obsolete reference to Rule 70B (repealed by HB 2646). In addition, the amendments to ORCP 68C(5)(b) make it clear that a supplemental judgment for attorney fees or costs may only be used when issues relating to attorney fees or costs have not been resolved before entry of a general judgment.

Section 33 (limited judgments in probate proceedings). The passage of HB 2646 raised questions about when a limited judgment could be entered in a probate proceeding. Section 33 answers that question by listing those types of decisions in probate that may be the subject of a limited judgment. The listing specifically cross-references the authority of the Chief Justice to add to the list by adopting a rule or order under section 3 of the bill. Because of questions relating to whether the Oregon Rules of Civil Procedure applied to probate proceedings, subsection (2) of the section specifically requires that the judge make the ORCP 67B findings (no just reason for delay) before entering a limited judgment pursuant to the provisions of the section.

Section 34 (probate). The amendments to ORS 116.113 clarify that final distribution in a probate proceeding is made by a general judgment. HB 2646 had amended ORS 116.213 to indicate that the subsequent discharge of the personal representative is done by supplemental judgment.

Section 36 (limited judgments in protective proceedings). As with probate proceedings, questions were raised about when a limited judgment could be entered in protective proceedings (guardianships, conservatorships). Section 36 answers that question in essentially the same manner as section 33, listing those decisions of the court that properly can be decided by limited judgment. However, the appointment of a fiduciary was felt by the Work Group to be so significant that a limited judgment should always be used for this decision. Section 36 reflects this requirement.

Section 37 (termination of protective proceeding). The amendment to ORS 125.090 clarifies that termination of a protective proceeding (e.g. guardianship, conservatorship) is accomplished by entry of a general judgment.

Sections 39 and 40 (repeal of 18.478). These sections address the repeal of ORS 18.478. Last session's judgment bill inadvertently failed to repeal ORS 18.478. The actions addressed by that section are now addressed by other sections of ORS Chapter 18.

IV. AMENDMENT NOTE

HB 2359 was amended in the House. The amendments were developed through the Law Commission's work group process and had the support of the Judgments Work Group. The amendments are generally technical. They provide additional clarification on various matters including (a) those specific aspects of a judgment that are jurisdictional for purposes of creating a judgment lien; and (b) the scope of appellate court jurisdiction when limited and supplemental judgments are appealed.