

OREGON LAW COMMISSION

**Date March 20, 2013
3:00 p.m.**

**Oregon Civic Justice Center
Melvin Henderson-Rubio Hearing Room
Salem, OR**

MEMBERS PRESENT:

**Lane Shetterly, Chair
Prof. Bernie Vail, Vice Chair
Mark Comstock
John DiLorenzo, Jr.
Hardy Myers
Scott Shorr
Associate Dean Danny Santos (for Dean Symeon Symeonides)
Julie McFarlane
Judge Stephen Bushong
Prof. Susan Gary
Chief Judge Rick Haselton
Attorney General Ellen Rosenblum**

MEMBERS EXCUSED:

**Chief Justice Thomas Balmer
Rep. Chris Garrett
Sen. Floyd Prozanski**

STAFF PRESENT:

**Jeffrey C. Dobbins, Executive Director
Wendy J. Johnson, Deputy Director and General Counsel
Dexter Johnson, Legislative Counsel
BeaLisa Sydlik, Legislative Counsel
Lisa Ehlers, Legal Assistant
John Adams, Law Clerk**

GUESTS:

**Ron Morgan
Ansley Dennison Flores
Jane Edwards
Lisa Norris-Lampe
John Wittwer
Michele Greco
Charles Hinkle
Robin Pope
Gail Schelle
Carmen Brady-Wright
Tim Martinez
Justice Martha Walters
Kevin Christiansen
Staff member from Rep. Holvey's office
Ken Sherman
Rem Nivens**

MEASURE/ISSUES HEARD:

Uniform Unsworn Foreign Declarations Act, HB 2833

Adoption Records, SB 623
 Uniform Trust Code, SB 592
 Juvenile Records, SB 622
 Revised Uniform Law on Notarial Acts, HB 2834
 U.C.C. Article 9, HB 2600

Speaker	Comments
Shetterly	Welcome. We are going to start with Adoption Records. John DiLorenzo was the chair of that work group and will be starting us off.
DiLorenzo	I would like to acknowledge Wendy's hard work and the Work Group's work as well. It's been an absolute pleasure. I had heard it would be a contentous issue to deal with, but it was a very rewarding experience. The group was able to reach a consensus. Section 6 policy decision. Adoptees changed my thinking. Oregon needs to alter its paternalistic view. Once the adoptee is 18, they should be able to see their own records. It was a balancing act because we wanted to make sure we were being sensitive to all parties involved.
Johnson	We have the report, bill with amendments and ORS 7.211. I wanted you to see ORS 7.211 to see what was being repealed. The group was a well represented group. We were asked to take on this project by the Oregon Judicial Department. As they move to ECourt, they needed to look at who gets access. Everyone shouldn't need a court order for everything. Section 6 now lists who will always have access. Adoptee at age 18 should have access to all documents except the home study. The Work Group felt that the records are their story and they should have access to it. Parents will get whole record except ASIS. Medical information, home study and adoption report would be attached to the summary statement and would be put elsewhere in file so it would not be accessible. We made an exception for the DHS cases, involuntary cases. The default rule for those would be no information would be given. There are other ways to gain contact, but the group felt that the default should be court order only. To gain public access you would need a court order which was not changed. May be considered at a later time because the Work Group is continuing. Repealing 7.211. First part of the bill is cleaning up what is

filed. Petition is main document so Section 4 states what goes into the petition. We aren't changing what goes in, just where it goes. The work group will work on the substance as it continues.

DiLorenzo

I want to point out that there are a number of conceptual amendments. I would like to ask that -1 amendments be adopted with the entire bill being redone. I move that SB 622 as conceptually amended be recommended for the 2013 Legislative Session and the Report be accepted by the Law Commission.

Shetterly

Questions?

Haselton

I have a couple of questions regarding section 6(5)(a) and (b) – I am an adoptive parent. Are the birth parents or child given notice of request?

Johnson

No notice is required.

Haselton

Except upon good cause shown, how will it work without notice?

DiLorenzo

We struggled with that. One of the problems about putting a notice requirement is that we might not know who to notify.

Haselton

Couldn't the court do it?

DiLorenzo

We hope this will be practice until we can come up with a better set of standards.

Haselton

Is there a definition of what would count as good cause?

Johnson

No, but we think the courts use good cause.

Walters

What is the current process?

Johnson

7.211 – The records are sealed, no standard, and no notice.

Walters	So there is some improvement.
Shetterly	Does the report discuss good cause? It might be helpful if it does.
Johnson	Not anticipated by the Work Group, but the group believed that the birth parents have the same right to contact the adoptee as the child to start a relationship.
DiLorenzo	This is a continuing conversation, but we wanted to send a message to the Judges that there is flexibility besides just granting the motion.
Walters	On request for home study, is there flexibility to allow the adoptee to have access to part of the home study or is it all or nothing?
Johnson	The judge can grant the motion in full or in part. There is flexibility.
Shetterly	Is good cause not imposed on maker of motion, but for the judge to decide?
Johnson	Yes. Because of the issue of “how do you know”? The court is the only one with all of the information.
DiLorenzo	The court could postpone consideration until notice was sent to interested parties.
Haselton	Regarding “good cause shown”. How can the court say there is good cause shown on their own?
Johnson	I would hope that if the court were somewhat hesitant the court would provide notices and postpone.
Haselton	Can the court, on its own, deny the motion?
Johnson	I don’t think the group would be opposed to dropping “shown” and just saying good cause.
Bushong	I’m concerned with how the trial judge is going to make the determination of good cause and whether or not to send a notice.

DiLorenzo	Are there any members of the Work Group members to address that?
Wittwer	I am an adoption attorney - I have never known a judge to act in an ex parte manner with a request. These cases are protected with a great deal of concern.
Pope	I am an adoption attorney in Beaverton – I concur with John Wittwer’s comment. Judges are very protective which is appropriate. When looking at the file, DHS might be more likely to have good cause. Judges ask questions like what kind of adoption it is, what information is in the file, etc. If it was at least partially open then maybe it would be okay to give information. It’s more guidance than what we have now.
Wittwer	Adoption cases by nature are long-lasting. We may need to do a notice after 30 to 50 years.
Shetterly	Please capture some of this in the report. Include a roadmap for judges on how or when to provide notice.
Walters	Section 6 is applicable to adoptions in the past. What were the considerations there?
Johnson	The changes are prospective and retroactive. The real issue is right now, not in 18 years, and the group wanted it to be about the adoptee and birth parents.
Pope	We did struggle initially, but then reached consensus. The group looked at where Oregon policy is going. We are progressing to open adoptions and this seemed like a logical progression.
DiLorenzo	We asked representatives of agencies as to whether this would be a chilling factor for child birth mothers. They said no.
Shetterly	Section 4 page 5 line 17-19. Is there a standard for why a petition for adoption may not need to be notarized unless specified?
Johnson	Requirements are elsewhere in statute, but sometimes you just don’t know information and you have to list why.

Comstock	Knowing that this came from Judicial ECourt, I look at section 6(1) page 8 and wonder if this is accessible via ECourt?
Norris-Lampe	Within ECourt the process is to look at what the statutes require and then decide how to do it. This bill will help clarify that and help us a great deal on how to set up the process. Adoption records will be assigned heightened security so that limited court staff will have access to. This is how the separation is insured.
Johnson	So they are separate from other records and will be with ECourt.
Comstock	So will lawyers and judges have to request remote access?
Norris-Lampe	ECourt will have to decide that once the bill is passed. It is possible to do, but the question is whether the court will provide it.
Comstock	Are you comfortable with this Sec. 6(1) language?
Norris-Lampe	Yes. Currently there is a case-type for adoption with sealed access.
Comstock	So no changes if this bill passes?
Norris-Lampe	Perhaps we will change labels for ASIS.
Shetterly	Restate motion with conceptual amendment to section 6 and corresponding section of the report relating to good cause. Further discussion? Objection? No. Motion carried. Thank you to John DiLorenzo and the Work Group.
Pope	John and Wendy both deserve a lot of kudos.
Shetterly	Next is UTC. SB 592.
Gary	I am very sorry I cannot be there in person. The project began in the estate planning section of the Bar. They improved the code

by clarifying some provisions.

Page 3 adds two definitions for remote interest beneficiary and secondary beneficiary. Requires notice and consent of all beneficiaries. Idea to create definition of remote interest beneficiary and secondary beneficiary. Discussed at length with a number of people with different perspectives – some for beneficiaries and some for trustees. We have members of the Work Group who do trust litigation and Assistant Attorney General with charities.

Page 4 Section 2 clarification of when AG gets notice and had AG rep with charities section reviewing it as we went along.

Page 6 Section 13 looks at need to appoint successor trustee.

Sec. 14 permits court to remove trustee if other requirements are met unless trustee comes forward with additional evidence.

Page 7 Section 17 & 18 – Duties apply but they are not enough to block a modification.

Needed to make a couple of changes in definitions in report right on page 3.

Page 8 in report – take abatement provision from probate only for revocable trust.

Myers

Clarification of Definitions – variance in language at the time the determination is awarded versus at the time the determination of interest is made. Was this an error?

Johnson

BeaLisa Sydlik says the change has already been made.

Walters

Another definition clarification. Interest of secondary beneficiary vs. interest of the beneficiary.

Johnson

BeaLisa Sydlik says it's done as well.

Shetterly

Questions? Comments? Prof. Gary, I know you were with David English, the guru of Uniform Trust Code. Has he looked at this?

Gary

Not the final version, but he made comments on a prior version for the work group.

Shetterly

Other comments? The Chair would move that SB 592 as conceptually amended today be presented to the 2013

Legislative Assembly and the report be accepted as written by Susan Gary. Any objections? No. Motion carried.

Johnson

Unsworn Foreign Declarations Act – John Adams, Law Clerk, worked on it with me, and Chair Scott Shorr. It was a very straight forward bill.

Adams

This bill makes it less onerous on those out of the country. Section 3 allows applicability of unsworn statements. Section 4 sets up validity and Section 4(2) states what it does not apply to. Section 6 allows for how unsworn statements are made and includes a form.

Shorr

This Work Group was the smallest. ORCPs have unsworn statements in Oregon state courts. Is there a law that prohibits an unsworn foreign declaration from being used in courts?

Bushong

It would still have to be subject to penalty of perjury.

Shorr

But you can submit statements with penalty of perjury. Do we really need this law? Has to state in the statement subject to penalty of perjury when it is subject to the penalty of perjury?

Shetterly

Not exactly all statements needed for court and it is not all directed at the court.

Shorr

Should we table this to confirm whether our report is true?

Comstock

ORCP 1E is addressed in section 9(4) page 3.

Shorr

Not necessarily a conflict, but we should check if there is a law that otherwise prohibits the use of unsown foreign declarations.

D. Johnson

LC will check.

Shetterly

Let's ask that this not be heard until clarified beyond court proceedings. Moves to table consideration of HB 2833. Objections? No. Motion carried.

Johnson	UCC Article 9
Shetterly	Nutshell – Describes alternative A (narrower option) and alternative B (retains current law) regarding the debtor’s name in a financing statement. The OLC presented alt. B in 2012. We knew the majority of the states might use alt. A and felt that it could be revisited.
DiLorenzo	I want to hear whether B would act as impediment for undocumented persons purchasing automobiles, furniture, etc.
Sherman	I’m here on behalf of OBA which recommends alt. A. NCCUSL really struggled with what to recommend, but they went with 2 alternatives. The whole system is organized around individual name of debtor. Described alt. A and alt. B. 25 states have passed alt. A. Only 6 states have passed alt B and one of them, Washington, is about to change to alt. A. Of the 17 states left, 13 of them have introduced alt. A. Likelihood is that all West Coast states will go to alt. A except for Oregon. Neither A nor B is perfect. Alt. A is better not just for banks, but also for casual lenders. Alt. B makes it more difficult for all lenders to do the search process. I disagree that alt. B is friendlier to small lender and unsophisticated creditor because of the search aspect. There is an error in HB 2600 page 3 line 1 name of debtor or (not and) surname that will be fixed.
DiLorenzo	How does it differ from current law for undocumented persons?
Sherman	It doesn’t, but most people have documentation if they are buying goods at this level.
Shetterly	Under alt. A, would the bank limit their search to driver’s license name?
Sherman	Depends on a variety of situations, such as the relationship and size of the transaction. I think we have narrowed the group of instances we will need to search outside of the driver’s license.
Walters	Why does it narrow it? How does the decision to search come

	from the decision of how you file?
Sherman	In lots of cases, they will only check search for driver's license name. If alt A becomes law, many lenders will stop search at driver's license name.
Shetterly	Tax liens, etc. may be under other names. Alt. B has not been satisfactory.
Sherman	It is time to move to something more satisfactory and simplified.
Haselton	What problems have there been?
Sherman	Loss of security interest because of other names used. Hopefully, this would simplify it, but it won't work in all cases.
Haselton	Under alt. A, if the right name is not put on the documents, the lender will lose security interest? It comes down to which lender loses out?
Sherman	That is corrected. I think Alt A will make the life easier of the unsophisticated lender.
DiLorenzo	Looking at paragraph 4 of the Holvey memo. Question to the Chair.
Shetterly	We don't have ready access to DMV records. There is a request process.
Johnson	We don't have online access like most states have that adopted Alt. A. The DMV only has 200-300 accounts for phone verification of license. This change would greatly increase their work load. The fear is that if you don't have a driver's license you won't get credit.
DiLorenzo	What about having to search? Might take a day or two? Is it an impediment?
Sherman	Never been raised as an issue by bankers.

- Johnson Before this meeting, we emailed the work group and every reply we got back requested we continue to support alt B.
- Haselton How much does uniformity play into this?
- Sherman We thought a lot about that. There is a growing feeling from lenders that Oregon isn't a good place to do business. It concerns me that if we don't go to with a majority of the states, especially the ones on the West Coast, we could become capital poor.
- Haselton Wouldn't you do a regional or national search and not just a state search?
- Sherman It depends on what the state does.
- Haselton Lane, where do you fall?
- Shetterly Being on the Uniform Commission, personally, I'm in favor of alt. B. Alt A could be a trap for overly reliant banks. Rules for perfection are the location of debtor. As long as there is a group of states with B, then lender will have to look at the UCC to see which alt. they went with.
- Walters Regarding search – if any state has an option B, you have to do a national search, right?
- Sherman If debtor and collector are both in Oregon then just limit the search to Oregon.
- Bjerre Article 9 can be a very complicated statute. Any questions?
- Haselton Can collateral be transient or mobile?
- Bjerre 1999 Article 9 revision – We no longer pay attention to location of collateral. Purpose of both alternatives is to allow each state to make their own policy choices. Both alternatives are uniform, alt. B being in the minority does not make it less uniform. The lender will need to know the law in the state where the

transaction is occurring. Secured lender needs to file own announcement and to check for other announcements from other secured lenders. Filing is most important. Failing to file is failure to protect rights. Searching is much less important than filing. The easier to search, the harder to file. Alt. B is not perfect. The good thing is that we can allocate the problems to the areas that are not as important. This means putting those problems on the searching end.

Comstock

I am presuming from your testimony that you are saying alt. B gives some protection to unsophisticated lender?

Bjerre

That's correct. The protection it gives is the ability to rely on common sense and the facts.

AG Rosenblum

How about the effect on married women who are in process of changing names or haven't changed their name, but are planning to?

Bjerre

Point 6 of my submission shows an example using a wife. My wife is a perfect example for this. My wife's drivers license uses Bjerre as her last name, but in every other aspect (business cards, etc.) she hyphenates her name. Alt. A would only allow a search to be done using Bjerre and not what she uses as her last name on a daily basis.

Shetterly

It is time to vote.

Walters

I move that the OLC continue to support alt. B because the Work Group decided on that position and when they were recently polled, they still support that alternative.

Shetterly

Discussion?

DiLorenzo

Why take a position?

Shetterly

We can remain neutral. I think it would be a good idea to vote on a position since this was just last year that we proposed this. For, against, or affirmative neutral, but we need to be able to say what our positions is.

Comstock	I urge that the OLC take a position and I second Justice Walters motion. My decision is based on a real situation that came to my desk recently. The farmer would be protected under alt. B, but not under alt. A. Alt B protects the unsophisticated and that is something we need to further in this area.
Haselton	I support Justice Walters thinking that we go with what the Work Group decided.
Shetterly	Votes on Walters'. Show of hands - 9 supporting. Motion carries.
DiLorenzo	Vote Explanation: I do not think we should take a position on something in the legislature without a new Work Group.
Shetterly	We are now moving on to Notarial Acts.
Adams	Quick Summary given. Modernizes the notarial laws modified last in 1993. Highlights: Sec. 2 definitions – spells out all of the Oregon officials who have power of notarial acts. Section 3 conflicts of interest rule IDs allowed up to 3 years expired Section 14 broadens the notaries power to correct certificates Section 17 stamping guidelines Section 18 journaling guidelines
Shetterly	Was the Work Group able to reach consensus on the expired ID part?
Adams	I believe so.
Johnson	The reason the Banker's were able to okay it is because the statute does allow for the notary to refuse to notarize something or they can ask for more pieces of ID as well.
Walters	Moves that HB 2834 be presented to the 2013 Legislative Assembly with the recommendation of the OLC and adopt the

report to accompany HB 2834.

Shetterly

Are we ready to vote or are there any questions at this time?

Bushong

Judges often administer oaths by phone. This says must be in person. Could we inadvertently screw this up?

Johnson

Secretary of State says that's been the law already. This law has always been against it.

Shetterly

Ask LC if we need to clarify that. Reads Justice Walters' motion. Objections? No. Motion carried.

Dobbins

Budget Update - stable funding as long as things stay as they are.

Judicial Update – The Work Group decided at the last meeting that it was not likely to get legislation suggested during this section. We have a newly proposed schedule. Wendy secured grant funding. It will go to Willamette and through agreements it will come to us.

Is the OLC alright with that?

Johnson

It is pretty straight forward. The money will go to focus groups and polling. I wrote the grant so we would have control over it. Proteus does have an agenda to improving the courts and favors merit selection. They have not restricted the funds and will not have any control over the funds. They do ask that we give them credit for the funds. We would like the approval to accept the funds.

AG Rosenblum

What are the direct affiliations of Proteus?

Johnson

They fund AJS projects, but not directly affiliated. Piper is the particular branch this is coming through. We stressed we are not advocacy group. The Work Group was comfortable accepting the grant.

DiLorenzo

Unrestricted grant?

Johnson

Yes, but restricted to the purpose we've specified.

DiLorenzo	Motion to accept grant.
Shetterly	Discussion? Objections?
Myers	Objects to polling on matters before the OLC decides on the best course of action.
Shetterly	Motion carried.
	Juvenile Records – Justice Walters, Judge Haselton, Commissioner McFarlane all recuse themselves. AG Rosenblum will stay to maintain quorum but will not vote.
Johnson	SB 622 – The Work Group discussed public access at meeting yesterday and took out all references to public access. We looked at those mentioned in Juvenile statutes – who should be getting what records. 419A applies to delinquency and dependency cases. We defined the two types of files. The Work Group also considered inspection rights vs. copy rights. The biggest issue is parent’s access. We did fix some conflicts of access rights there.
DiLorenzo	When is our next meeting? Is this bill in Senator Prozanski’s committee? What’s the deadline? When will this be considered? I support putting this off. Moves to consider this at our next meeting.
Bushong	What about other amendments? Is the Work Group going to continue to clarify this bill? The supplemental confidential file is a bit ambiguous in this bill.
Johnson	That document has been replaces with the 3/19 document. The issue with the ambiguity of the supplemental confidential file has been fixed. It is a court file. We need to provide another statute that for OYA and the Juvenile Department to ensure their records are confidential. Group agreed that’s what we needed.
Shetterly	Objections? No. Motion carried. We will look at meeting dates.

Johnson

We are recommending Aid and Assist. You have already approved that. We could really use help getting it through Ways and Means if you can.

Shetterly

Adjourned.

Submitted By,

Reviewed By,

Lisa Ehlers
Legal Assistant

Wendy Johnson
Deputy Director and General Counsel

EXHIBIT SUMMARY

Staff Suggested Motions
 HB 2833 & Legislative Report
 SB 623, with amendments & Legislative Report
 SB 592, proposed amendments & Legislative Report
 SB 622, proposed amendments, & Legislative Report
 HB 2834 & Legislative Report
 OLC Reasons for Selection of Alternative B
 HB 2600
 HB 4035, Section 12, from 2012 & Legislative Report
 2010 Amendments to UCC Article 9 Legislative Statutes by State
 American Bankers Association UCC Article 9 Work Group Section 9-503 Name of Debtor and Secured Party Position Paper
 Oregon Bankers Association Comments in Support of HB 2600
 Four Reasons to Adopt Alternative A for Individual Debtor Names
 Material Provided by Carl Bjerre, Kaapcke Professor of Business Law, U of O School of Law
 Grant Proposal for AJS